

# Texas Historical Statutes Project

1918 SUPPLEMENT TO  
VERNON'S CIVIL AND CRIMINAL STATUTES  
VOLUME 2

Annotated Civil Statutes (Articles 4608 to End)



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SUPPLEMENT  
TO  
VERNON'S  
TEXAS CIVIL AND CRIMINAL  
STATUTES

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

ANNOTATED  
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN TWO VOLUMES

VOLUME 2

CIVIL STATUTES, TITLES 68 TO 136  
PENAL CODE  
CODE OF CRIMINAL PROCEDURE

KANSAS CITY, MO.  
VERNON LAW BOOK COMPANY

1918



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SUPPLEMENT TO VERNON'S SAYLES'  
 ANNOTATED CIVIL STATUTES  
 OF THE  
 STATE OF TEXAS  
 VOLUME 2

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

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VOLUME 2

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2 SUPP.VERN.S.CIV.ST.TEX.

(1007A)

## TITLE 68

## HUSBAND AND WIFE

## Chap.

1. Celebration of marriage.
2. Marriage contracts.

## Chap.

3. Rights of married women.
4. Divorce.

## CHAPTER ONE

## CELEBRATION OF MARRIAGE

## Art.

4608. Who are authorized to celebrate rites.

## Art.

4609. Who are not permitted to marry.

**Article 4608. [2954] Who authorized to celebrate rites.**

**Public policy regarding marriages.**—It is the policy of the law and judiciary to look upon the marital relation, whether statutory or common-law, with great liberality, in an endeavor to sustain the legality of such relationship. *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

**Ceremonial marriage in general.**—Where a woman, believing a man to be divorced, in good faith celebrated a marriage with him, slight evidence will be sufficient to uphold the validity of the marriage after removal of the impediment. *Gorman v. Gorman* (Civ. App.) 166 S. W. 123.

If deceased entered into valid common-law marriage, he was never the husband of another woman, though they afterwards went through the legal form of statutory marriage. *Walton v. Walton* (Civ. App.) 191 S. W. 188.

**Common-law marriage—Requisites and validity.**—In order to constitute a valid, common-law marriage sufficient to support a prosecution for bigamy, there must be not only the assent of the parties to the marriage, but also a continuous living together as husband and wife. *Melton v. State*, 71 Cr. R. 130, 158 S. W. 550.

To constitute a common-law marriage, the parties must unconditionally agree to live together as husband and wife during their lives, and live together and cohabit as such and so hold themselves out to the public. *Whitaker v. Shenault* (Civ. App.) 172 S. W. 202.

A real common-law marriage, properly agreed to and consummated, is legal, and in determining whether there was a valid common-law marriage, the acts of the man in subsequently celebrating a ceremonial marriage with another, without divorce, are admissible. *Nye v. State* (Cr. App.) 179 S. W. 100.

In action against railroad for wrongful death, evidence held sufficient to warrant finding that decedent did not have common-law wife at time of marriage to beneficiary's mother. *International & G. N. Ry. Co. v. Sneed* (Civ. App.) 181 S. W. 702.

Where a man and woman, whose marriage was not prohibited, maintain the relationship of husband and wife, holding themselves out to the world as such, there is a valid common-law marriage. *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

The validity of common-law marriage is not an open question in Texas. *Walton v. Walton* (Civ. App.) 191 S. W. 188.

**Duress.**—A marriage taking place through fear of, or to stop, a prosecution for seduction, will not be set aside for duress. *Gass v. Gass* (Civ. App.) 182 S. W. 1195.

**Ratification.**—Where a woman, mistakenly believing a man to be divorced, entered into a marriage without knowledge of the impediment, the continued cohabitation of the parties after removal of the impediment is sufficient to establish a good marriage. *Gorman v. Gorman* (Civ. App.) 166 S. W. 123.

A marriage induced by fear of physical violence will not be set aside where the parties lived together as husband and wife after the threatening influences were removed. *Gass v. Gass* (Civ. App.) 182 S. W. 1195.

**Art. 4609. [2955] Who not permitted to marry.**

**Who may marry.**—See *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

## CHAPTER TWO

## MARRIAGE CONTRACTS

**Article 4619. [2965] Can not be altered after marriage.**

**Postnuptial agreements.**—Where plaintiff breached a separation agreement confirmed by the court, by removing children from the state, held that she could not thereafter recover damages from defendant for breach of the agreement as to conveyance of certain land to her. *James v. Golson* (Civ. App.) 174 S. W. 688.

A postnuptial agreement between husband and wife who have separated will be upheld when fair and equitable. *Cox v. Mailander* (Civ. App.) 178 S. W. 1012.

## CHAPTER THREE

## RIGHTS OF MARRIED WOMEN

- |   |  |
|---|--|
| <p><b>Art.</b><br/>4621. <b>Separate property; management; joinder of husband in conveyance, etc.; permission to convey where husband abandons wife, is insane, or refuses to join; husband's debts; conveyance of homestead.</b></p> <p>4621a. <b>Money or property received as compensation for personal injuries to wife.</b></p> <p>4622. <b>Community property; what property should be under control, etc., of wife; bank deposits.</b></p> <p>4623. <b>Presumption as to community property.</b></p> | <p><b>Art.</b><br/>4624. <b>What property subject to debts of wife; husband must join in certain contracts.</b></p> <p>4625. <b>Judgment and execution in such cases.</b></p> <p>4627. <b>Community property liable for debts.</b></p> <p>4629a. <b>May apply to district court to become feme sole for mercantile and trading purposes, how.</b></p> <p>4629d. <b>Decree declaring married woman feme sole for mercantile and trading purposes; effect of decree.</b></p> |
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**Article 4621. [2967] Separate property; management; joinder of husband in conveyance, etc.; permission to convey where husband abandons wife, is insane, or refuses to join; husband's debts; conveyance of homestead.**—All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessities furnished herself and children after her marriage with him. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be the separate property of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal, and the wife shall have the sole management, control and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her, or of which she may be given control by this Act; provided, also, that if the husband shall have permanently abandoned his wife, be insane, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term

Art. 4621  
V. S. Suppl.  
1918  
Amended  
37 L. P. 251

time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interest of the wife, to make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, in which event she may encumber, convey or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband has permanently abandoned the wife, or is insane, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate estate.

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessities furnished herself and children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by the preceding sentence. [Act March 13, 1848; P. D. 4641; Const., art. 16, § 15; Acts 1913, p. 61, § 1; Act April 4, 1917, ch. 194, § 1.]

**Explanatory.**—The act amends art. 4621, ch. 32, general laws 33rd Legislature, regular session, amending art. 4621, tit. 63, ch. 3, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Allen v. Allen* (Civ. App.) 158 S. W. 1049; *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

**1/2. Validity.**—Title of Acts 33d Leg. c 32, amending this article and arts. 4622, 4624, held sufficient within Const. art. 3, § 35. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

**2. Definitions**—"Acquired"—"Claim"—"Owned or claimed."—The word "claimed" as used in this article, providing that all property of the husband owned or claimed by him before marriage shall be his separate property, means a legal claim, or an equitable claim which may ripen into a legal claim. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

**3. "All property, both real and personal."**—If one in possession of land did not have a contract with the owner for its purchase constituting at least an equitable claim, a husband purchasing such claim before marriage did not acquire separate property, under this article, making all property of the husband owned or claimed before marriage his separate property. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

**6. Separate estate of husband in general.**—Property acquired by a husband by descent was his separate property. *Cotten v. Friedman* (Civ. App.) 158 S. W. 780.

**7/2. Partition—Parties.**—Art. 1841 was not repealed by this article and arts. 4622, 4624; therefore a husband was a necessary party to a suit to partition land claimed by his wife. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

**11. Actions by husband.**—See art. 1839 and notes.

The wife is not a necessary party to an action by her husband for injuries to her person. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 173 S. W. 522.

In view of this article, in an action on fire policy, proof that property insured belonged to wife of plaintiff held not to sustain his allegations that he was owner of property at time of contract and when house was destroyed by fire. *St. Paul Fire & Marine Ins. Co. v. McQuary* (Civ. App.) 194 S. W. 491.

**13. Separate property and rights of husband and wife in general.**—Where the jury found that husband and wife had permanently separated, and that there was no fraud in procuring a contract under which the husband conveyed land to the wife, but that the parties did not understand its precise terms or legal effect, and that it was not just and equitable, judgment should have been rendered for the wife instead of for the husband, as the jury cannot substitute their judgment of its fairness and equitableness for that of the parties. *Versyp v. Versyp* (Civ. App.) 159 S. W. 165.

That husband received and exercised control over cash and notes received in transaction whereby husband and wife purchased lots, cash, and notes by conveyance of realty owned half by wife and half by community did not deprive wife of her half interest in notes and cash. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

**14. Separate estate of wife in general.**—Under this article and art. 4622, the rents from the wife's real estate or her separate property are her "separate property," not community property. *Maxwell v. Journey*, 238 Fed. 566, 151 C. C. A. 502.

Under Sayles' Ann. Civ. St. 1897, art. 2969, providing that during marriage the wife's property shall be under the control and management of the husband, where a husband and wife lived on property belonging to her, her ownership was no defense to a prosecution of the husband for maintaining a disorderly house thereon. *Key v. State*, 71 Cr. R. 485, 160 S. W. 354, 356.

At common law a wife's separate property vested at marriage in her husband for purposes of control and sale. *Blakely v. Kanaman* (Civ. App.) 168 S. W. 447, judgment affirmed (Sup.) 175 S. W. 674.

Transaction of husband and wife, after their purchase of land partly with the wife's separate property and partly with the proceeds of community property, held to vest title of the remaining part of the land in the wife. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

If a wife, out of her separate estate, paid the consideration which induced the husband's judgment creditor to convey to her the husband's land on which such creditor had levied under writ of execution, the creditor's deed vested title in the wife as her separate estate. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

The mere fact that land purchased with proceeds of the wife's separate personal property was school land, and the purchase money on a deferred payment was due that fund, would not affect the wife's right to hold it in severalty if it was paid for from her funds. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

**16. Conveyances or gifts to or for use of wife as her separate property.**—A conveyance by a husband to his wife by a deed reciting a valuable consideration and duly recorded vested title in the wife as her separate property. *Bird v. Lester* (Civ. App.) 166 S. W. 112.

Where a husband and wife treated animals as her separate property under a mistaken view of the law, there was no gift to the wife, but if the husband relinquished his claim because it was just to the wife, there was a gift by him to her of such animals. *Wofford v. Lane* (Civ. App.) 167 S. W. 180.

A deed from husband to wife necessarily vests the wife with a separate estate in the property conveyed. *Molloy v. Brower* (Civ. App.) 171 S. W. 1079.

As between a husband and wife and their heirs, a conveyance of separate property of the husband to the wife vests the title in her separately to the extent of the equity conveyed, even if the conveyance is subject to an incumbrance which the wife assumes to pay, irrespective of whether the deed is without a valuable consideration. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

Where title to the community land is passed by two simultaneous deeds for nominal consideration by the husband to a third person and by him to the wife, the conveyances are equivalent to a deed from the husband and raise the presumption that there was a gift to make the land the wife's separate property. *Ferguson v. Dodd* (Civ. App.) 183 S. W. 391.

The husband may give or convey to the wife community property, and thereby make it her separate property, when it is not done in fraud of creditors, and such a gift is good against subsequent creditors of the husband, and while mere branding cattle in the wife's name is insufficient to prove gift thereof to her, it is evidence which may be considered with other facts to show a gift of the increase, as well as its proceeds. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

Where a wife was alone named as the grantee in a deed, the legal title was vested in her. *Martinez v. De Barroso* (Civ. App.) 189 S. W. 740.

Where wife takes conveyance of property purchased in part with her separate estate and partly with community funds, deed having nothing to show property is conveyed to wife as her separate estate, there being no agreement that it shall be her separate property, the wife has a separate interest proportionate to amount her separate estate contributed. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Where husband conveyed land to wife, it became her separate property, and husband could not without her consent divest her of her title. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

Where husband buys land with community funds, deed of such land to his wife may be sufficient to indicate his intention to make it his wife's separate property as between husband and wife and their heirs. *Richards v. Hartley* (Civ. App.) 194 S. W. 478.

**18. Property acquired by husband for wife as her separate property.**—Where the wife's separate funds were used in making a cash payment for land, the husband, giving his note for deferred payments, taking the land in the wife's name under her agreement to pay the note, the equitable title vested in her as against the subsequent creditors of the husband, and the mere fact that the husband mingled the wife's separate money with his would not defeat her title to land purchased therewith. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

Where wife paid seven-eighths purchase price of land taken in name of husband and husband bought goods giving note and mortgage to seller which borrowed money from bank depositing accounts and the note as collateral, and was thereafter declared bankrupt and the trustee recovered the collateral from the bank, the trustee could convey the husband's legal title. *Gee v. Parks* (Civ. App.) 193 S. W. 767.

**23. Proceeds or increase of or interest on separate property.**—This article and art. 4622, do not change the rule that property acquired by the use of the wife's separate property becomes that of the community. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

A husband, who, with wife, received lots, notes, and cash for property owned half by community and half by wife, could not partition the same by allotting the realty to wife without her consent. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Where the wife owned separate real estate, and the rents thereof were exempt from

the husband's debts, creditors of the husband could not, when she purchased an automobile with such rents, levy on the automobile. *Emerson-Brantingham Implement Co. v. Brothers* (Civ. App.) 194 S. W. 608.

**25. Right of action.**—A wife may sue her husband for protection of separate property in his possession against waste or damage, for the recovery of her separate estate, wrongfully converted by him, and to have resulting trust declared, and under this article and arts. 4622, 4624, she may sue to quiet title to land claimed as her separate property, to which her husband is asserting title adverse to her. *Barton v. Barton* (Civ. App.) 190 S. W. 192.

**26. Estoppel of wife to claim property.**—Where land was the separate property of a wife, a deed from the stepmother of the wife to the wife's husband conveyed no title, notwithstanding the wife permitted and acquiesced in the conveyance. *Vanderwolk v. Matthaei* (Civ. App.) 167 S. W. 304.

A married woman is not estopped unless her conduct has been intentional and, in contemplation of law, fraudulent. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Where wife paid seven-eighths purchase price of land taken in name of husband, who bought goods, giving note and mortgage to seller, which borrowed money from bank, depositing accounts and the note as collateral, and seller was thereafter declared bankrupt, and the trustee recovered the collateral from the bank, trustee's rights held superior to secret equity of wife. *Gee v. Parks* (Civ. App.) 193 S. W. 767.

**28. Evidence.**—In a counterclaim on a contract by a married woman, authorizing defendant to sell her property for commissions for making the sale, evidence held to show that plaintiff's husband consented to the contract with defendant. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

In a suit for specific performance of a contract for the sale of land, made between plaintiff's guardian and the husband of the owner of the legal title, evidence held insufficient to show that the wife was a party to the contract, or that she assented to or ratified her husband's act. *Ross v. Blunt* (Civ. App.) 166 S. W. 913.

Under art. 1841, a husband being a necessary party to a suit to partition land claimed by his wife, was not rendered a competent witness concerning an alleged gift to his wife by a decedent, notwithstanding this article and arts. 4622, 4624. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

In suit to partition land which married woman claimed by gift from decedent, her husband held an incompetent witness on account of interest, notwithstanding this article, giving married women control over the rents from their separate real estate. *Id.*

Evidence held to show that real estate was the separate property of the husband, so that his children on his death would inherit it. *Whitaker v. Shenault* (Civ. App.) 172 S. W. 202.

Evidence held sufficient to support a finding that the husband gave live stock and its increase to the wife, so as to defeat the lien claim of the husband's creditors to land purchased with its proceeds. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

Evidence held to show that certain horses were of the separate estate of the wife, so that their issue and proceeds were exempt from the husband's creditors. *Id.*

Where defendant in an action to recover real property claimed the deed was intended to convey the entire estate to her, but that in any event she should have a lien for sums expended, evidence regarding part payment of mortgage debts on the property from her separate estate is admissible. *Smith v. Jones* (Civ. App.) 192 S. W. 795.

Jury's finding that land was purchased by a husband with his wife's money held sustained by the evidence. *Padgitt v. Still* (Civ. App.) 192 S. W. 1110.

Evidence held insufficient to support finding that the wife was not the owner in her separate right of certain notes sued on. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

Evidence held to show that the money with which an automobile was purchased was intended when borrowed to be the separate estate of the wife, so that the automobile was not subject to execution for the husband's debts. *Emerson-Brantingham Implement Co. v. Brothers* (Civ. App.) 194 S. W. 608.

Under this article and arts. 4622, 4624, on collateral attack on judgment against husband and wife, proof aliunde the judgment held inadmissible to show that it was not based on contract for necessities for wife or her children or for benefit of her separate estate. *Akin v. First Nat. Bank* (Civ. App.) 194 S. W. 610.

**29. Management of separate estate of wife.**—A husband is entitled to receive and control, not only the community estate, but his wife's separate estate. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Husband has management of community estate, with exception of conveyance of homestead, or when the wife is abandoned by the husband, or the property is conveyed in fraud of the wife. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

**30. Contracts.**—This article and arts. 4622 and 4624 evidence the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas; for the word "another" in art. 4624, cannot reasonably be given such a meaning as would prevent the husband from being regarded as "another" than his wife, and the wife may not become a surety on bonds and obligations in which the husband cannot join. *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613.

At common law, a wife possessed no contractual capacity. *Blakely v. Kanaman* (Civ. App.) 168 S. W. 447, judgment affirmed (Sup.) 175 S. W. 674.

An agreement by a feme covert to make a bequest in favor of another is not binding on her, unless ratified by her after she became discoverer. *Dyess v. Rowe* (Civ. App.) 177 S. W. 1001.

Under this article and arts. 4622 and 4624, and in view of arts. 4629a to 4629d, removing certain disabilities of coverture, a wife has no power to become a joint maker with her husband in his note. *Red River Nat. Bank v. Ferguson* (Civ. App.) 192 S. W. 1088.

Even prior to the legislation of 1913, a married woman might contract with her husband. *Potter v. Mobley* (Civ. App.) 194 S. W. 205. See, also, note 35 under this article.

31. — **Ratification.**—A husband's contract to convey his wife's separate property will not be specifically enforced on the theory of ratification. *Gossett v. Vaughan* (Civ. App.) 173 S. W. 933.

35. **Conveyance of separate estate of wife.**—It cannot be claimed that because a house built upon land, which was a married woman's separate property, was built with community funds, a grant of the perpetual use of a passageway in the house was not an attempt to convey an interest in the wife's real estate. *King v. Driver* (Civ. App.) 160 S. W. 415.

Where the husband of the owner of land contracted for its sale, the purchaser is not entitled to specific performance, unless he shows that the owner's husband was acting as her agent, or that she knew he was so acting and ratified the contract. *Ross v. Blunt* (Civ. App.) 166 S. W. 913.

A married woman would not be bound by covenants of warranty contained in a deed by her. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

A wife, during coverture, neither at common law nor under this article and art. 4622, could make an enforceable contract to convey her land, unless joined by her husband. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

Under this article and art. 4622, a husband has no authority to sell an automobile belonging to his wife. *Scruggs v. Gage* (Civ. App.) 182 S. W. 696. See, also, notes under art. 1114.

36. — **Parties in suits for wife's separate property.**—The wife of a purchaser is not a necessary party to a suit for specific performance of a contract which did not require the deed to be made to her or the vendor's lien notes to be executed by her, although the purchaser requested the vendor to execute a deed to her. *Beaton v. Fussell* (Civ. App.) 166 S. W. 458.

41. — **Mortgage—Liability on.**—Where a wife as principal executed a note and mortgage with her husband for the benefit of her separate estate, she cannot escape liability because the mortgage authorized the substitution of a new note for the old one, and permitted the renewal note to be signed by different parties, nor because she and her husband had agreed to the execution of a different instrument, where the instrument, as executed, was duly explained to her. *Tinkham v. Wright* (Civ. App.) 163 S. W. 615.

43. — **Title of purchaser.**—Defendant, who purchased an automobile from plaintiff's husband, is not charged with constructive notice of plaintiff's suit for divorce, where at the time of the purchase citation had not been served. *Scruggs v. Gage* (Civ. App.) 182 S. W. 696.

Where defendant induced plaintiff husband to surrender deed to property owned by wife, upon false representations and under materially different terms from those previously assented to by the wife and without her authority, such deed conveyed no title which the grantee could convey to a bona fide purchaser. *King v. Diffev* (Civ. App.) 192 S. W. 262.

Where plaintiff's husband took title in his own name to land purchased with her funds and disposed of it to defendants, who were bona fide purchasers, evidence as to a subsequent divorce plaintiff secured from her husband, etc., is not admissible, nor are defendant's rights affected because the amounts the husband agreed to pay the broker were exorbitant, and such purchasers being protected are not bound in order to preserve their rights to demand reimbursement from plaintiff on her assertion of ownership. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

49. **Liability of husband or wife.**—Where a wife, though not a party, joined with her husband in replevying property which had been sequestered, and executed with him a joint bond claiming the property as her separate estate, she became bound for rents and damages to it while in their possession under the bond. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Where a wife executed a mortgage to secure her husband's note, any extension of such note without her consent, which would be binding upon both parties, so that the holder of the note could decline to accept payment until the extended date, would release her property so mortgaged. *Vanderwolk v. Matthaer* (Civ. App.) 167 S. W. 304.

Extension of time for payment of a note, secured by mortgage executed by a husband in which his widow joined, cannot initiate any personal liability on her part on the debt, though granted at her request. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

A married woman to whom land subject to vendor's lien was conveyed, it having first been conveyed by her husband to a third person, and by such third person to her, held not liable on her agreement to assume payment of the vendor's lien note. *Pierson v. Beard* (Civ. App.) 181 S. W. 765.

Where a married woman failed to appear or defend garnishment proceedings on judgment against her, she cannot recover an amount paid thereunder on the ground of invalidity of the judgment. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.



50. — **Enforcement.**—Judgment in trespass to try title, taken against a wife, sued as a feme sole, who did not plead her coverture, in its operation and effect was the same as if rendered against a feme sole. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

In suit on a note given by husband and wife, purchasers of land at guardian's sale, to rewrap their note, securing the advancement of the purchase price, judgment held improper in form for one other than personal against the wife. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

52. **Agency of wife for husband.**—A wife may act as her husband's agent, and the fact that she uses her name instead of her husband's does not alter his liability. *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132.

54. — **Evidence of agency.**—In an action by an automobile dealer for the value of a car sold by one representing himself as agent, evidence held to warrant finding of agency in plaintiff's wife to employ salesman. *Holmes v. Tyner* (Civ. App.) 179 S. W. 887.

Evidence held to show a wife to have been the agent of her husband in contracting for the education of their son at plaintiff's college. *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132.

55. — **Authority as agent.**—On the question of liability of a husband for the education of his son at a college contracted for by his wife, it is immaterial whether the education is a necessary. *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132.

56. **Agency of husband for wife.**—While prior to the legislation of 1913 the husband was the sole manager of the wife's separate estate, he could not be her agent in transactions with himself, and where the wife, in acquiring notes from a firm of which the husband was a member, acted of her own separate will, her husband could not be regarded as her agent, and she would not be affected by his knowledge of defects in title to the notes, but if the husband pursuing his power to manage his wife's property assigns a note to her in the name of his firm and draws a check against her funds in favor of the firm without any agreement with her, she could not hold the note without being bound by his knowledge of defects in the title. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

**Art. 4621a. Money or property received as compensation for personal injuries to wife.**—All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actually and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation. [Act March 15, 1915, ch. 54, § 1.]

**Note.**—See notes under Vernon's Sayles' Civ. St. 1914, art. 4621. This act took effect 90 days after adjournment of legislature on March 20, 1915.

**Husband's right to sue.**—Under art. 1839, providing that the husband may sue for recovery of any separate property of the wife, he may sue for personal injuries to her, recovery therefor being, by this article, declared her separate property. *Texarkana Telephone Co. v. Burge* (Civ. App.) 192 S. W. 807.

**Art. 4622. [2968] Community property; what property shall be under control, etc., of wife; bank deposits.**

$\frac{1}{2}$ . **Constitutionality.**—Acts 33d Leg. c. 321, amending this article, by giving to the wife the right of control of that part of the community property which consists of her personal earning, but still leaving it community property, impairs no vested right. *Scott v. Scott* (Civ. App.) 170 S. W. 273.

Title of Acts 33d Leg. c. 32, amending this article and arts. 4621, 4624, concerning marital rights of parties and defining separate and community property, held sufficient within Const. art. 3, § 35. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

2. **Validity of marriage affecting property rights.**—Where plaintiff and defendant were never legally married, but the woman believed that they were married, she was entitled on separation to one-half of the property acquired during the existence of the putative relation. *Green v. Green* (Civ. App.) 167 S. W. 263.

Where, when a man married, he had, as set at all times thereafter, a living and undivorced wife, property purchased by him and the second putative wife with joint earnings, deeds naming both as grantees, was not community property, but joint or partnership property of the two. *Little v. Nicholson* (Civ. App.) 187 S. W. 506.

3. **Community property in general.**—This article and arts. 4621 and 4624 evidence the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas. *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613.

Where, under the act of August 26, 1856 (Laws 1856, c. 128), settlers on the reserve thereby subjected to location and sale, caused their tracts to be surveyed, filed the field

notes, and assigned their rights to a party who subsequently married and during marriage made the payment of 50 cents an acre required by the act, his title had its inception during marriage, and the property was community property. *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011.

Where a deed from a husband prior to his marriage was a mortgage, the fact that the husband and wife subsequently occupied the land for a period sufficient to acquire title by adverse possession did not render the land community estate, the entire interest in which passed to the wife on the husband's death without issue. *Allen v. Allen* (Civ. App.) 158 S. W. 1049.

Where one entered on land as a trespasser, and occupied it for four or five years, and then orally gave it to a married daughter, and she and her husband remained in possession long enough to acquire title by adverse possession, the property was community property. *Treadwell v. Walker County Lumber Co.* (Civ. App.) 161 S. W. 397.

Where a husband conveyed, one-half of the community property of himself and wife to their infant child, the rights of the parties, upon the death of the child intestate and without issue, are the same as if no conveyance had been made. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Property acquired by a husband before his wife secured a divorce is community property, even if at the time of the acquisition she was living apart from him because obliged to do so to make her own living. *Id.*

Property belonged to a community estate, though the husband was a mere settler under a pre-emption claim, and occupancy had not been completed at the death of his wife. *Adams v. West Lumber Co.* (Civ. App.) 162 S. W. 974.

Under this article, property acquired by deeds made after marriage is deemed community property. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

Where a husband and wife exchange their homestead for other land upon which they never resided, such land becomes part of the community estate. *Witt v. Teat* (Civ. App.) 167 S. W. 302.

Where community land is conveyed to one member of the community, he holds the other's interest in trust. *Mitchell v. Schofield*, 171 S. W. 1121, 106 Tex. 512, affirming judgment (Civ. App.) 140 S. W. 254.

Where a grantor conveyed during the lifetime of his wife a half interest in land to a grantee, who during the lifetime of the wife reconveyed the land, at least one-half of the land was community property. *Word v. Colley* (Civ. App.) 173 S. W. 629.

The court, in determining whether land is community property, must look to the inception of the title, and its character relates to its origin. *Id.*

Where a conveyance to a married woman in her own right, in consideration of a payment out of her separate estate, gave her no title, any title acquired under the adverse claim of herself and husband was community property. *Brown v. Foster Lumber Co.* (Civ. App.) 178 S. W. 787.

Under this article, where daughters to whom a wife conveyed her separate property reconveyed to the husband, the land prima facie became community property, and where a judgment creditor of the husband levied upon the community lands before the husband quitclaimed to his wife, and the consideration for a deed to the wife from the judgment creditor was paid out of community funds, such deed from the judgment creditor vested title in the community estate; the evidence sustaining a finding that the wife did not pay her separate funds to such judgment creditor. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

A married woman has as much interest in the community property as her husband, and has an equal right to its beneficial use. *Davis v. Davis* (Civ. App.) 186 S. W. 775.

Where divorced wife appointed agent and attorney to recover land which had been community property, such agent and attorney carried out his contract by employing an attorney to prosecute suit against adverse claimants, who did file suit. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

Community status, like partnership, has elements of gains and losses based on presumed labors of each, irrespective of real industry of either. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

Under this article and arts. 4621 and 4624, and in view of arts. 4629a-4629d, removing certain disabilities of coverture, a wife has no power to become a joint maker with her husband in his note. *Red River Nat. Bank v. Ferguson* (Civ. App.) 192 S. W. 1088.

If husband on separation from wife promised future contributions for her support, intending to disregard and actually disregarding his promise, there was such actual fraud as would authorize rescission of a contract for division of community property induced by such promise. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

In the absence of an understanding or agreement at the time, money borrowed by either the husband or wife is community property. *Emerson-Brantingham Implement Co. v. Brothers* (Civ. App.) 194 S. W. 608.

4. **Equitable title.**—Where the legal title to real estate is vested in the husband, the wife and her heirs have only an equitable title. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

5. **Right of second community.**—The wife of one acquiring right to land by pre-emption survey has only an equitable title, by reason of her community interest therein; he deeding it to another, to whom patent issued. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

6. **Life insurance.**—After divorce, wife cannot recover of insurer because community funds were used in paying premiums on husband's life policy. *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Civ. App.) 188 S. W. 22.

7. **Interest, increase, rents, profits and products of separate property.**—Under this article and art. 4621, the rents from the wife's real estate or her separate property are her "separate property," not community property. *Maxwell v. Jurney*, 238 Fed. 566, 151 C. C. A. 502.

Crops grown upon the wife's separate estate are community property, which, under this article, can be conveyed by the husband alone. *Hanks v. Leslie* (Civ. App.) 159 S. W. 1056.

This article and art. 4621, do not change the rule that property acquired by the use of the wife's separate property becomes that of the community. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

This article and art. 4621 do not make the rents from the separate real estate of the wife her separate property, but merely gives her control thereof, and the rents received from such property are community property. *Emerson-Brantingham Implement Co. v. Brothers* (Civ. App.) 194 S. W. 608.

**8. Improvements on separate property.**—The wife's land cannot be sold for the husband's debts because of improvements made thereon with community funds when he was insolvent, unless made to her knowledge with intent to defraud his creditors, though the creditors may have some remedy as to the improvements. *Palmer Pressed Brick Works v. Stevenson* (Civ. App.) 185 S. W. 999.

**9. Earnings of husband or wife.**—Where an insolvent husband suffered judgment on a community debt, and thereafter purchased property to the price of which the wife contributed money earned by her, such money, as against the debt, was community funds, notwithstanding an antecedent agreement between her and her husband that such earnings should constitute her separate property. *Henry v. Land* (Civ. App.) 168 S. W. 994.

The right formerly given the husband by this article to control the community property was extinguished as to prior as well as subsequent personal earnings of his wife, by the amendment of 1913, declaring her personal earning shall be under her control alone. *Scott v. Scott* (Civ. App.) 170 S. W. 273.

Any right of a husband to control community property, consisting of commissions earned by his wife as guardian, is not divested by an order of the court directing payment thereof to her by her successor as guardian. *Id.*

Under this article land bought during marriage and within two or three years after the husband was committed to an insane asylum, and paid for by the labor of the wife and of the children, who were not emancipated, was community property, notwithstanding an agreement between the wife and children that if they would work and assist her in paying for the land she would later give it to them. *Messimer v. Echols* (Civ. App.) 194 S. W. 1171.

**11. Damages recovered.**—Damages recovered by either or both parents for the death of their minor child is community property. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

Damages recoverable by the wife, suing alone in action for slander after abandonment by her husband, held such property as she might resort to for the support of herself and child. *Davis v. Davis* (Civ. App.) 186 S. W. 775. See, also, article 4621a.

**15. Presumptions.**—Evidence held insufficient to rebut presumption created by this article, that funds deposited in, the name of the husband or wife are the separate property of the person in whose name they stand. *Emerson-Brantingham Implement Co. v. Brothers* (Civ. App.) 194 S. W. 608.

**16. Evidence.**—In a suit for partition of community property, evidence held to sustain a verdict that a certain tract was purchased after the marriage, and not before, as claimed by the husband, and that it was paid for in part with community funds. *Gameason v. Gameson* (Civ. App.) 162 S. W. 1169.

Under art. 1841, a husband being a necessary party to a suit to partition land claimed by his wife, was not rendered a competent witness concerning an alleged gift to his wife by a decedent, notwithstanding this article and arts. 4621, 4624. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

In trespass to try title, evidence held to sustain the conclusion of the trial court that a husband paid out of community funds for two tracts of land reconveyed to him by daughters to whom his wife had previously conveyed. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

In suit to recover land, evidence held to justify finding that plaintiff wife, to whom her husband, after the community purchased the land, voluntarily conveyed subject to the vendor's lien, did not offer within a reasonable time to redeem of the vendor after foreclosure of lien, that vendor rescinded as to wife, that she had notice, or knowledge putting her on notice and that in offering to perform she delayed an unreasonable time. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

Where a defendant and his wife were permanently separated and divorce suit was pending, he was not entitled to introduce evidence of the pendency of the divorce proceedings in an action involving the community property. *Mecom v. Vinton* (Civ. App.) 191 S. W. 763.

Under this article and arts. 4621, 4624, on collateral attack on judgment against husband and wife, proof aliunde the judgment held inadmissible to show that it was not based on contract for necessities for wife or her children or for benefit of her separate estate. *Akin v. First Nat. Bank* (Civ. App.) 194 S. W. 610.

**17. Management, conveyances, incumbrances or gifts of community property before separation of parties.**—During the lifetime of a husband he has control and management of the community property with power of disposition. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

Although, under this article, the husband alone can dispose of community property, a deed executed by the wife alone conveying community property, if executed with the consent of the husband, gives good title; but where a wife, with the consent of her husband, executed a chattel mortgage upon crops grown on her separate estate, the record of such a mortgage was not constructive notice to a creditor of the husband of the execu-

tion thereof by the wife with the husband's consent and authority. *Hanks v. Leslie* (Civ. App.) 159 S. W. 1056.

A conveyance by a husband of the community property of himself and wife is good as to his interest in the property and should not be canceled at the suit of the wife except as to her share. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Where first deed of trust to land, undivided half interest of which was wife's separate property and one-half community property, by husband and wife secured debt on which wife was surety, while second deed by husband alone secured his debt, wife's right to have husband's interest sold and applied to the first debt before resorting to her interest held superior to the equity of the creditor. *H. O. Wooten Grocer Co. v. Smith* (Civ. App.) 161 S. W. 945.

A wife may not renounce to her husband her interest in the community estate by contract, practically without consideration, even through the intervention of a trustee. *Suggs v. Singley* (Civ. App.) 167 S. W. 241.

Where a husband and wife exchange their homestead for other land upon which they never resided, the community estate may be disposed of by the husband alone, without the consent of his wife. *Witt v. Teat* (Civ. App.) 167 S. W. 302.

A wife, during coverture, neither at common law nor under this article and art. 4621, could make an enforceable contract to convey her land, unless joined by her husband. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

A husband cannot defeat his wife's community interest in the real property by a sale thereof made with that intent, of which intent the purchaser had notice. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

Community property, not constituting a homestead, may be conveyed or mortgaged by the husband alone. *Flynn v. J. M. Radford Grocery Co.* (Civ. App.) 174 S. W. 902.

A voluntary disposition by one of community property to defraud his wife is void against her and those claiming under her. *Krenz v. Strohmeir* (Civ. App.) 177 S. W. 178.

Under this article and art. 4621, a husband has no authority to sell an automobile belonging to his wife. *Scruggs v. Gage* (Civ. App.) 182 S. W. 696.

A deed of a husband, properly acknowledged and recorded, conveyed the community interest in the property. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

As between a husband and wife and their heirs, a conveyance by the husband of community property to the wife vests the title in her separately, but where a husband quit-claimed community land, the deed conveyed into the separate estate of the wife only such title as the husband, or the community estate, had at the time of the conveyance, and where a wife accepts a conveyance from her husband subject to an incumbrance, and thereafter pays it off out of her separate estate, full title will vest in such estate, but if it is paid off with community funds, the community estate will be credited with the amount. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

Interest of husband or wife in community property may be conveyed or donated to the other, subject to certain limitations, and execution and delivery of a deed by husband to wife is sufficient evidence of a transfer to wife's separate estate. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

Where husband and wife conveyed realty owned half by community and half by wife separately, receiving therefor lots, cash, and notes, they might have agreed at exchange or prior thereto that wife should take the lots as her separate property, and the husband take the notes and cash in satisfaction of the community interest. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Where husband buys land with community funds and conveys it to his wife, it presumably remains community property as to subsequent purchasers. *Richards v. Hartley* (Civ. App.) 194 S. W. 478.

24. **Abandonment or separation or dissolution of community as affecting title of parties.**—On the death of the husband the community is dissolved, and the widow holds her interest as tenant in common. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

Where an agreement of separation between husband and wife provides for an equitable division of the community property, property subsequently acquired by either spouse was his or her separate property. *Corrigan v. Goss* (Civ. App.) 160 S. W. 652.

A voluntary separation by the wife from her husband does not forfeit her interest in the homestead to the extent that it was benefited by the community funds. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

That a wife had knowledge of the character and amount of the community estate when partition was made by a separation agreement would not prevent the partition from being so unfair that it should not be enforced, nor did fact that wife, after discovering fraud, continue to receive a monthly allowance under such agreement, but less than she was really entitled to, estop her from questioning its validity, and though the partition was fair when made, it would be vacated by their subsequent living together, there being no provision to the contrary, and upon a second separation and a second partition agreement the husband could not claim corporate stock purchased with the proceeds of property allotted to him on the prior partition and separation. *Cox v. Mailander* (Civ. App.) 178 S. W. 1012.

25. — **Abandonment or separation as affecting right to manage, Incumber or convey.**—Where the husband has abandoned the wife, leaving her no means of support, she may make a valid conveyance of community property without his consent for the purpose of supplying herself and family with necessaries. *Hanks v. Leslie* (Civ. App.) 159 S. W. 1056.

Where a husband and wife have separated, a deed of separation, including partition of community property, will be sustained if just and made without coercion. *Corrigan v. Goss* (Civ. App.) 160 S. W. 652.

Where a husband deserts his wife, she may sell the community estate to provide necessaries for herself, even though she has no minor children. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

26. — **Divorce as affecting right to manage, incumber or convey.**—Judgment of divorce, adjudging personal property to belong to community estate, does not give wife, after divorce, any interest in policy of husband's life. *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Civ. App.) 188 S. W. 22.

Where, at time of wife's suit for divorce and division of property, husband was not contributing to her support, and prior thereto each party had determined not to live together, and agreement for division of property was entered into by them when wife was of sound mind, agreement for division was enforceable in suit at instance of next friend of wife, because insane. *Skeen v. Skeen* (Civ. App.) 190 S. W. 1118.

27. — **Authority, interest and liability of survivor.**—Where husband's wrongful abandonment of wife continued until her death, and wife acquired a house and lot and died intestate without necessity for administration, the property was properly decreed to the surviving husband subject to a lien for services rendered wife in her last illness. *Hollie v. Taylor* (Civ. App.) 189 S. W. 1091.

29. **Actions for community property.**—In trespass to try title to community property, it is not necessary to make the defendant's wife a party, even though the land be used as their homestead. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Art. 1841 was not repealed by Acts 33d Leg. c. 32, amending this article and arts. 4621 and 4624; therefore a husband was a necessary party to a suit to partition land claimed by his wife. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

A married woman cannot sue in her own name without joining her husband to recover community property, unless she has been abandoned by the husband. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

Where a husband conveyed community property to his wife, expressly reserving vendor's lien in seller, it was unnecessary to make wife a party to proceedings to foreclose lien. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

In suit to foreclose vendor's lien on land purchased by community, judgment did not bar wife, who was not a party; the husband having voluntarily conveyed to her, subject to the lien. *Id.*

A wife who has been abandoned by her husband need not be in actual want before she can sue alone for community property, and in an action for slander, it was not essential to the wife's right to sue alone that husband should have expressly refused to bring the suit, where the jury might infer that if she had not brought it, it would not have been brought and any damages recoverable would have been lost. *Davis v. Davis* (Civ. App.) 186 S. W. 775.

Where a defendant and his wife were permanently separated and divorce suit was pending, he was liable to be sued alone so far as community property is concerned. *Mecom v. Vinton* (Civ. App.) 191 S. W. 763.

A suit against a husband gives court jurisdiction to declare fraudulent deed under which he claims, and to determine that community estate of husband and wife had no interest in land, though wife was not party. *Gabb v. Boston* (Sup.) 193 S. W. 137.

34. **Redemption of community from liens.**—Where a husband conveys community property to his wife, expressly reserving vendor's lien in seller, wife is not estopped from tendering purchase money, or from filing bill in equity to redeem, though not a necessary party to proceedings to foreclose lien, and judgment, sale, and purchase did not preclude her from redeeming land, the equities otherwise giving her the right, but the foreclosure suit did not preclude vendor's rescinding sale as to wife's right to redeem land; the husband having conveyed to her subject to the lien, and she had no equity against the vendor, who gave her no actual notice of his purpose to rescind the contract for nonpayment; he having gone into possession by tenant, and she having left the county and failed to pay taxes. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

While suit against husband to foreclose vendor's lien waived rescission on an antecedent failure of the husband to pay the note, it did not relieve wife, to whom husband voluntarily conveyed subject to vendor's lien, of her obligation thereafter to perform in reasonable time, and she could not recover where 15 years elapsed, after the vendor purchased on execution, after foreclosure of his lien, before she offered to perform, and 14 years after he took possession through a tenant. *Id.*

### Art. 4623. [2969] Presumption as to community property.

**Applicability in general.**—Under this article, the presumption that the property is community property must be overcome by evidence reasonably satisfactory to the jury; such presumption continuing until the contrary is "satisfactorily" proven, and the word "dissolved" includes divorce as well as death, and "possess," implies ownership. *Gameason v. Gameason* (Civ. App.) 162 S. W. 1169.

**Presumptions and burden of proof.**—Land conveyed to a husband is prima facie community property. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017; *Wauhup v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

Defendants having acquired the legal title to certain land for a valuable consideration, the burden was on plaintiffs to charge them with notice of the rights of the heirs of the widow of the first grantee in order to subordinate defendants' claim to the equitable interest of such heirs. *Loomis v. Cobb* (Civ. App.) 159 S. W. 305.

One claiming title to a widow's interest in community property under a sale by the husband's executor or administrator has the burden of proving that the property was sold to pay community debts. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

Where a wife died before the execution of a deed by which the surviving husband acquired title, the presumption was that the property was his separate estate, unless it were shown that title had in effect been acquired by purchase prior to the death of the

wife and had been paid for with community funds. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

Where a deed in favor of a husband and wife recited the payment of money for the land, the fact that the grantor was the father of the wife would not destroy the presumption that the payment was made out of community funds and raise a presumption that the property belonged to the wife. *McCulloch v. Nicholson* (Civ. App.) 162 S. W. 432.

A 14-acre tract of land was prima facie the separate property of the husband, where the consideration therefor was a deed executed by him for his undivided half interest in another tract which was owned by him before marriage, and the burden was on the wife to prove an allegation that it was paid for in part out of community funds, though one of the purchase money notes was paid a year or more after marriage. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

Under Act Jan. 20, 1840, p. 6, § 12, 2 Gam. Laws, p. 180, and this article, real estate reciprocally possessed by a husband and wife at the time of the husband's death held presumably community property, where such land, with land previously granted, amounted to 640 acres, the quantity to which the head of a family was entitled. *Swilley v. Phillips* (Civ. App.) 169 S. W. 1117.

Where conditional land certificate was issued to woman in 1839, issuance of unconditional certificate in 1846 to her in her former name held not sufficient evidence that she was not then married to rebut the presumption that land granted to the husband in 1840 was community property. *Id.*

There is a presumption of law that land acquired during coverture is community property. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

Where it appeared a grantee was a married woman at the time of the execution of the deed, there is a presumption that a community estate would arise. *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

A purchaser of an automobile, the separate property of the seller's wife, who believed the seller to be unmarried, held not a bona fide purchaser on the theory that a purchaser from the husband alone may presume that the property was community. *Scruggs v. Gage* (Civ. App.) 182 S. W. 696.

Where a deed is made to a wife without limiting it to her separate use, the presumption prevails that it was intended as a conveyance of a community estate, but the presumption is otherwise where the husband is the grantor, or the consideration was paid out of the wife's separate property, and where a deed from the husband's judgment creditor, who had levied upon the land under execution, to the wife, who paid off the incumbrance, did not by apt words, limit the conveyance to her separate estate, the legal presumption of the community character of the land obtained, and the burden of proof was on the party asserting the contrary. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

Where the wife, to save lands from execution levied by the husband's creditors, claimed them as her separate lands, the burden was upon her to show that the land was paid for from her separate funds, to avoid the presumption that the land was community property. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

#### Art. 4624. What property subject to debts of wife; husband must join in certain contracts.

Cited, *Rishworth v. Moss* (Civ. App.) 159 S. W. 122.

**Constitutionality.**—Title of Acts 33d Leg. c. 32, amending this article and arts. 4621, 4622, held sufficient within Const. art. 3, § 35. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

**Authority to contract in general.**—This article and arts. 4621 and 4622, evidence the establishment, or the continuance, with the modifications thereby made, of a well-defined public policy of preventing the diminution of the estates of married women by unauthorized transfers or conveyances, or by subjecting them to the payment of forbidden obligations; and a contract made in Illinois by a married woman residing in Texas, whereby she became a surety for her husband, being contrary to this public policy, cannot be enforced in the courts of Texas, or in courts administering the laws of Texas, since the word "another" cannot reasonably be given such a meaning as would prevent the husband from being regarded as "another" than his wife, and the wife may not become a surety on bonds and obligations in which the husband cannot join. *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613.

Prior to the act of the 33d Legislature amending this article, a married woman was not liable on a note executed by her, where there was no allegation or proof that the note was created for necessities furnished her or her children or for the benefit of her separate estate. *Fisher v. Scherer* (Civ. App.) 169 S. W. 1133.

A married woman cannot, even with the consent of her husband, legally bind herself as surety on an appeal bond, and a bond on which she is a surety may be refused. *Wilson v. Dearborn* (Civ. App.) 179 S. W. 1102, denying rehearing, 174 S. W. 296.

A wife is not personally liable for a debt due a physician for necessary services rendered to her child, unless the debt was contracted by her personally, but if she calls in a physician to treat her child, it is presumed she does so as agent of her husband. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

Under the common law a married woman was not bound by a promissory note executed by her jointly with her husband, but it was the note alone of the husband, and under this article, she is not authorized to become a comaker, coprincipal, or surety for her husband's debt or obligation. *Red River Nat. Bank v. Ferguson* (Civ. App.) 192 S. W. 1088.

Under this article, a note signed by a wife without being joined by her husband is a nullity. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.

— **Avoidance of contract by other party.**—That a married woman who was a party could not legally sign the supersedeas bond did not affect its validity if the sureties were sufficient. *Duller v. McNeill* (Civ. App.) 161 S. W. 45.

**Necessaries.**—Debt due from a wife for commissions for an exchange of her separate property is not for necessaries within this article, and community property is not liable therefor. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

A wife, who purchased goods which were necessaries for her own use, was personally liable for their value. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

**Debts or liabilities charged on separate estate.**—A city may not impose a personal liability against a married woman for an assessment of benefits on her homestead for a local improvement, in view of this article. *Eubank v. City of Ft. Worth* (Civ. App.) 173 S. W. 1003.

**Conclusiveness and effect of judgment against wife.**—A judgment on a note signed by a wife without joinder of her husband will be set aside on direct attack, though she appeared by attorney and did not set up coverture. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.

Under this article and arts. 4621, 4622, on collateral attack on judgment against husband and wife, proof aliunde the judgment held inadmissible to show that it was not based on contract for necessaries for wife or her children or for benefit of her separate estate. *Akin v. First Nat. Bank* (Civ. App.) 194 S. W. 610.

Where a wife in Texas signed notes as surety, and mortgaged her separate property to secure payment, and the payee sued in Oklahoma, and the wife, by authority of her husband, filed an answer setting up invalidity as a defense, judgment for payee was entitled to full faith and credit. *Bray v. Union Nat. Bank of Dallas* (Civ. App.) 194 S. W. 1165.

### Art. 4625. [2971] Judgment and execution in such cases.

**Costs.**—Where, in trespass to try title by married woman's grantee, he sought a recovery against the husband and wife on the warranty of title, and they offered to rescind, judgment for plaintiff for title and possession held to have properly awarded him costs as against the husband and wife. *Morton v. Calvin* (Civ. App.) 164 S. W. 420.

### Art. 4627. [2973] Community property liable for debts.

**Community debts—What are.**—Taxes and expenses of administration accruing after the death of an intestate are not community obligations for which the widow's interest in a land certificate could be sold. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 571.

A judgment recovered against a husband is a charge upon the community estate of the husband and wife, because within the spirit and intent of the Constitution and statutes she is a party to the suit. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 171 S. W. 247.

A husband's obligation for a commission for the sale of land owned jointly by himself and wife held joint and several. *Babcock v. Glover* (Civ. App.) 174 S. W. 710.

**Community and separate debts—Property liable for.**—Community property is liable for the antenuptial debts of the wife. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

Community property is subject to payment of husband's debts. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

**Parties liable for.**—Neither a wife nor her heirs can be made parties to a sale of her interest in the common property by her husband's legal representative, unless it is rightfully taken to pay community debts, and if disposed of for any other purpose she is not bound thereby, since the interest of the widow can be sold only to pay debts of the community, under Pasch. Dig. art. 1363. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

**Rights and remedies of creditors.**—Husband's creditors cannot be deprived of right to subject community property by mere fact that wife claims it as separate estate, and husband claims no interest, after transaction whereby the property was purchased by husband's and wife's conveyance of property owned half by wife and half by community. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

### Art. 4629a. May apply to district court to be feme sole for mercantile and trading purposes, how.

**Joint maker on husband's note.**—Under arts. 4621, 4622, and 4624, and in view of arts. 4629a-4629d, a wife has no power to become a joint maker with her husband in his note. *Red River Nat. Bank v. Ferguson* (Civ. App.) 192 S. W. 1088.

### Art. 4629d. Decree declaring married woman feme sole for mercantile and trading purposes; effect of decree.

**Joint maker on husband's note.**—See note under article 4629a.

## DECISIONS IN GENERAL

**Notice of marriage.**—Notice of a marriage is notice of all property rights arising from such status. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

## CHAPTER FOUR

## DIVORCE

Art.		Art.	
4630.	Marriage may be annulled, when.	4634.	Division of property.
4631.	Divorce may be granted in what cases.	4637.	Debts and alienations after suit.
4632.	Plaintiff must be resident in state and county.	4638.	Inventory and appraisal, etc.
4633.	Husband and wife may testify.	4639.	Temporary orders, etc.
		4641.	Custody of children.

**Article 4630. [2976] Marriage may be annulled, when.**

**Note.**—Jurisdiction in divorce cases in Travis, Williamson, Nueces, Kleberg, Willacy, and Cameron counties has been transferred to the criminal district courts created for such counties. See Vernon's Code Criminal Procedure, arts. 97vv to 97½i.

**Vacating decree.**—Decree in action for divorce on ground of wife's abandonment, within jurisdiction of district court under express provisions of this article and art. 4631, the cause being called out of its regular order and tried at an unusual place, without notice to defendant or her counsel, etc., while not a nullity, held so irregular as to authorize its vacation. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

**Art. 4631. [2977] Divorce may be granted in what cases.**

1. **In general.**—Unless the influence of plaintiff's mother was such as to deprive plaintiff of her free will and choice, the fact that the mother influenced plaintiff to sue for divorce is no defense if plaintiff is legally entitled to a divorce, mere persuasion or importunity not amounting to undue influence. *Powell v. Powell* (Civ. App.) 170 S. W. 111.

Wife, on being divorced, ceased to have any interest as beneficiary in policy on husband's life. *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Civ. App.) 188 S. W. 22.

Husband's refusal to sell their home and move to some other community did not entitle wife to divorce. *Hartman v. Hartman* (Civ. App.) 190 S. W. 846.

2. **Cruelty—Acts constituting.**—Whipping defendant's stepdaughter held not cruel treatment entitling the husband to a divorce. *Murchison v. Murchison* (Civ. App.) 171 S. W. 790.

5. — **Condonation.**—Condonation applies to cruelty, except that the cruelty is condoned only until the particular act is repeated, and act of a wife in whipping her minor stepdaughter held condoned so as not to constitute ground for divorce. *Murchison v. Murchison* (Civ. App.) 171 S. W. 790.

8. — **Evidence.**—Evidence in wife's suit for divorce held not to establish statutory grounds for a divorce. *Provine v. Provine* (Civ. App.) 172 S. W. 587.

Where testimony of plaintiff, if believed, entitled her to divorce, and was corroborated by her mother, refusal to grant divorce without hearing testimony of defendant is an abuse of legal discretion requiring reversal and remand. *Brueggerman v. Brueggerman* (Civ. App.) 191 S. W. 570.

11. **Abandonment—Elements of.**—While the statute does not use the term "permanent" in prescribing abandonment as a ground for divorce, its permanency is necessarily implied, and an abandonment which is only temporary is not cause for divorce. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

15. — **Evidence.**—Evidence held to show not an agreed separation, but a voluntary abandonment by the wife, without fault of the husband, entitling him to divorce. *Hope v. Hope* (Civ. App.) 178 S. W. 32.

In husband's action for a divorce on ground of wife's abandonment, evidence as to his other reasons for filing the suit, such as her humiliation or cruelty to him, was immaterial. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

21. **Vacating decree.**—Decree in action for divorce on ground of wife's abandonment, within jurisdiction of district court under express provisions of this article and art. 4630, the cause being called out of its regular order and tried at an unusual place, without notice to defendant or her counsel, etc., while not a nullity, held so irregular as to authorize its vacation. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

**Art. 4632. Plaintiff must be resident, etc.**

Cited, *Swearingen v. Swearingen* (Civ. App.) 165 S. W. 16; *Laird v. State* (Cr. App.) 184 S. W. 810 (in dissenting opinion).

**Residence.**—Under this article, a temporary absence during the six months next preceding filing of the petition would not affect right to maintain the action. *Fox v. Fox* (Civ. App.) 179 S. W. 883.

— **Petition.**—Petition averring plaintiff had been a resident of state and county for more than year, held sufficient under this article. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

In divorce case, petition should follow language of statute respecting jurisdictional facts of residence in state and county. *Bloch v. Bloch* (Civ. App.) 190 S. W. 528.



— **Evidence.**—Evidence in wife's action for divorce and for the recovery of her separate property held to show that she had been a bona fide inhabitant of the state for one year, and a resident of the county for six months next preceding the filing of the petition, within the jurisdictional requirement of this article. *Fox v. Fox* (Civ. App.) 179 S. W. 883.

Evidence held sufficient to establish that plaintiff had been bona fide inhabitant of state for 12 months at time he exhibited his amended petition and had lived in D. county as alleged for number of years immediately preceding filing of suit. *Nesbit v. Nesbit* (Civ. App.) 194 S. W. 405.

**Insanity.**—This article prohibits granting of divorce when either spouse is insane, and, where insanity of a spouse exists, a next friend, intervening during pendency of the insane spouse's suit for divorce, cannot prosecute it to termination. *Skeen v. Skeen* (Civ. App.) 190 S. W. 1118.

### Art. 4633. [2979] Husband and wife competent witnesses.

**Right of nonanswering defendant.**—In wife's suit for divorce on ground of cruel treatment, husband need not answer to all to render it court's duty to hear testimony showing that wife has been guilty of similar acts of misconduct toward husband. *Hartman v. Hartman* (Civ. App.) 199 S. W. 846.

**Weight and sufficiency of evidence.**—Under this article, a divorce is properly denied, where the only testimony consisting of the testimony of a wife suing for divorce and of her mother and grandmother is not full and satisfactory. *Fitzgerald v. Fitzgerald* (Civ. App.) 168 S. W. 452.

— **Conclusiveness of findings of jury.**—Under this article, judge may refuse to render judgment for divorce, if evidence is not satisfactory to himself, even though it is a jury case, but under Const. art. 1, § 15, art. 5, § 10, this article, and arts. 1984a and 1986, the court, where jury has found by special verdict that necessary facts constituting legal grounds for divorce are wanting, may not disregard its verdict and grant a divorce to either party. *Grisham v. Grisham* (Civ. App.) 185 S. W. 959.

**Vacation of decree.**—Before a judgment against defendant in divorce on two grounds, entered on appearance day in the absence of his counsel, should be set aside, defendant must show a meritorious defense, setting up the facts upon which each of the defenses rests, and show that a different result would be reached on another trial. *Wade v. Wade* (Civ. App.) 180 S. W. 643.

Wife against whom husband had fraudulently obtained a decree of divorce held entitled to its vacation and to the restoration of her status as a lawful wife and to his support, etc., notwithstanding he had afterwards married another innocent woman; as he was in no position to profit thereby. And fact that defendant was not cognizant of agreements of his counsel in violation of which such decree was entered was not a defense; and counsel's violation of an oral agreement that the jury fee might be paid at any time before trial, though not enforceable, might be considered as a circumstance of fraud. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

Specific allegations in petition as to her visit to her father, the husband's refusal to furnish a home, etc., held not prejudicial to defendant, though general allegations would have been sufficient; evidence of quarrel between them eleven years before and that she then left him, in view of subsequent reconciliation, was inadmissible on issue of three years' abandonment, and allegations and evidence held sufficient to take case to jury. *Id.*

**Review.**—Appellate court may reverse judgment of trial court refusing a decree of divorce and grant plaintiff a divorce on the facts; and may reverse judgment granting divorce, where the case is tried before or without a jury, because, in its opinion, evidence is insufficient to sustain material allegations alleged and necessary. *Grisham v. Grisham* (Civ. App.) 185 S. W. 959.

Error cannot be predicated on the alleged conflict in the verdict which found the mother entitled to a divorce and custody of two girls, but not a fit and proper person to have custody of a boy; no actual conflict necessarily following from such findings. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

### Art. 4634. [2980] Division of property.

Cited, *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

**Jurisdiction of court to order division in general.**—In view of law recognizing rights of husband and wife to agree as to division of property when living apart or in view of separation, in insane wife's suit for divorce, the court, having jurisdiction of parties, could take charge of their property and grant partition thereof at instance of next friend of wife. *Skeen v. Skeen* (Civ. App.) 190 S. W. 1118.

**Disposition of community property.**—Under this article, district court, in wife's action for divorce on ground of abandonment, had the right to decree her the use and benefit of the homestead for life, as the head of the family. *Wade v. Wade* (Civ. App.) 180 S. W. 643.

— **Judgment.**—A decree approving report of commissioners appointed in divorce proceedings to partition community property held not void, though voidable, where it was entered after death of the husband without his legal representatives being made parties; and a recital that the parties had agreed on the disposition made in the report of commissioners is conclusive on collateral attack. *Baker v. Stephenson* (Civ. App.) 174 S. W. 970.

— **Estoppel to question disposition.**—The court having jurisdiction of the parties and subject-matter, the part of the decree, in divorce, adjudging to the wife, with the consent of the husband, the community property, acted on by the parties for many years, estops him and his subsequent grantees. *Bird v. Palmetto Lumber Co.* (Civ. App.) 176 S. W. 610.

**Vacation of division of property.**—In action to set aside a divorce decree making division of community property on agreement of parties and for divorce or to set aside division of property, evidence held to warrant a jury finding as to fair market value of community estate at time of divorce decree; and court properly divided community estate equally and deducted from the plaintiff's half payment made under the agreement, there being no merit in contention that division should be made as in a divorce action. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**Property not disposed of by divorce judgment.**—Divorced wife, no partition of community property having been made, could sue bank, after sale by husband of community property and his death, to recover half of funds paid into bank for husband for property, though administration was still pending on his estate and all claims had not been finally adjusted. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

**Support of children.**—District court, authorized by this article and art. 4641, to make division of property and award custody of children in divorce, held without jurisdiction to make decree in personam for payment of monthly stipend for future support of children. *Gully v. Gully* (Civ. App.) 173 S. W. 1178.

While in granting a divorce the court may make necessary orders concerning the custody of the children, it cannot thereafter set apart for the maintenance of the children portions of the community property apportioned between the spouses; but, under this article and arts. 4068, 4069, both parents after divorce are liable to maintain children of the marriage; and where the wife maintained the minor children, she is entitled to recover from her former husband one-half the cost of such maintenance. *Gully v. Gully* (Civ. App.) 184 S. W. 555.

#### **Art. 4637. [2983] Debts and alienations after suit filed.**

Cited, *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

#### **Art. 4638. [2984] Inventory and appraisalment; injunction.**

**Pleading.**—Where, in a suit to set aside a divorce decree obtained by a husband and for a divorce in favor of complainant, the bill did not allege necessary jurisdictional residence on complainant's part, the court properly refused to grant an injunction restraining the husband from transferring his property pendente lite, under this article. *Swearingen v. Swearingen* (Civ. App.) 165 S. W. 16.

#### **Art. 4639. [2985] Temporary orders.**

Cited, *Crawford v. Crawford* (Civ. App.) 163 S. W. 115.

#### **Art. 4641. [2987] Custody of children.**

**Power of court in general.**—Under Const. art. 5, § 8, giving the district court original jurisdiction and general control over all minors, and this article, the court in granting a divorce has authority to award the custody of the children to the father's mother, grant their mother the right to visit them at all reasonable times, and require them to be kept within its jurisdiction. *Ex parte Ellerd*, 71 Cr. R. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

Under this article and Const. art. 5, §§ 8, 16, court in divorce proceedings may award custody of child to third person who intervenes and asks therefor. *Noble v. Noble* (Civ. App.) 185 S. W. 318.

A district court granting a divorce cannot secure exclusive power to dispose of minor children of the marriage, and after the decree has been rendered, another court may, circumstances having changed, determine the question of the minors' custody. *Ex parte Garcia* (Civ. App.) 187 S. W. 410.

**Judgment.**—A divorce decree which forbids plaintiff and defendant, without the agreement of the parties, to remove the children from the jurisdiction of the court designates the parties who must agree with sufficient certainty to be enforceable. *Ex parte Ellerd*, 71 Cr. R. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

**Modification of judgment.**—Where in divorce the custody of infants is awarded, such judgment is a conclusive adjudication as to those conditions and circumstances, but does not preclude subsequent proceedings involving the custody of such infants when the conditions and circumstances have changed. *Ex parte Garcia* (Civ. App.) 187 S. W. 410.

**Order for support.**—In a statutory proceeding for divorce, the court has no power to make incidental decrees against the spouses in personam for payment of a monthly stipend for future support of minor children of the marriage. *Gully v. Gully* (Civ. App.) 184 S. W. 555; *Gully v. Gully* (Civ. App.) 173 S. W. 1178.

## TITLE 69

## INJUNCTIONS

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4651.	Notice to opposite party.	4674.	Unlawful sale, etc., of liquors may be enjoined.
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4654.	The bond for injunction.	4685.	Use of premises for gaming enjoined.
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**Article 4643. [2989] Writs of injunction granted, when.**

Cited, *Lester v. Gatewood* (Civ. App.) 166 S. W. 389; *Stevens v. City of Dublin* (Civ. App.) 169 S. W. 188; *Waples v. Gilmore* (Civ. App.) 189 S. W. 122; *Robertson v. Haynes* (Civ. App.) 190 S. W. 735; *Terrell v. Middleton* (Sup.) 191 S. W. 1138.

**3. Nature and purpose of injunction in general.**—Injunctions consist of either a “restraining order” made upon application as a part of a motion for a preliminary injunction, pending the hearing of the motion, or an order which operates, unless dissolved by an interlocutory order, until the final hearing, or a perpetual injunction which can only be ordered upon final decree. *Ex parte Zuccaro*, 106 Tex. 197, 163 S. W. 579, Ann. Cas. 1917B, 121; *Ex parte Mussett*, 106 Tex. 200, 163 S. W. 580.

Equity will take jurisdiction when necessary to administer a preventive remedy, or when the ordinary courts are made instruments of injustice, or the legal remedy is inadequate to meet the demands of justice. *Supreme Lodge of Fraternal Union of America v. Ray* (Civ. App.) 166 S. W. 46.

Injunctions are mandatory or preventive according as they command defendant to do or to refrain from doing a particular thing. *Cartwright v. Warren* (Civ. App.) 177 S. W. 197.

Under this article, authorizing a writ of injunction where it appears that applicant is entitled to relief which requires the restraint of some prejudicial act, the right to injunction is not confined to rules of equity jurisprudence. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Where plaintiff was entitled as member of Democratic party to run as a Democrat for office of state railroad commissioner, held, that nomination by state Democratic executive committee in violation of art. 3173, would be enjoined. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

A suit by school districts and taxpayers against county school trustees to enjoin a redistricting of the county could be maintained as an ordinary suit between the parties, and need not be by a proceeding by quo warranto under statute. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

Injunction cannot issue to restrain one not an attorney at law from inducing the presentation of exaggerated or doubtful claims for personal injuries against a railroad; the court being without jurisdiction. *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

**4. Nature of right protected.**—An injunction to restrain a person from allowing his chickens and turkeys to run at large will not issue, in absence of a statute prohibiting fowls from running at large. *Coffman v. Martin* (Civ. App.) 167 S. W. 22.

Equity will not grant an injunction to protect a technical or unsubstantial right. *Gillespie County v. Fredericksburg Land Co.* (Civ. App.) 168 S. W. 9.

Stockholders of an oil company could not enjoin the cancellation of an oil lease because wells driven by virtue of the lease produced a paying quantity of oil, where the lease provided for a greater quantity. *McLean v. Kishi* (Civ. App.) 173 S. W. 502.

A grantor with covenants of warranty may enjoin a sale of the land on execution under a void judgment. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.

The purpose of a writ of injunction is to enforce the performance of a duty clearly defined by law. *Jefferson v. McFaddin* (Civ. App.) 178 S. W. 714.

In absence of riparian rights, plaintiff is not entitled to enjoin another from build-

ing a wharf; the injunction being sought on the ground that it interfered with such rights. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

Where laborer fails to take measures provided by *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 5621-5623, 5631, to secure lien on building intended for occupancy as homestead, he cannot enjoin its delivery by contractor to owner. *Norton v. Elliott* (Civ. App.) 184 S. W. 1096.

That plaintiff in a suit against T. had judgment requiring T. to lay out a road, and giving plaintiff an easement therein, gives plaintiff no right to have S. enjoined from obstructing the road where it passes through his property; it not being shown that title thereto was acquired against him. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 187 S. W. 978.

6. **Jurisdiction.**—See notes under art. 1712, ante.

That irrigation company was in the hands of a receiver appointed by a federal court held not to defeat water user's right to enjoin interference with an irrigation ditch on the part of the owner of land across which the ditch was constructed. *Houk v. Robinson* (Civ. App.) 160 S. W. 120.

Where the commissioners' court revoked an order changing the course of a road, such revocation left the matter as if no order had ever been entered, and the district court had jurisdiction to entertain a suit to enjoin obstructions of the road. *Wheeler v. McVey* (Civ. App.) 164 S. W. 1100.

Art. 5732, giving the Supreme Court exclusive jurisdiction to issue mandamus or injunction against any executive officers of the state does not deprive the district court of jurisdiction to restrain by injunction an executive officer from performing an act authorized by a state law which is claimed to be invalid. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Acts 33d Leg. c. 47, punishing the pollution of any water course by the discharge of sewage therein, does not deprive the district court of jurisdiction to suppress such nuisances by injunction. *Cardwell v. Austin* (Civ. App.) 168 S. W. 335.

Under Const. art. 5, § 8, and art. 4643, relating to the jurisdiction of the district court, such court has jurisdiction to restrain trespass and the cutting of timber, regardless of the value of the timber. *Poe v. Ferguson* (Civ. App.) 168 S. W. 459.

The county court, having no jurisdiction of forcible detainer suit or of trespass to try title, in action involving title or possession of land was without jurisdiction to enjoin defendant from building fence and cutting timber. *Benavides v. Benavides* (Civ. App.) 174 S. W. 293.

Under art. 4643, subd. 3, and article 4653, district court of McLennan county held without jurisdiction to enjoin sale of land therein ordered sold by the district court of Hunt county. *Brown v. Fleming* (Civ. App.) 178 S. W. 964.

Where a partner was a trustee in bankruptcy, and his copartners secured an injunction against his delivery to his successor of alleged partnership funds received by the trustee, the funds, having been received by the successor without notice, are no longer subject to the jurisdiction of the state court. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

If the petition alleges no ground of injunction within arts. 4643-4693, the district court is without jurisdiction to issue the writ; and, the remedy by appeal from the order granting injunction being inadequate, defendant may apply for writ of prohibition to the Court of Criminal Appeals if the law involved is penal. *State v. Clark* (Cr. App.) 187 S. W. 760; *State v. Nabers* (Cr. App.) 187 S. W. 783, 784.

A special district judge of one court has no authority to grant a temporary injunction returnable to any other court, and an injunction so granted is void. *League v. Brazoria County Road Dist. No. 13* (Civ. App.) 187 S. W. 1012.

Every judge is independent in his own jurisdiction, and cannot be restrained in the discharge of his functions by injunction of another court. *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

Where school-teacher employed under contract for eight months was refused permission to teach, and sued for seven months' wages accrued, and to enjoin payment to others employed in her stead and for writ of mandamus to compel payment of amount to her, the real cause of action was on the contract for wages of \$70 per month, so that the district court had no jurisdiction. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

Where application for mandamus was first filed with one district court of county, subsequent filing of petition in another district court to enjoin relator from proceeding, etc., held not to deprive first judge of jurisdiction. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

11. **Inadequacy of remedy at law.**—Under this article, providing that an injunction shall be issued where the applicant is entitled to the relief demanded, and the relief requires the restraint of some act prejudicial to the applicant, an applicant is entitled to an injunction, regardless of his remedy at law; the amendment of 1909 not changing the previous rule. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183; *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715; *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

The county tax collector being enjoined from ignoring plaintiff under his contract with the commissioners' court of the county to collect delinquent taxes, there is no necessity for enjoining the State Comptroller, who has no authority to cancel the contract as far as the state is concerned, and who has no authority over the county tax collector; plaintiff, if he shall collect delinquent taxes, and so become entitled to commissions, which the Comptroller shall refuse to pay, having remedy by proceeding to compel payment. *Lane v. Mayfield* (Civ. App.) 158 S. W. 223.

Where defendant, in an action of forcible entry and detainer, could set up the fact of fraud affecting the right of possession, but only incidentally involving the title, there

was an adequate remedy at law, and hence the action would not be enjoined on the ground that there was such a defense. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

A legal remedy is not adequate, so as to prevent equity from taking jurisdiction, unless it is as practical and efficient to secure the administration of justice as is the equitable remedy. *Supreme Lodge of Fraternal Union of America v. Ray* (Civ. App.) 166 S. W. 46.

The remedy by injunction will not be denied merely because defendant is able to respond in damages, where the remedy at law is doubtful. *Tomlin v. Clay* (Civ. App.) 167 S. W. 204.

A railroad company, prosecuted by a city in courts having jurisdiction for the penalties imposed by art. 1068, for failure to place its roadbed over a street in a proper condition for travel, has an adequate remedy at law, and may not sue to restrain actions at law. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 167 S. W. 292.

The enforcement of an unconstitutional criminal statute will not be enjoined, as the party has an adequate remedy at law. *Winn v. Dyess* (Civ. App.) 167 S. W. 294.

A fisherman whose nets and seines the fish commissioner is threatening to destroy has an adequate remedy at law for all damages which he may sustain by the unlawful destruction of his nets, and is not entitled to an injunction to restrain such destruction. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Where a consignor brought two suits in justices' courts in different counties for a single injury arising out of the same transaction and recovered in one of them, the defendant being authorized to plead such recovery on appeal to the circuit court of the other in bar of that action under art. 759, could not enjoin the prosecution of the second action. *Texas & P. Ry. Co. v. Southern Produce Co.* (Civ. App.) 168 S. W. 999.

Where a party could have procured relief by appeal from an order of which he complained, he is not entitled to an injunction to give him the same relief. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

That a receiver is unfit or is not properly discharging duties of his office is not ground for enjoining him from acting, or enjoining parties on whose petition he was appointed from further prosecuting their suit, for the surety on the receiver's bond is liable for any misconduct. *Id.*

That a receiver is selling property of a corporation to himself is no ground for enjoining him from continuing to act, for his bond will protect those injured. *Id.*

That a receiver was a surety upon the cost bond of the plaintiff at whose suit he was appointed, and that such plaintiff was indebted to the corporation for which the receiver was ordered, is no ground for enjoining the receiver from acting; the court never having been asked to remove him, nor to order him to sue plaintiff. *Id.*

Irregularities which may be invoked under art. 6319k, to contest a local option election, are not grounds for an injunction to restrain the county judge from publishing the result. *Watson v. Cochran* (Civ. App.) 171 S. W. 1067.

Injunction is the proper remedy where the commissioners' court is proceeding without authority to open a first-class 60-foot road; art. 6866, giving appeal only as to adequacy of damages. *Currie v. Glasscock County* (Civ. App.) 179 S. W. 1095.

Where the assignee of a foreclosure judgment against a nursery company in the hands of a receiver was not satisfied with the terms of the order of sale, requiring the land and nursery stock to be sold separately and denying its right of lien upon the stock, its remedy was to appeal, and not to buy the land and then enjoin sale of the stock. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 184 S. W. 537.

In suit to enjoin defendant from removing a gin plant from premises purchased from plaintiff and to enforce the contract as to its maintenance, held that equity would not decree specific performance, which would require supervision by the court, but would leave the parties to their remedies at law. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 185 S. W. 991.

An "irreparable injury" is one which cannot be fully compensated in damages or cannot be measured by any certain pecuniary standard. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Under art. 3631, a person aggrieved by the decision of a county court relating to administration of community property in which he has a joint interest with decedent must appeal to district court of county in which administration is pending and cannot restrain enforcement of such decision of county court. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

Costs incident to preparation and trial of suit, such as lawyer's fees, loss of time, legitimate expense of collecting testimony, none of which can be recovered, even in trial resulting in defendant's favor, do not constitute pecuniary loss or injury, to entitle railroad to enjoin one not an attorney from inducing injured persons to present exaggerated or doubtful claims. *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

12. — **Trespass and injury to real property.**—Since a levee district cannot pay damages occasioned by the construction and maintenance of levees or other improvements, a property owner may enjoin the completion of the work where its effect will be to especially injure his property. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 153 S. W. 164, 48 L. R. A. (N. S.) 994.

As nothing but the right of possession can be determined in forcible entry and detainer, the pendency of such an action for the possession of land will not preclude the issuance of an injunction to prevent injury to the land by the district court in a suit to quiet title, notwithstanding the fact that the county court has exclusive jurisdiction to issue injunctions in cases falling within its sphere. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

The remedy by action for damages for diversion of waters of a lake, not being as practical and efficient to the ends of justice and its prompt administration as that of injunction, is inadequate. *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

While the commissioners' court has wide discretion in opening a public road, an abuse thereof may be enjoined, especially as art. 6882, confines the issues upon appeal to the amount of damages. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

13. — **Collection of taxes.**—A property owner cannot sue a tax collector to compel him to cancel invalid tax assessments which are a cloud on her title, because he would not institute an action thereon; it not appearing that he had authority to do so. *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

The fact that an owner of property of a certain class, illegally valued for taxation, may defeat collection by paying the proper amount, held not an adequate remedy at law so as to preclude an injunction, where the illegality of the plan would embarrass the city's fiscal affairs. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

14. — **Judgment and execution.**—Where defendant executed a note and mortgage for the price of a piano, and upon nonpayment the mortgage was foreclosed, he is not entitled to an injunction to restrain execution upon the foreclosure judgment, on the ground that plaintiff is indebted to him; it appearing that the plaintiff is solvent. *Bullitt v. Jesse French Piano & Organ Co.* (Civ. App.) 158 S. W. 782.

Enforcement of an execution will not be enjoined for newly discovered evidence of a letter, in which defendant had admitted complainant's debt to be much less than the amount recovered, where there was no allegation of an effort to produce the letter at the trial, and complainant had not disclosed its existence prior to judgment. *Ripps v. Hermann* (Civ. App.) 163 S. W. 1023.

Injunction does not lie to restrain the enforcement of a void judgment of a justice, where the right of appeal has not expired. *Robinson v. Gibson* (Civ. App.) 168 S. W. 877.

Under this article, the owner of real estate held entitled to enjoin a sale under execution against another, though his remedy at law was adequate. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

Under this article, owner of property levied on under execution against another held entitled to sue for injunction, and not limited to statutory remedy. *Allen v. Carpenter* (Civ. App.) 182 S. W. 430.

In suit to enjoin enforcement of default judgment brought after term of judgment's rendition, plaintiff's failure to move to set aside judgment during term held to bar right to relief. *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5.

The remedy of plaintiffs, in suit to enjoin seizure of property under writ of sequestration issued in trespass to try title against the tenant of one of them, to permit the sequestration to have been completed, and then, had they prevailed in their suit to set aside the execution sale, to have brought an action in damages for loss sustained by reason of the sequestration, was not as efficient as the remedy by injunction. *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

In wife's suit to restrain sale under execution by husband's creditor of land conveyed her by husband, whether husband was indebted to creditor before execution of deed to wife, and whether he was insolvent at time of execution, and at date of levy of execution, were distinct facts necessary to be proven by evidence not of record, so that the execution sale would cast a cloud on the wife's title. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

Under this article, remedy of injunction should not be denied wife, her husband's grantee, against husband's creditor, seeking to sell property on execution, on ground that wife has adequate remedy at law precluding equitable remedy. *Id.*

Sale on execution, to satisfy judgment against husband in favor of his creditor, of land conveyed by husband to wife, casts cloud on wife's legal title. *Id.*

One may, as against claim of adequate remedy at law, have injunction against execution sale of his homestead which would cast a cloud on his title. *Pierce v. Jones* (Civ. App.) 193 S. W. 1137.

18. **Injunction ineffectual or not beneficial.**—Injunction will not lie to restrain the holding of an election for the issuance of bonds of a road district, on the ground that the law authorizing such election is unconstitutional, as in that case the bonds will be void. *League v. Brazoria County Road Dist. No. 13* (Civ. App.) 187 S. W. 1012.

19. **Injury to defendant.**—Plaintiff, in trespass to try title, is not entitled to restrain the defendants from enforcing a judgment secured against plaintiff's tenant in forcible entry and detainer, in which plaintiff could not rely upon his superior title, without showing irreparable injury or at least greater injury than defendants would suffer from the restraining of the enforcement of their judgment. *Gibbons v. Ross* (Civ. App.) 167 S. W. 17.

An injunction will not be issued to prevent an act already committed. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

An injunction will not be granted where no probable injury can arise from the act sought to be restrained. *Gillespie County v. Fredericksburg Land Co.* (Civ. App.) 168 S. W. 9.

20. **Defenses in general.**—The fact that plaintiff, in a suit in trespass to try title, had wrongfully entered upon possession of defendant, for which entry the defendant had secured a judgment in forcible entry and detainer, does not deprive the plaintiff of his right to restrain the enforcement of the forcible entry and detainer judgment. *Gibbons v. Ross* (Civ. App.) 167 S. W. 17.

A suit by taxpayers to enjoin an illegal and unconstitutional plan of taxation which defendant city had declared would be enforced held not premature. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

In suit to enjoin trespasses, held, that defendant might assert ownership in himself and set up a claim for damages for being unlawfully dispossessed by plaintiff. *Harper v. Stewart* (Civ. App.) 179 S. W. 277.

Under a contract providing for reimbursement to defendant for advances to a corporation, held, that plaintiff, corporate stockholder, having given notes to secure the advances, not having paid them, was not entitled to enjoin defendant from disposing of stock held as collateral or receiving dividends to repay such advances. *Leary v. International Coal & Wood Co.* (Civ. App.) 185 S. W. 665.

Plaintiffs did not waive their right to enjoin the opening of a public road by presenting to the condemnation commissioners a claim for damages which reserved the right to contest such opening, especially where waiver was not pleaded. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

21. **Laches.**—A person desirous of enforcing a covenant restricting the use of land will not be denied an injunction for that purpose where they made protest upon discovering the intended violation and instituted suit as soon as the protests were shown to be unavailing. *Hooper v. Lottman* (Civ. App.) 171 S. W. 270.

Where defendants, on sale of gin and mill outfit, agreed with purchaser not to engage in such business, failure for more than three years after contract was broken to ask for equitable relief by injunction was not such laches as would bar right to injunction. *Malakoff Gin Co. v. Riddlesperger* (Sup.) 192 S. W. 530.

23. **Right of individual to restrain acts against public welfare.**—Equity will not enjoin the enforcement of an ordinance prohibiting stock from running at large in a city, even if the ordinance be void, where it is not shown that complainants own any stock in the city. *Lilly v. City of Houston Heights* (Civ. App.) 158 S. W. 189.

Taxpayers of a school district held to have capacity to sue to restrain the holding of an election to abrogate a school tax, previously voted to supplement the general school fund apportioned to the district. *Beeman v. Mays* (Civ. App.) 163 S. W. 358.

Performance of official duty will be enjoined only on showing that the act is unlawful and will result in a private injury to complainant. *Marion County v. Perkins Bros. Co.* (Civ. App.) 171 S. W. 789.

Under this article, subds. 1, 2, held, that a taxpayer in a county might maintain a suit to enjoin the creation of a void debt and an illegal tax levy, in excess of the county's constitutional debt limit. *Tullos v. Church* (Civ. App.) 171 S. W. 803.

Under this article, a property owner seeking an injunction against disorderly houses must show special damage to entitle him to relief. *Coman v. Baker* (Civ. App.) 179 S. W. 937.

Property owners cannot restrain a city from constructing a sidewalk in front of their premises on property which is part of the public thoroughfare because of the unconstitutionality of the statute under which the city is proceeding. *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344.

A citizen and taxpayer may maintain an action to restrain state officers from performing illegal and unauthorized and unconstitutional acts. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

Plaintiff, without showing any injury to him different from that of the public, may have defendant enjoined from obstructing a road, where in a prior suit by him against it he was adjudged an easement in it. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 187 S. W. 978.

Interest of taxpayers of county in having competitive bids invited for unpatented class of pavement, and in having the county commissioners required to let the contract to lowest bidder, authorized such taxpayers to maintain a suit to enjoin county officials from making a contract for paving with a patented pavement at excessive cost. *Orndorff v. McKee* (Civ. App.) 188 S. W. 432.

Under statute governing commissioners' court of El Paso county in repairing roads, taxpayers could enjoin officials from making contract with paving company in exchange for political support, while better and cheaper paving could be had than by patented process in control of company. *Id.*

Individual taxpayers may sue to restrain the threatened erection of a bridge by commissioners' court at a crossing different from that designated in proceedings resulting in issuance of bridge bonds, where taxes therefor would be a lien upon their property. *Moore v. Coffman* (Civ. App.) 189 S. W. 94.

Whether attorney's fee was paid by school trustees out of special maintenance fund prior to teachers' salaries did not legally affect taxpayers with a peculiar injury. *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

A taxpayer cannot secure the aid of equity to prevent de facto officers from serving and receiving compensation, and relief which cannot be granted to a taxpayer for public benefit as well as for his own cannot be granted to commissioner of city department on sole ground that he holds such position. *Uhr v. Brown* (Civ. App.) 191 S. W. 379.

Suit by city police commissioner to restrain interference with his charter right to appoint to offices in police department, held suit brought by him in his individual capacity, as distinguished from suit in his official capacity on behalf of city in aid of enforcement of police regulations. *Id.*

Freeholders cannot enjoin counting ballots of election to determine whether stock should run at large. *Fuller v. McHaney* (Civ. App.) 192 S. W. 1159.

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

26. **Grounds for granting or denying temporary injunction.**—Under this article, where defendants who entered as trespassers and have by means of a worthless appeal

bond given in a forcible entry and detainer suit withheld possession, plaintiffs, the owners in fee of land, are entitled to an interlocutory injunction in a subsequent suit to quiet title. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

Where telephone company which acquired rights under grant from city conducted its business on the terms fixed by the grant, preliminary injunction requiring it to furnish telephones to persons paying the rental specified in the grant held proper to maintain the status quo, though it was not bound by the terms of the grant. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

In a suit to recover property, a temporary injunction will not issue enjoining defendant from conducting his business in the premises, because of his failure to pay rent to plaintiff, in absence of an allegation that defendant is insolvent, and cannot be made to respond to any judgment. *Block v. Fertitta* (Civ. App.) 165 S. W. 504.

In an action for realty, a temporary injunction will not issue restraining its lawful use by defendant pending the action, in absence of a showing that defendant's possession was forcibly or fraudulently obtained, and that the injunction is necessary to preserve the status quo of plaintiff's possession or to prevent irreparable injury to the property or to plaintiff by defendant's use thereof. *Id.*

Allegations of the petition, in a suit by a lessee to recover property claimed under a lease, that defendant was conducting a shoe shining parlor in such premises which was detrimental to plaintiff's interest in leasing the other property, and that defendant employed negro boys who were boisterous and disturbed plaintiff as lessee of the adjacent property, etc., held not to authorize a temporary injunction restraining defendant from conducting his shoe shining business. *Id.*

In trespass to try title involving a mere boundary line dispute on which the evidence was conflicting, there being no allegation that defendants were not able to respond in damages for any timber shown to have been so taken, the court did not err in refusing a temporary injunction. *Houston Oil Co. of Texas v. Taliaferro* (Civ. App.) 168 S. W. 84.

In action by minority stockholders to enforce lien on assets of foreign corporation, transferred to a domestic corporation, temporary injunction against disposal or removal of assets held erroneously dissolved. *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562.

The balance of convenience and hardship ordinarily controls in cases of substantial doubt as to whether a preliminary injunction shall be granted. *Cartwright v. Warren* (Civ. App.) 177 S. W. 197.

The court, in granting a temporary injunction should require a case of probable right and probable danger to the right without the injunction. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

Where a party has complied with all the requirements of law for the issuance of an injunction, he is entitled to its issuance as a matter of right. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

Taxpayers and residents of a school district consolidated by the county commissioners with another to form one so large as to violate art. 2815, held entitled to temporary injunction restraining the commissioners from issuing bonds, etc. *Cleveland v. Gainer* (Civ. App.) 184 S. W. 593.

Where the evidence in an action to restrain closing an alley made a case of probable right to the relief sought, it was not an abuse of the trial court's discretion to grant a temporary injunction. *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

Where no cause of action against a corporation was alleged nor was its dissolution warranted, a temporary injunction restraining corporation officers from carrying on the business will be denied; it being asked as an adjunct to the appointment of a receiver which was refused. *Leary v. International Coal & Wood Co.* (Civ. App.) 185 S. W. 665.

In determining propriety of granting temporary injunction restraining defendants from erecting cotton gin on ground that it would constitute a nuisance, averments of petition must be taken as true. *Moore v. Coleman* (Civ. App.) 185 S. W. 936.

Petition of a corporation for an injunction against other corporations and individuals, claiming that they were engaged in a partnership or joint enterprise, held insufficient to show abuse of discretion in refusing a temporary injunction. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

Plaintiffs held entitled to a temporary injunction restraining sale of alleged home-stead, until case was tried on merits. *Canales v. Canales* (Civ. App.) 190 S. W. 842.

Wife suing to enjoin sale under execution by husband's creditor of land conveyed her by husband had legal right to have status of property involved remain as it was until suit was determined on merits. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

A temporary injunction will not be granted unless specifically prayed for. *Boyd v. Dudgeon* (Civ. App.) 192 S. W. 262.

A petition in a suit to set aside a judgment foreclosing a mechanic's lien for fraud, held sufficient to warrant a temporary injunction against dispossessing plaintiffs pending the suit. *Hammond v. Hoffman* (Civ. App.) 192 S. W. 362.

**28. Mandatory injunction.**—Where a railroad company willfully fails to comply with Const. art. 10, § 9, requiring railroads to pass through county seats within three miles of their line, the court can enforce obedience thereto by mandatory injunction. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

A mandatory injunction should not be granted to place plaintiff in possession of property, where he had recovered judgment in a forcible entry and detainer case begun in justice court, and defendant had appealed to the county court, even though two terms had passed without filing a transcript in such court. *Fritsche v. Niechoy* (Civ. App.) 158 S. W. 791.

Mandatory preliminary injunction requiring telephone company to furnish telephones to all persons paying \$1.50 a month held not to deprive the company of its property



without due process of law, as it merely maintained the status quo, and prevented impending injury. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

Mandamus or mandatory injunction is a proper remedy to prevent a railroad company from abandoning a part of its road after completion. *Státe v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

Under arts. 6485, 6495, relating to the right of way of railroad companies, it is proper to compel a railroad company by injunction to construct openings in its roadbed, which will permit surface waters and natural streams to escape, so as not to overflow adjoining land. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

A mandatory injunction will not ordinarily be granted until final hearing on the merits, and not then unless necessary to complete execution of the court's decree. *McFaddin v. Wiess* (Civ. App.) 168 S. W. 486.

Where the sole purpose of a suit was to compel defendant F. to sign and acknowledge a certificate of complainant's election as trustee of a joint stock association, a preliminary mandatory injunction, requiring defendant to sign and acknowledge the certificate before trial on the merits, was erroneous. *Id.*

Where a Texas railroad company wrongfully refused to exchange business with a foreign company, it may be required to discharge its duties by mandamus or injunction. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

In action against railroad to secure deliveries to plaintiff over a spur track, mandatory injunction ordering that deliveries be made until final hearing, without limitation as to continuance of plaintiff's operation of the spur, held proper, where the contract for establishment of the track had 20 years to run. *Missouri, K. & T. Ry. Co. of Texas v. Seeger* (Civ. App.) 175 S. W. 713.

A mandatory injunction may be granted on an interlocutory application before final hearing in extreme cases where the right is clearly established, and its invasion results in serious injury. *Cartwright v. Warren* (Civ. App.) 177 S. W. 197.

30. Proceedings which may be restrained in general.—Courts of equity will not appoint a receiver of a corporation at the suit of a stockholder on the ground of fraud, mismanagement, etc., on the part of the corporate authorities, but will merely enjoin or forbid the wrong complained of. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

31. Civil actions and proceedings.—Where in a suit by the assignee of wages, the debtor and the employer filed a counterclaim for \$90 usurious interest alleged to have been paid by the debtor to plaintiff, the counterclaim gave the county court jurisdiction on appeal, and its judgment for the employer was not subject to injunction, however erroneous. *Cotton v. Rea*, 106 Tex. 220, 163 S. W. 2.

A District Court may enjoin the enforcement of a county court judgment, the invalidity of which appears by the record. *Id.*

After judgment of Supreme Court holding that state superintendent of public buildings was entitled to enter upon certain property in the custody of a patriotic organization and improve it, a suit by such organization to require the superintendent to answer interrogatories as to his plans and expenditures held to be enjoined as an interference with the judgment. *Conley v. Anderson* (Sup.) 164 S. W. 985.

A party to a garnishment proceeding in justice court, who appeared and controverted the truth of the garnishee's answer, was bound by the judgment, and could have errors reviewed only by appeal or writ of error, and not by a suit to enjoin collection of the judgment, where the judgment was not absolutely void. *Eppler v. Hiley* (Civ. App.) 166 S. W. 87.

Where a judgment was rendered for "\$——, being the amount of" a replevy bond, the filling in of the blank with the amount of the bond would not affect the rights of the parties to the judgment, and therefore would not be a material alteration which would authorize an injunction to restrain execution on the judgment. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

Where one who had secured judgment in forcible entry and detainer was not able to respond in damages for the rental value of the premises during the pendency of a suit in trespass to try title, a temporary injunction to restrain the enforcement of the forcible entry and detainer judgment will be granted in a suit in trespass to try title. *Gibbons v. Ross* (Civ. App.) 167 S. W. 17.

The railroad company may not sue to restrain the actions on the ground that they are an attack on its franchise. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 167 S. W. 292.

Defendant held not entitled to enjoin the prosecution of the suits on the ground that they were so instituted to prevent an appeal, and that complainant could not expect to get justice before a justice of the peace. *Wells Fargo Co. v. Gullheim* (Civ. App.) 169 S. W. 1053.

Under will giving residuary estate to wife for life with remainder to children, authorizing the wife to sell or encumber it with consent of majority of children, held, that execution sale of child's interest would not be enjoined as creating a cloud on the title of wife or other children. *Ward v. Caples* (Civ. App.) 170 S. W. 816, judgment affirmed. *Caples v. Ward* (Sup.) 179 S. W. 856.

Where the tax collector refused to sue to enforce tax liens, the property owner is not entitled to an injunction to prevent suit. *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

Where a receiver of a corporation was appointed, the fact that the trial court refused to hear the plea in abatement of those objecting to the appointment until he tried the case upon the merits is no ground for enjoining the receiver from acting, and those who instituted the receivership suit from continuing to prosecute it. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

That a receiver of a corporation is conducting the business at a loss, while it had been before conducted at a profit, is no ground for enjoining him from continuing to act as such. *Id.*

Where a receiver of the assets of a corporation was ordered by the court to sell them, he will not be enjoined from selling because the assets may be sacrificed. *Id.*

Under this article a debtor against whom final judgment had been rendered in the district court and who had been garnished in an action in the county court against his judgment creditor might have the district court enjoin the collection of the judgment by an assignee until the right to the fund has been settled in the county court. *Barcus v. O'Brien* (Civ. App.) 171 S. W. 492.

Equity will enjoin a sale of a husband's land on execution against his wife, where parol evidence is necessary to show that she was not sued for necessities. *Winkie v. Conatser* (Civ. App.) 171 S. W. 1017.

Where complete justice may be done, as between citizens of Texas in a suit in a sister state, a court of Texas will not interfere by injunction to prevent the foreign suit unless there is oppression or fraud. *Wade v. Crump* (Civ. App.) 173 S. W. 538.

Injunction does not lie to restrain a resident from prosecuting his action in a sister state, against petitioner, a resident, on the ground that the latter is deprived of his right to be sued in the county of his residence. *Id.*

Failure of a justice and of plaintiff's counsel to notify defendant's counsel when judgment was rendered held fraud supporting a suit to enjoin collection of the judgment, notwithstanding arrangement with another attorney to notify him. *Woodard v. Eskridge* (Civ. App.) 174 S. W. 868.

A belief by defendant that an action had been abandoned, caused by a delay of five weeks in transferring the case after a plea of privilege was sustained, does not excuse a failure to defend so as to authorize an injunction against the enforcement of the judgment. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

Judgment against owners of land in justice court, in favor of one who had supplied materials to contractors working on such land, held conclusive upon failure of the owners to appeal therefrom, and not open to collateral attack, as by having its enforcement enjoined in suit to enforce mechanics' liens by the contractors against the owners and materialman. *Waples Painter Co. v. Ross* (Sup.) 176 S. W. 47, reversing judgment (Civ. App.) 141 S. W. 1027.

The remedy of a defendant against a judgment of a justice's court, void on its face for want of jurisdiction, is by injunction, when such judgment is sought to be enforced. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

That at the time the holder of notes acquired them interest thereon was past due and unpaid did not entitle the maker of the notes who claimed a good defense to enjoin the holder from suing, where the notes were acquired by the holder in good faith and for value before maturity. *Tuke v. Feagin* (Civ. App.) 181 S. W. 805.

Under this article, owner of realty held entitled to writ of injunction enjoining the purchaser of the property under execution sale, and the sheriff from seizing it under writ of sequestration issued in a suit in trespass to try title in which the purchaser at execution sale was plaintiff and the owner's tenant defendant. *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

Where levy of execution upon land exchanged for homestead of the judgment debtor is made within six months after the exchange, sale thereunder will be restrained by injunction, although the six months has expired; the levy made within such time being wholly ineffectual. *American Nat. Bank of Ft. Worth v. Strong* (Civ. App.) 188 S. W. 1014.

The court has jurisdiction upon a proper case made to enjoin in one case its own judgment rendered in another case. *Hammond v. Hoffman* (Civ. App.) 192 S. W. 362. See, also, notes under *Vernon's Sayles' Civ. St.* 1914, art. 4647.

32. — Preventing multiplicity of suits.—Whether a court of equity will enjoin actions at law to prevent multiplicity of suits is controlled by no fixed rule, but each case depends upon its own particular facts. *St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co.* (Civ. App.) 162 S. W. 1174.

Seventeen different suits against initial carrier for injuries to 17 different shipments of fruit shipped from different points to different consignees on different dates to different destinations, and passing over the lines of several different carriers, could not be enjoined to prevent multiplicity of suits. *Id.*

Before several actions at law will be enjoined in order that the controversies may be determined in a single suit, it must appear that the different suits may be determined by the settlement of one or more issues of law or of fact common to them all. *Id.*

Equity will enjoin the prosecution of numerous suits at law where all of them arise from a common source, involve similar facts, and are governed by the same legal rules, so that the whole litigation may be settled in a single suit, and it appears that the maintenance of separate suits will materially injure the parties. *Supreme Lodge of Fraternal Union of America v. Ray* (Civ. App.) 166 S. W. 46.

Where separate actions in justice's court by 39 members of a fraternal benefit association were all brought solely to determine the right of the association to put in force an increased rate of assessment, equity will take jurisdiction to restrain the maintenance of the separate actions and to determine the whole matter in one suit. *Id.*

One entitled to maintain a suit in equity to restrain the maintenance of 39 separate actions, brought against it in justice's court, involving the same question, will be required, as a condition to the assumption of jurisdiction by equity, to pay all costs accrued in the justice's court, but defendants may assert such right against complainant in their answer. *Id.*

A court of equity can enjoin the bringing of separate suits to vex and harass by a multiplicity of actions, when plaintiff's demand can be completely litigated in one suit. *J. B. Farthing Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 178 S. W. 725.

Multiplicity of suits, that can be enjoined in equity, applies only where numerous suits are based on same cause of action, or on causes of action that can be legally joined. *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

Under this article, where pending action for land in which defendant gave replevin bond, plaintiff and others were conspiring to bring another suit and otherwise harass defendant, held, that injunction against such suit was properly granted. *Simpson v. McGuirk* (Civ. App.) 194 S. W. 979.

**33. Criminal prosecutions.**—Ordinarily, an injunction will not be granted to stay criminal proceedings. *Dibrell v. City of Coleman* (Civ. App.) 172 S. W. 550.

The general rule is that injunction will not be granted to stay criminal proceedings or quasi criminal proceedings, whether the prosecution be for the violation of the common law or the infraction of statutes or municipal ordinances. Civil courts may restrain by injunction acts of prosecutor in enforcing penal statute declared valid by Court of Criminal Appeals only when a vested property right is about to be invaded by such act. *State v. Clark* (Cr. App.) 187 S. W. 760; *State v. Nabers* (Cr. App.) 187 S. W. 783, 784; *Dibrell v. City of Coleman* (Civ. App.) 172 S. W. 550. Hence injunction will not lie to prevent enforcement of the pool hall law, which merely imposes a penalty upon violators, and does not affect property rights. *State v. Clark* (Cr. App.) 187 S. W. 760; *State v. Nabers* (Cr. App.) 187 S. W. 783, 784.

A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so. *Id.*

If prosecution by the county attorney is enjoined, the court may appoint another person to prosecute, and no power exists to prevent prosecution. *Id.*

**34/2. Condemnation proceedings.**—Condemnation proceedings may be enjoined, if there is no right to condemn for the proposed purpose, and the right to condemn cannot be litigated in the proceedings themselves. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

**35. Foreclosure proceedings.**—Where a junior lienholder obtained the appointment of a receiver for the assets of an insolvent corporation, which were insufficient to pay more than the first lien, the court properly restrained a sale of the assets on execution, and, the senior lienholder having applied for a sale, the court could properly order the same by the sheriff or by such method as would cost the least money. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

In a suit for receivership and for an injunction against sale on foreclosure of a first lien against corporate property, an allegation that it would not sell for its full value by reason of uncertainty of title, unpaid judgments, and suits against it is insufficient for the injunction. *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

An unpropitious market is not sufficient ground for enjoining a foreclosure sale. *Id.* Injunction restraining sale under deed of trust on payment of the debt less claimed value of land claimed under a superior title, held to grant sufficient relief. *Walker v. Sandoz* (Civ. App.) 178 S. W. 26.

**36. Trespass or injury to real property.**—Where a railroad company had given a particular transfer company the exclusive right upon the railroad company's trains and premises to solicit baggage, etc., defendant will be enjoined at the suit of the company from going upon its premises to solicit patronage. *Denton v. Texas & P. Ry. Co.* (Civ. App.) 160 S. W. 113.

An injunction to restrain defendants from erecting a telephone line over plaintiff's property should be issued under this article, the injury being an irreparable one. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

A decree, in a proceeding to recover title, by which title and possession of land was decreed and ordered in plaintiff bank, gave bank constructive possession of land justifying granting of an injunction restraining defendants from trespassing on premises and harvesting growing crops. *Schaefer v. First Nat. Bank, Bay City* (Civ. App.) 189 S. W. 556.

Decree enjoining defendants from trespassing on plaintiff's lands adjoining navigable stream and restraining defendants from their lawful right to use shore line for fishing and hunting and camping held to be too comprehensive. *Dincans v. Keeran* (Civ. App.) 192 S. W. 603.

**38. — Stay of waste.**—The holder of the title to land may maintain trespass to try title and recover the land with damages for taking timber, and an injunction restraining defendants, who were without title, from taking other timber therefrom. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Emerson v. Rice* (Civ. App.) 165 S. W. 471.

Where title to land on which improvements had been placed was in controversy, and suit was pending, it was proper to enjoin appellants from removing or destroying any of the improvements until final determination of suit. *Crawford v. El Paso Land Improvement Co.* (Civ. App.) 192 S. W. 256.

**39. Violation of contract in general.**—The insolvent proprietor of a moving picture show, who licensed plaintiffs to visit his show at any time without payment, will be enjoined from preventing plaintiffs from visiting his performance. *Prickett v. Steiner* (Civ. App.) 161 S. W. 35.

The court may enjoin a railway company from moving its depot located under a contract, provided public interests do not demand a removal. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

Upon a bill for the specific performance and for an injunction, where it appears that plaintiff is not entitled to a specific performance, he is not entitled to an injunction against the breach of the contract. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 185 S. W. 991.

In action for breach of contract for sale of gin and mill outfit to plaintiff's assignors, in which defendants agreed that, while assignors should operate gin and mill in community, defendants would not directly or indirectly engage in, or be interested in, such business in such community, a verdict for nominal damages was sufficient to indicate that defendants had broken contract, entitling plaintiff to injunction restraining further breach. *Malakoff Gin Co. v. Riddesperger* (Sup.) 192 S. W. 530.

**43. Acts of public officers, boards and municipalities.**—Injunction will lie to restrain a levee district from completing a levee, the effect of which will be to destroy a city's waterworks plant already dedicated to public use. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Parties, alleging interest and a serious loss and injury by the putting of a stock law into operation in a certain county, and facts which, if true, showed that the law was not operative in such county, held entitled to enjoin the county judge from proclaiming its operation therein. *Holman v. Cowden & Sutherland* (Civ. App.) 158 S. W. 571.

Under the act creating Dunn county (Acts 33d Leg. [1st Called Sess.] c. 35), the division of such county into commissioner's justice's and voting precincts held so manifestly wrong, in view of the comparative size and comparative number of voters and the inconvenience to residents of two of the three largest towns in reaching the polling place and justice's court, as to require the holding of an election in such precincts to be enjoined. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

Courts cannot enjoin the canvass of an election by the commissioners' court of a county on the question of the prohibition of pool halls; such canvass being a political power beyond judicial authority, and it is immaterial that the canvass might affect plaintiff's pecuniary rights. *Lyle & Eiker v. Longan* (Civ. App.) 162 S. W. 1156.

If Acts 33d Leg. c. 74, authorizing the commissioners' court to order an election to determine whether pool rooms should be prohibited, is unconstitutional, persons having an established pool room business, which would be destroyed by the enforcement of this statute, were entitled to enjoin the holding of an election to put it into operation. *Roper & Gilley v. Lumpkins* (Civ. App.) 163 S. W. 110.

The state superintendent of public buildings and grounds could be restrained by injunction from interfering with the exercise of a right granted by a resolution of the Legislature; the action not being one against the state. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

A petition of a taxpayer in a suit to enjoin creation of a contract obligation by a county in excess of its constitutional limit must show that its existing indebtedness was valid when the new obligation was sought to be created. *Tullos v. Church* (Civ. App.) 171 S. W. 803.

Where the right to an injunction was doubtful, the issuance of city bonds for the construction of public improvements will not be enjoined on the doctrine of "balance of convenience." *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

Where the plan adopted for construction of a drainage system necessitated the overflow of private property, held, despite the jurisdiction of the commissioners' court, the district court could enjoin construction of the drain. *Matagorda County Drainage Dist. No. 5 v. Borden* (Civ. App.) 181 S. W. 780.

The court has no power to interfere with the commissioners' court in the exercise of a statutory judgment or discretion to transfer the excess of a fund raised for one county purpose to the fund of another, so long as the exercise of such discretion does not exceed constitutional limitations. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

Injunction is a proper remedy where a charter election is void because preliminary questions were not submitted by the council to the voters. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

An injunction against the issuance of school bonds which, under art. 2815, would prevent alteration of the district and a mandatory injunction for the creation of a new district held proper. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

Injunction is proper remedy to prevent creation of a nuisance by municipal corporation. *City of Marlin v. Holloway* (Civ. App.) 192 S. W. 623.

**44. — Levying and collecting tax.**—Under Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58 (Vernon's Sayles' Civ. St. 1914, art. 2828), the validity of an election to vote on a school tax to supplement the state school fund may be attacked for failure to give the statutory notice in a suit to enjoin the collection of the tax. *Cochran v. Kennon* (Civ. App.) 161 S. W. 67.

Suit to enjoin collection of a tax on the ground that plaintiff's property had been assessed at a higher proportionate value than that of others was not a collateral attack upon action of board of equalization in fixing assessment. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

In suit to enjoin collection of tax assessed too high proportionately, good faith and lack of specific intent to injure on part of board of assessors held immaterial. *Id.*

The existence of illegal taxes, and the existence and enforcement of an illegal system of taxation against plaintiffs' lands, reducing their value, held to constitute a cloud on the title thereof which equity would remove. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

Injunction is a proper remedy for persons injuriously affected by a discriminatory system or plan of taxation. *Id.*

Equity may interfere to restrain the assessment and collection of taxes illegally imposed, to prevent a multiplicity of suits by parties entitled to the same relief as plaintiffs therein. *Id.*

Where defendant city's illegal and unconstitutional tax plan would require plaintiffs and others to pay taxes in excess of what they would have to pay under the constitutional system, equity may restrain the further operation of the city's tax plan. *Id.*

Where different classes of property are systematically valued at different ratios of value for purposes of taxation, the law will restrain the collection of taxes from property on a higher ratio of value than as applied to other classes of property. *Id.*

45. — **Acts relating to roads or streets.**—Petition for injunction alleging the commissioners' court fraudulently laid out a first-class 60-foot road several miles to the side of the route required by art. 6863, so as to pass through plaintiff's lands, states ground for relief. *Currie v. Glasscock County (Civ. App.) 179 S. W. 1095.*

If the commissioners' court in laying out a first-class 60-foot road is acting in substantial compliance with art. 6863, it cannot be enjoined, though the road would irreparably injure one's land. *Id.*

The commissioners' court can be enjoined if in laying out a 60-foot road under art. 6863, it has transcended its authority or grossly abused its discretion. *Id.*

The building by a county of a causeway across a bay, part of which, spanning deep water, was a bridge, held unauthorized by Const. art. 3, § 52, and subject to restraint. *Coleman-Fulton Pasture Co. v. Aransas County (Civ. App.) 180 S. W. 312.*

Where the people of a county voted bonds to construct macadamized, graveled, or paved roads, the diversion, by county authorities, of over half the funds realized to the construction of necessary bridges will be restrained. *Coleman-Fulton Pasture Co. v. Aransas County (Civ. App.) 180 S. W. 316.*

In suit to enjoin contract to furnish shells to county for road building and repairing, evidence held to show that parties intended that shell should be paid for out of current revenues and that there was reasonable ground to believe that such revenues would be sufficient. *Broussard v. Wilson (Civ. App.) 183 S. W. 814.*

The holding of an election to authorize the issue of road bonds is a political proceeding, and not subject to interference by way of injunction by the courts. *League v. Brazoria County Road Dist. (Civ. App.) 187 S. W. 1012.*

Without a showing of necessity for closing an alley on the ground that it was a menace to public health or safety, the city would have no right to close or permit it to be closed, and an injunction would lie in favor of lot owner having a special property interest in keeping abutting alley open. *Bowers v. Machir (Civ. App.) 191 S. W. 758.*

46. — **Appointment and removal of and interference with officers.**—After nominees of commissioner, vested with sole power to nominate to office in police department, were confirmed by commissioners and qualified, equity would not aid de facto officers to restrain such appointees from discharging their duties or receiving their salary. *Uhr v. Brown (Civ. App.) 191 S. W. 379.*

Failure of de facto officers serving in police department under an ordinance to cease performing the duties of and exercising the rights of their offices, did not constitute an interference with the discharge of police commissioner's duties of supervision and enforcement of police regulations. *Id.*

A public officer de jure or de facto in possession of an office is entitled to an injunction to restrain any one disputing his right to it or interfering with his discharge of its duties. *Id.*

47. — **Publishing election returns.**—The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute. *Watson v. Cochran (Civ. App.) 171 S. W. 1067.*

The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute. *Id.*

48. **Enforcement of void ordinance.**—Although an ordinance purporting to have been adopted under the initiative provisions of a charter, and to regulate the rates of fare of street railway companies, was void, held that as it stood on the minutes of the city as a law the enforcement of which would irreparably injure a company's business and property rights, the company was entitled to enjoin its enforcement. *City of Dallas v. Dallas Consol. Electric St. Ry. Co. (Civ. App.) 159 S. W. 76.*

Equity will restrain the enforcement of a void criminal ordinance where its enforcement will work an irreparable injury to property for which complainant has no adequate remedy at law. *Ray v. City of Belton (Civ. App.) 162 S. W. 1015.*

In view of this article, held, that the enforcement by prosecutions of a void ordinance prohibiting the keeping of hogs in a sparsely settled portion of a city would be enjoined. *Dibrell v. City of Coleman (Civ. App.) 172 S. W. 550.*

Injunction held to lie to restrain enforcement of criminal ordinance, the validity of which is involved, where repeated prosecutions would seriously impair or destroy property rights. *Auto Transit Co. v. City of Ft. Worth (Civ. App.) 182 S. W. 685.*

Where an individual acquired pool hall and fixtures and licenses after prohibitory penal statute was adopted and declared valid by the Court of Criminal Appeals, but after Supreme Court declared it invalid, he had no vested property rights to entitle him to enjoin enforcement of the statutes. *State v. Clark (Cr. App.) 187 S. W. 760; State v. Nabers (Cr. App.) 187 S. W. 783, 784.*

50. **Nuisance.**—An ordinary game of baseball is not a nuisance per se, and the conducting of baseball games will not be enjoined because of the shouts and noises incident to the game, although an injunction may be granted where the game is conducted in an indecent and disorderly manner. *Royle Independent School Dist. v. Reinhardt (Civ. App.) 159 S. W. 1010.*

A lawful business may be conducted so as to become a nuisance, in which case one injured thereby may enjoin the continuance of the business in such a way. *Block v. Ferritta* (Civ. App.) 165 S. W. 504.

In a suit by a county to compel the removal of a bridge and approach constructed by a private party, evidence held to show that they did not obstruct the road and street connected thereby. *Gillespie County v. Fredericksburg Land Co.* (Civ. App.) 168 S. W. 9.

Bridge and approach constructed by private party on the unused end of a street at a creek connecting the street with a road on the opposite bank held not a nuisance. *Id.*

A jail which a county was required to provide held not a nuisance per se, though if the authorities allowed inmates to disturb religious worship, or to interfere with the comfort and use of a nearby church, they would be enjoined. *Baptist Church of Madisonville v. Webb* (Civ. App.) 178 S. W. 689.

Where there was a showing that a garbage incinerator would be a nuisance in the neighborhood, held that, notwithstanding the showing of the city that it was to be odorless, etc., its construction will be enjoined until after hearing. *City of San Antonio v. Hamilton* (Civ. App.) 180 S. W. 160.

When a business lawful in itself becomes obnoxious to neighboring dwellings, rendering their enjoyment uncomfortable by smoke, noise, offensive odors, or otherwise, it is a nuisance which equity will restrain. *Id.*

Act, omission, or use of property resulting in polluting atmosphere with noxious or offensive odors, gases, or vapors, thereby producing material discomfort and annoyance to persons residing in vicinity, or injuring their health or property, is a "nuisance." *Moore v. Coleman* (Civ. App.) 185 S. W. 936.

A cotton gin is not a nuisance per se, but may become so by reason of the manner or place of its operation. *Id.*

A cotton gin, operation of which produces loud noises, causes dust, sand, dirt, and cotton lint to be deposited in churches and residences thereabouts, and also causes deposit of offal and excrement from animals used in hauling cotton, production of noxious gases and odors, and swarms of gnats and flies, is a nuisance. *Id.*

Not every use to which property is devoted causing incidental discomfort and annoyance to neighbors will give rise to right of injunction to abate it, but surrounding circumstances, location of alleged nuisance, and necessity of objectionable features of use will be considered in determining right to injunction. *Id.*

The construction by a city of an open drainage ditch in a street in which it owned the fee held not such a nuisance as to entitle the abutting owners to injunction under this article. *City Com'r's of Port Arthur v. Fant* (Civ. App.) 193 S. W. 334.

51. — **Public or private injury.**—Owners of homesteads near by city's proposed sewerage disposal plant held entitled to prevent by injunction construction and operation of plant. *City of Marlin v. Holloway* (Civ. App.) 192 S. W. 623.

57. **Sale of community property.**—In a suit, under this article, to restrain the sale of a wife's separate property under execution against the husband, the husband being only a formal party, plaintiffs need not offer to pay the debt for which the execution was levied. *City Nat. Bank of Eastland v. Kinnebrew* (Civ. App.) 190 S. W. 536.

58. **Fraudulent transfer of property.**—A judgment creditor who has garnished a debt due his debtor from the executrix of an estate cannot restrain his debtor from assigning such claim. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

59. **Corporate acts and proceedings.**—The duly elected officers of a corporation can enjoin others claiming to be such from interfering with the property, using an imitation seal, or making corporate minutes. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

A colored order, known as the Free and Accepted Masons, held not entitled to enjoin a rival order from the use of the name of the Ancient Free & Accepted Masons, Colored. *Free and Accepted Masons of the State of Texas v. Ancient and Accepted Masons, Colored* (Civ. App.) 179 S. W. 265.

The stockholders of a corporation may restrain it from engaging in enterprises beyond the purposes or manner provided by its charter, since it is in fact only their business agent with a limited authority and has contracted with them to spend their money only as provided in the charter. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

61. **Building party wall.**—In an injunction suit by an adjoining owner against a bank seeking to compel the bank to close an opening in plaintiff's wall, it was not a condition precedent to the relief prayed that plaintiff should comply with a previous agreement to pay half the cost of the party wall in which the opening was cut. *First Nat. Bank of Wichita Falls v. Zundelowitz* (Civ. App.) 168 S. W. 40.

68. **Hearing and determination of application for injunction.**—It is proper, upon the hearing for a temporary injunction to restrain a receiver from acting, to refuse to restrain the parties at whose suit he was appointed from continuing to prosecute their suit. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

A suit for an injunction should not be determined on a hearing for a temporary injunction, but the court sitting in chambers should grant or refuse a temporary injunction. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

The trial judge on hearing in chambers an application for a temporary injunction cannot pass on exceptions to the petition. *Id.*

Prohibition to prevent one district court from enjoining a judgment of another, affirmed by the Court of Civil Appeals, will not, in view of this article and art. 4653, be denied, because the court hearing the injunction should properly administer the law on the facts. *Cattlemen's Trust Co. of Ft. Worth v. Willis* (Civ. App.) 179 S. W. 1115.

On direct raising of the issue of clerical mistake, in a taxpayer's suit to enjoin collection of tax, on the ground that the levy was not voted for by the proportion of alder-

men required by art. 931, all the parties being before the court, correction of the record of the city council, in accordance with the evidence, to show enough voted, may be directed. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

68½. **Application to nonresident judge.**—Under this article, affidavit attached to petition in suit to enjoin sale of realty under execution held sufficient to authorize nonresident judge, on hearing, to issue writ of injunction. *Wooten v. Odell* (Civ. App.) 191 S. W. 721.

Under this article, authorizing nonresident district judge to issue injunction to stay execution when resident judge is not accessible, order of nonresident district judge, making injunction effective until modified or vacated by further order of his court, was erroneous. *Id.*

69. **Decree.**—In suit to enjoin defendant from removing a gin plant from premises purchased from plaintiff and to enforce the contract as to its maintenance, held that equity would not decree specific performance, which would require supervision by the court, but would leave the parties to their remedies at law. *Beckham v. Munger Oil & Cotton Co.* (Civ. App.) 185 S. W. 991.

### Art. 4644. Appeals allowed to courts of civil appeals.

Cited, *Denton v. Texas & P. Ry. Co.* (Civ. App.) 160 S. W. 113; *Hicks v. Murphy* (Civ. App.) 162 S. W. 925; *National Surety Co. v. David Castle Const. Co.* (Civ. App.) 170 S. W. 800; *State ex rel. Cavanaugh v. Nelson* (Civ. App.) 170 S. W. 814; *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562; *McFarland v. Hammond* (in dissenting opinion) 106 Tex. 579, 173 S. W. 645; *Craver v. Greer* (Civ. App.) 178 S. W. 699; *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

**Conflict of statutes.**—Articles 4644-4646, conferring upon the Supreme Court jurisdiction of appeals and writs of error in cases involving interlocutory injunctions, held not in conflict with article 1521, defining the power of the Supreme Court. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Nature of proceeding.**—In view of this article, and of the fact that the jurisdiction of the Court of Civil Appeals is appellate only, such court has no jurisdiction to issue an original writ of injunction to protect the parties from damage pending an appeal. *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 170 S. W. 113.

An appeal from an order denying a temporary injunction is interlocutory. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Writ of error from Supreme Court.**—A determination of the Court of Civil Appeals on appeal from the grant of a temporary injunction being made conclusive by art. 1591, the Supreme Court is not authorized by this article to review such determination on writ of error. *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645, dismissing writ of error *Hammond v. McFarland* (Civ. App.) 161 S. W. 47.

Articles 4644-4646, though not so expressly providing, confer upon the Supreme Court jurisdiction to entertain a writ of error to review a judgment of the Court of Civil Appeals affirming the denial of a temporary injunction. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Judgments and orders appealable.**—A decree restraining a levee district from completing a levee adjacent to the water works of complainant city held not a final judgment, so that an appeal therefrom would be treated as an appeal from an order granting a temporary injunction authorized by this article. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

An order restraining certain persons and officers from selling any property of a corporation, or any portion thereof, pending further order of the court, but mentioning no time at which the restraint expired, was a temporary injunction and appealable as such. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

While this article expressly authorizes appeals from orders granting, refusing, or dissolving temporary injunctions, no appeal lies from an order refusing to dissolve such an injunction previously granted. *City of Texarkana v. Bois* (Civ. App.) 160 S. W. 417.

Under this article, giving no appeal from an order refusing to dissolve an injunction, but allowing an appeal from an order granting a temporary injunction, in which case the transcript must be filed not later than 15 days after entry of such order, held that an appeal was from an order granting a temporary injunction. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

An order entered upon motion to dissolve a temporary injunction held appealable. *Collier v. Smith* (Civ. App.) 169 S. W. 1108.

Where a temporary injunction ordering a sheriff to desist from selling whisky was made permanent, and a mandatory provision added thereto ordering the sheriff to turn over the whisky to defendant's trustee in bankruptcy, plaintiff could appeal therefrom, though the order last made was modified in so far as it made the injunction permanent. *Kopplin v. Ludwig* (Civ. App.) 170 S. W. 105.

Where an order dissolves a temporary injunction and denies the application for the appointment of a receiver, the part of such order relating to the receiver is not appealable under art. 2079, relative to appeals from interlocutory orders appointing receivers. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

Judgment perpetually enjoining acts enjoined by temporary injunction held a final judgment and appealable, and not merely an order refusing to dissolve the temporary injunction which would not be appealable under this article. *Trayhan v. State* (Civ. App.) 180 S. W. 646; *Anderson v. State* (Civ. App.) 180 S. W. 648.

Order overruling motion to dissolve temporary injunction held not appealable under this article. *Sanders v. Bledsoe* (Civ. App.) 180 S. W. 926.

Since an order refusing to dissolve a temporary injunction is not appealable, no pro-

ceedings on the hearing at which such order was made can be considered on appeal from the order granting the injunction. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Under articles 4644-4646, order held not final so as to authorize appeal by mortgagors from order in foreclosure suit vacating temporary injunction and sustaining demurrer of plaintiffs to defendant's petition for injunction, where the defendant's plea of usury was not disposed of. *Wooton v. Jones* (Civ. App.) 189 S. W. 350.

Denial of injunction and sustaining demurrer to bill held not appealable as an order refusing a temporary injunction under this article, where the only relief prayed is for permanent injunction or general relief. *Boyd v. Dudgeon* (Civ. App.) 192 S. W. 262.

**Parties entitled to appeal.**—Attorneys made defendants in their individual capacity had a right to appeal and have vacated as to them an order for a temporary injunction against all defendants. *Strickland v. Lakeside Irr. Co.* (Civ. App.) 175 S. W. 740.

Under the statute relating to appeals from interlocutory orders granting injunctions, held, that a party, whose request to file a petition in intervention had been denied and whose petition was never filed in suit wherein an interlocutory injunction was granted, had no right to appeal. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

**Notice of appeal.**—The appellate court held to have jurisdiction to review an original order granting an injunction, although the notice of appeal recited that it was taken from the order dissolving the injunction; no notice of appeal, as required by art. 2084, in ordinary cases, being necessary under arts. 4643, 4644. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Appeal bond.**—Though the statute authorizes an appeal from an interlocutory order refusing an injunction, the appellate court cannot consider appeal from such order, where the defendants are not named as payees in the appeal bond. *Barker v. Wilson* (Civ. App.) 189 S. W. 748.

**Effect of appeal.**—After appeal from an interlocutory order on an application for a temporary writ of injunction, the trial judge cannot change his order or exercise any jurisdiction whatever over it. *Boynton v. Brown* (Civ. App.) 164 S. W. 897.

Under this article, an erroneous injunction held not to be extended in operation beyond the time set by the issuing judge by an appeal taken from its issuance, so that thereafter the reviewing court need not modify, but could reverse. *Sanders v. Bledsoe* (Civ. App.) 173 S. W. 539.

### Art. 4645. Proceedings on appeal.

Cited, *Denton v. Texas & P. Ry. Co.* (Civ. App.) 160 S. W. 113; *Swearingen v. Swearingen* (Civ. App.) 165 S. W. 16; *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562; *White v. Ferris* (Civ. App.) 186 S. W. 367; *McFarland v. Hammond* (Sup.) 173 S. W. 645 (in dissenting opinion).

**Conflict of statutes.**—See *Spence v. Fenchler* (Sup.) 180 S. W. 597; note under art. 4644.

**Writ of error.**—See *Spence v. Fenchler* (Sup.) 180 S. W. 597; note under art. 4644.

**Motion for new trial.**—Under this article a motion for a new trial is not a necessary prerequisite to appeal. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

**Briefs and assignments of error.**—Under this article, the filing of briefs on appeal from an order granting a temporary injunction is not a necessary prerequisite to the hearing of the appeal. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Under this article, providing that the case on appeal from interlocutory orders granting or refusing an injunction may be heard on the bill, answer, and affidavits, assignments of error need not be filed in such case but the case will be heard on bill, answer, and evidence introduced. *Lilly v. City of Houston Heights* (Civ. App.) 158 S. W. 189.

On appeal from an order declining to continue a temporary injunction, appellants are not required to file briefs containing formal assignments of error. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

**Discretion of lower court.**—Exercise of trial court's discretion in denying injunctive relief, while reviewable on appeal, will be upheld unless some abuse of discretion is shown. *Wells Fargo & Co. v. Guilheim* (Civ. App.) 169 S. W. 1053.

Refusal of a temporary injunction, especially when it is asked on the sworn petition unsupported by other testimony, will not be disturbed on appeal, unless it clearly appears that such discretion has been abused. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

**Consideration of pleadings and evidence.**—Where an appeal was taken from an order granting a preliminary injunction before answer, and the answer, subsequently filed, was not shown to have been called to the attention of the court by motion to vacate the writ or otherwise, it was not properly in the record on appeal. *Howell v. City of Sweetwater* (Civ. App.) 161 S. W. 948.

Under this article, on appeal in injunction cases, affidavits which are properly part of the pleadings will come up with them, but, where evidence is taken, it must in some proper way be made part of the record. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 168 S. W. 46.

In reviewing an order granting a temporary injunction the appellate court cannot consider an answer which was not before the trial court when he made the order appealed from. *Zarb v. Houston* (Civ. App.) 168 S. W. 877.

In determining whether a party is entitled to injunction, the answer, when verified,



as well as the petition, must be considered under this article. *Wells Fargo & Co. v. Guilheim* (Civ. App.) 169 S. W. 1053.

Where the record contains nothing but the pleadings and the order denying the injunction, there being no statement of facts, etc., the question whether denial of a temporary injunction was warranted must be determined on the pleadings. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

An appeal from an order granting a temporary writ of injunction will be determined upon the allegations of the petition, in the absence of any denial thereof at the time of granting the writ. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Where an injunction is refused upon petition alone, the court, on appeal from the order, made ex parte, cannot consider supposed knowledge of judge or contradictory affidavits by defendants, but is limited to the petition. *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

**Questions reviewed.**—In view of this article, the lower court, on an application for temporary injunction in chambers, cannot pass upon exceptions to the petition, and, where no pleadings were filed, aside from the exceptions, the only question is whether the petition authorizes the injunction. *Lane v. Jones* (Civ. App.) 167 S. W. 177.

Where the petition for an injunction, restraining the county attorney and others from putting into effect the poolroom law pending contest of an election, at which it was determined not to license pool tables, did not allege the unconstitutionality of the statute, that question need not be determined upon appeal. *Winn v. Dyess* (Civ. App.) 167 S. W. 294.

**Dismissal of appeal.**—On motion by the state to dismiss an appeal taken by defendants from a temporary injunction in an action to abate a public nuisance, the suit will be dismissed, where defendants had sold the property conducted as a disorderly house, although costs were involved. *Anslley v. State* (Civ. App.) 175 S. W. 470.

On appeal from judgment dissolving temporary restraining order and denying injunction in suit by taxpayers of county to enjoin county officers from contracting for expenditure and issuance of warrants and paying out certain county funds, held, that appellees' motion to dismiss would be sustained, on ground that subject-matter of litigation had ceased to exist. *Rogers v. Ivy* (Civ. App.) 191 S. W. 728.

**Determination and disposition in general.**—Under this article held that, in the absence of the evidence from the record, everything must be presumed in favor of the judgment of the trial court. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 168 S. W. 46.

Where injunction judgment appealed from has expired by its own limitation, leaving nothing but question of costs to be adjudicated, the Court of Civil Appeals will not entertain jurisdiction. *Sanders v. Bledsoe* (Civ. App.) 180 S. W. 926.

**Affirmance.**—Judgment denying injunction, though placed on other grounds, may be affirmed because of insufficiency to authorize injunction of the affidavit to the petition, questioned by special demurrer. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

**Disobedience of mandate.**—Where a mandate of the Court of Civil Appeals directing the entry of a perpetual injunction was directed to the district court of a certain county, and not to the particular judge thereof, such judge's refusal in chambers to grant the application for such injunction did not constitute disobedience of the mandate. *Witherspoon v. Daviss* (Civ. App.) 163 S. W. 700.

### Art. 4646. Case to have precedence on appeal.

See *Spence v. Fenchler* (Sup.) 180 S. W. 597; notes under art. 4644.  
Cited, *McFarland v. Hammond* (in dissenting opinion) 106 Tex. 579, 173 S. W. 645.

### Art. 4647. [2990] No injunction against a judgment, except, etc.

See art. 4643, note 31.

**Injunction against judgment or execution.**—Plaintiff held liable for costs in action on vendor's lien notes and not entitled to enjoin execution. *Jones v. Gough* (Civ. App.) 175 S. W. 1107.

Where A. has judgment against B., who has judgment over against others, and the latter desire to enforce a right of set-off against A. and his assignee they should pay amount of judgment into court and pray for adjudication of rights of all parties. *Pease v. Randle* (Civ. App.) 191 S. W. 566.

— **Tender of amount due.**—Where complainant admitted that a judgment against him was valid to the extent of \$616, he was bound to tender such sum as a condition to his right to restrain the execution. *Ripps v. Hermann* (Civ. App.) 163 S. W. 1023.

Under this article, a judgment debtor, cannot ask to have the enforcement of a judgment against him restrained pending the outcome of proceedings in another court in which he was garnished unless he tenders the difference between the amount of the judgment and the amount of the claim in the garnishment proceedings. *Barcus v. O'Brien* (Civ. App.) 171 S. W. 492.

Plaintiff, being liable for costs of a suit, held not entitled to enjoin execution on the judgment without tendering costs. *Jones v. Gough* (Civ. App.) 175 S. W. 1107.

In a suit under article 4643, to restrain the sale of a wife's separate property under execution against the husband, the husband being only a formal party, plaintiffs need not offer to pay the debt for which the execution was levied. *City Nat. Bank of Eastland v. Rinnebrew* (Civ. App.) 190 S. W. 536.

— **Grounds for Injunction in general.**—Under art. 3743, providing for levy of execution on the interest of a partner, a partnership cannot enjoin such levy, though it

would result in suspending the partnership business. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 161 S. W. 911.

In a suit to enjoin the execution of a judgment, complainant cannot recover in the absence of proof that it had a valid defense to the cause of action on which the judgment was based. *Collin County Nat. Bank v. McCall Hardware Co.* (Civ. App.) 161 S. W. 950.

A judgment cannot be enjoined unless there was a good defense which defendant was prevented from setting up by fraud or accident, and there is a probability of a different result on a new trial and the pleadings and issues are set forth in the petition for injunction. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

Suit to restrain enforcement of judgment after term is new action requiring showing of sufficient cause to authorize vacation of judgment and a good defense to the action. *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5.

One seeking to enjoin a judgment for matter not shown on the face of the record and which could be shown only by extrinsic evidence must establish a meritorious defense. *Union Pac. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 358.

Under this article, failure to allege value, in petition for injunction, of a lot which it is alleged should be subject to payment of a lien before the homestead, gives the court no basis upon which to make decree. *Loe v. Bellgardt* (Civ. App.) 193 S. W. 714.

To warrant enjoining execution on judgment in former action, it must appear one served as defendant's agent was not agent; that defendant had meritorious defense, and had a sufficient excuse for not moving for new trial. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

— **Void judgments.**—Enforcement of a judgment, void on the face of the record, will be enjoined without a showing of a defense. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.

Where railroad company sought to enjoin execution upon judgment rendered against it and judgment recited upon its face that company was duly served, it was not absolutely void but at most voidable, and the company is not, though proceeding be deemed direct attack, entitled to relief without showing a meritorious defense. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

**Art. 4648. [2991] Injunction to stay execution within twelve months, unless, etc.**

**Application in general.**—Under this article a judgment rendered in 1905 cannot be enjoined in 1912. *Bullitt v. Jesse French Piano & Organ Co.* (Civ. App.) 158 S. W. 782.

This article does not apply to an equitable suit to vacate a judgment, the time for which is limited by article 5690. *Texas & P. Ry. Co. v. Miller* (Civ. App.) 171 S. W. 1069.

A personal judgment, valid on its face, by a court having no jurisdiction of person of defendant at time of rendition, is void, and on direct attack is not a "valid and subsisting judgment," within the meaning of this article. *Kimmell v. Edwards* (Civ. App.) 194 S. W. 168.

**Art. 4649. [2992] Injunctions granted on sworn petition.**

**Petition in general.**—A suit held to be a suit to vacate a judgment. *Texas & P. Ry. Co. v. Miller* (Civ. App.) 171 S. W. 1069.

A petition held not to allege that the judgment plaintiff was a foreign corporation having no permit to do business so as to render the judgment void. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

Pleadings alleging that tax was illegal, because levied upon property of plaintiffs at a greater proportionate valuation than that of other owners, held not to sustain affirmative judgment for excess in favor of one plaintiff which had paid the tax. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

In a suit to restrain enforcement of a judgment, a recital in the judgment of due citation held not to control allegations in petition and return on citation served, showing service out of the state. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.

In a taxpayer's action against the commissioners' court to prevent its expending from the road and bridge fund amounts in excess of the constitutional limit upon taxation for road and bridge purposes, plaintiff must be limited to the relief sought, and unlawful amounts levied and expended for road and bridge purposes in previous years are beyond reach of the injunction. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

The pleadings in suit to enjoin collection of a tax not directly raising the issue of disqualification of an alderman under Const. art. 16, § 40, because holding another salaried office, and he being at least a de facto officer, his vote for the levy cannot be disregarded. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

No injunction will be granted under a prayer for general relief. *Boyd v. Dudgeon* (Civ. App.) 192 S. W. 262.

In railroad's suit to restrain alleged barrator from fomenting litigation, neither allegation that defendant knew nothing of claims, nor allegation that there appeared to be no real basis for claims of liability, could be construed to charge that claims were fraudulent, or that defendant induced claimants to conceal character or condition. *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

**Requisites of petition.**—To entitle plaintiff to an injunction, restraining defendants from trespassing upon real estate upon which they were building a fence, on the ground that it belonged to plaintiff, he must plead and prove such title as would entitle him to possession of the premises as against defendants. *Sanches v. Newman* (Civ. App.) 158 S. W. 797.

A petition to restrain the carrying out of a contract approved on the minutes of the commissioners' court on April 8th, which recited that an oral contract to the same effect

had been made on March 3d, should deny the making of the contract of March 3d, where the commissioners' court had authority to make the contract on that date, but not on April 8th. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

In suit to enjoin interference with an irrigation ditch and with plaintiff's right to maintain and repair it, held, that it was not necessary to describe the ditch by metes and bounds. *Houk v. Robinson* (Civ. App.) 160 S. W. 120.

A petition for an injunction must negative every reasonable inference arising from the facts alleged that petitioner might not be entitled to relief. *King v. Driver* (Civ. App.) 160 S. W. 415.

In a suit for an injunction, the rule that the allegations of the petition must be taken most strongly against complainant is re-enforced by the requirement that the material elements entitling complainant to relief shall be sufficiently certain to negative every reasonable inference possible on other supposable facts to the contrary. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

One seeking to enjoin the enforcement of an ordinance cannot complain that a temporary injunction was refused where his petition did not show that he was within the ordinance. *Ray v. City of Belton* (Civ. App.) 162 S. W. 1015.

The rule of pleading that statements of a party are to be taken most strongly against himself held reinforced in injunction suits by the requirement that plaintiff must not only state the essential elements entitling him to relief but must also negative the existence of other supposable facts which would preclude relief. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 168 S. W. 46.

A petition to enjoin collection of a tax should allege the amount in controversy, usually the value of the property seized, to show the court has jurisdiction. *Marion County v. Perkins Bros.* (Civ. App.) 171 S. W. 789.

An injunction against the enforcement of a judgment cannot be rendered even by default, if the petition does not show all the facts necessary to entitle plaintiff to the relief prayed for. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

In suit to enjoin erection of cotton gin as a nuisance, burden is on petitioners to show by allegations, in verified petition, where relief is sought without hearing, or by both allegations and proof, where hearing is had, that conditions constituting nuisance exist, or will occur if defendants are permitted to erect gin. *Moore v. Coleman* (Civ. App.) 185 S. W. 936.

In a petition for injunction, the averments of material and essential elements must be sufficiently certain to negative every reasonable inference of the existence of facts under which petitioner would not be entitled to relief. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

To authorize an ex parte injunction, the petition must expressly negative any possible hypothesis on which defendant might lawfully do the act complained of. *Santa Fé Town-Site Co. v. Norvell* (Civ. App.) 187 S. W. 978.

— **Verification.**—Where a supplemental petition in an injunction suit alleged a new ground for injunctive relief, it should have been verified. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

Under this article, requiring a petition for an injunction to be verified by the affidavit of the party, an affidavit by plaintiff's attorney, not upon his own knowledge, but to the best of his knowledge and belief, is insufficient. *Lane v. Jones* (Civ. App.) 167 S. W. 177.

An affidavit attached to a petition for an injunction, based solely on the affiant's belief, held insufficient under this article. *Collier v. Smith* (Civ. App.) 169 S. W. 1108.

The affidavit attached to a petition for an injunction may be amended so as to cure defects. *Id.*

Petition for an injunction held insufficiently verified where it stated merely that affiant "believes the material allegations in the foregoing petition to be true." *Kopplin v. Ludwig* (Civ. App.) 170 S. W. 105.

Temporary injunction issued on ex parte application, will be dissolved, where the petition alleging many of the material facts on information and belief was verified by an affidavit that the affiant believed the allegations so made to be true. *Ginther v. De Zabalgoitia* (Civ. App.) 170 S. W. 793.

In an action for injunction, where the petition was signed "P. & S., Attorneys for Plaintiffs," verification by affidavit made by H. R. S., not therein describing himself as either the agent or attorney of the plaintiff, held insufficient. *Hook v. Payne* (Civ. App.) 185 S. W. 1014.

Under this article, as to review of granting of a temporary injunction, sufficiency of the verification of the petition to authorize the granting of the writ may be questioned for the first time on appeal. *White v. Ferris* (Civ. App.) 186 S. W. 367.

Verification of petition for injunction under this article held insufficient, where affiant merely states that she believes the statement of every allegation of fact relied on in the petition to be true. *Id.*

Under this article, a verified petition is necessary for granting of a temporary injunction on the petition's allegation alone. *Id.*

The general rule is that an affidavit on mere information and belief, without supporting affidavits of the informants, is not sufficient in injunction cases. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

Where, in an injunction suit, the answer contains special denials to most allegations of the petition in addition to a general denial, the allegation that plaintiffs are property taxpayers of the county, not met by special denial, is sufficiently proved by affidavit attached to the petition. *Commissioners' Court of Trinity County v. Miles* (Civ. App.) 187 S. W. 378.

Upon petition for temporary injunction restraining the sale under execution of lands, affidavits annexed thereto, stating that the land was exchanged by petitioner for his homestead, were sufficient, although one of them stated such facts not positively but as

true to the best of affiant's knowledge and belief. *American Nat. Bank of Ft. Worth v. Strong* (Civ. App.) 188 S. W. 1014.

The verification of a petition for a writ of injunction should state positively that the grounds alleged therein are true. *Id.*

Affidavit verifying petition for injunction, required by this article, must be direct and positive, and not from hearsay, that the facts stated in the petition are true. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

Under this article, in an action by school districts of a county to enjoin redistricting of county, affidavit may be made by any one of joint applicants cognizant of facts. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

That petition for injunction was not properly verified as required by this article should be raised in the trial court by exception, and failure to except is waiver of sufficiency of affidavit. *Id.*

Petition for temporary injunction, verified by affidavit stating that it was true, except as to matters stated on information and belief, etc., held sufficient, where no facts were alleged on information and belief. *Simpson v. McQuirk* (Civ. App.) 194 S. W. 979.

**Sufficiency of petition.**—The petition alleging prior interference, but not alleging it was being continued, states no cause for injunction on that account. *Lane v. Mayfield* (Civ. App.) 158 S. W. 223.

A petition to restrain the carrying out of a contract by the commissioners' court, on the ground that it was made subsequent to the enactment of Act March 31, 1913, giving the power to make such contracts to the highway commissioners, which alleges that an order approving the contract was entered on April 8th, but does not deny that the order was entered on March 3d, is insufficient. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

Where the petition to restrain interference with plaintiff's right to enjoy an easement under a contract, which provided that the easement was granted with the express agreement that plaintiffs should not use the stairway so as to injure defendant's property or annoy him, did not negative any possible inference that plaintiffs had violated such provision, it was insufficient. *Id.*

Petition in a suit to enjoin maintenance of several suits against the initial carrier for damages to interstate shipments held fatally defective, where it failed to negative the negligence of its connecting carriers for whose dereliction the federal statute made it liable. *St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co.* (Civ. App.) 162 S. W. 1174.

An allegation of an attempt to sell exempt property in satisfaction of a county court judgment held sufficient to confer jurisdiction on the district court to issue an injunction restraining the sale regardless of the question of value and unaffected by Rev. Civ. St. 1911, art. 4653. *Cotton v. Rea*, 106 Tex. 220, 163 S. W. 2.

Petition, in an action to enjoin defendant from competition in a business which he had sold to plaintiff, alleging a sale of the business including horses, carriages, etc., for a specified sum in cash held to sufficiently allege a consideration for the good will. *Kennedy v. Winfrey* (Civ. App.) 163 S. W. 1018.

An allegation that the manner of constructing the telephone poles interfered with the sidewalks and curbing is a conclusion upon which an injunction should not be granted. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

A petition merely alleging that plaintiff did not consent to defendants' erection of a telephone line over plaintiff's land does not sufficiently negative plaintiff's acquiescence therein to warrant an injunction to restrain the use of such a line. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

Where defendant having filed 43 suits against complainant express company for damages in the shipment of turkeys, complainant sought an injunction, a petition alleging that it had a receipt for every shipment, "and none dead within complainant's knowledge," held not an allegation that none of the turkeys were dead as claimed by defendant, and the petition was therefore demurrable. *Wells Fargo & Co. v. Guilheim* (Civ. App.) 169 S. W. 1053.

A petition to enjoin collection of tax held insufficient for want of an allegation that collection had been attempted or threatened by a levy. *Marion County v. Perkins Bros. Co.* (Civ. App.) 171 S. W. 789.

A petition to restrain the prosecution by defendant of an action in a sister state, which merely alleges that the action was to harass petitioner who would be compelled to incur expenses in the suit, held to state no cause for relief. *Wade v. Crump* (Civ. App.) 173 S. W. 538.

A petition which contained only general allegations and conclusions, held insufficient. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

Petition to restrain a railway company from moving its passenger depot held good as against a general demurrer, and the court on the evidence must ascertain whether plaintiffs are entitled to a temporary injunction. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

Petition held to show plaintiff's cattle were not subject to the stock law (arts. 7271, 7272); so sequestration by inspector of cattle and hides should be enjoined, though inspector averred that he did not intend to proceed against cattle except as provided by law. *Harrell v. Holmes* (Civ. App.) 184 S. W. 285.

In suit to restrain erection of cotton gin as nuisance, where petition alleged certain results would follow, and that such matters were the usual results of such a plant, the court was justified in concluding from averments of petition that operation of gin would entail results alleged. *Moore v. Coleman* (Civ. App.) 185 S. W. 936.

Allegations of threatened ouster from a farm and destruction of growing crops held sufficient allegations of irreparable injury to authorize a temporary injunction. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

A petition for injunction, alleging that plaintiff's lessor was formerly the owner in fee

simple for the year 1916, must be construed as implying that he was not the owner of the land and had no legal right to lease to plaintiff, and is therefore insufficient to sustain a writ of injunction restraining the ejection of plaintiff. *Id.*

In an action to enjoin the issue of bonds of a road district, a petition, attacking the qualifications of the signers of the petition for the district, merely alleging that some petitioners had paid no poll tax and that others had not returned their property for taxation, held not sufficient. *League v. Brazoria County Road Dist. No. 13 (Civ. App.) 187 S. W. 1012.*

In a suit to enjoin redistricting of a county, a petition, alleging that proposed acts are a gross abuse of authority and a fraud upon rights of plaintiffs held sufficient basis upon which to grant relief sought. *Collin County School Trustees v. Stiff (Civ. App.) 190 S. W. 216.*

A petition for injunction to restrain execution held sufficient to admit proof that the debt on which the judgment was founded was one provable in bankruptcy, and that plaintiff had been discharged. *Bunting Stone Hardware Co. v. Alexander (Civ. App.) 190 S. W. 1152.*

Allegations of petition in suit to enjoin sale of realty under an execution held good as against general demurrer. *Wooten v. Odell (Civ. App.) 191 S. W. 721.*

Petition in suit to restrain abolition of school district held sufficient to raise issue of an abuse of discretion of county school trustees. *Price v. County School Trustees of Navarro County (Civ. App.) 192 S. W. 1140*

— **Allegations as to facts.**—In a suit for an injunction, if the material elements which entitle plaintiff to relief are not alleged with sufficient certainty to negative reasonable inference from the facts stated, such inference will be taken as true. *Loe v. Bellgardt (Civ. App.) 193 S. W. 714.*

**Effect of answer.**—Where a railroad seeks to change its established depot on the ground that it is for public benefit, it has the burden of proving such benefit in an action to restrain removal. *San Antonio & A. P. Ry. Co. v. Mosel (Civ. App.) 180 S. W. 1138.*

Under this article, and despite Acts 34th Leg. c. 101, ante, art. 1902, held, that a temporary injunction may be granted on a verified petition alleging facts sufficient to warrant issuance though defendant filed a general denial. *McAmis v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 184 S. W. 331.*

In railroad's suit to enjoin city from interfering with laying of track, city's pleadings held to raise issue whether right to relocate granted by ordinance had been exercised and exhausted by road. *Galveston & W. Ry. Co. v. City of Galveston (Civ. App.) 186 S. W. 368.*

Under this and arts. 4663, 4671, as to injunction pleadings, plaintiff, in proceeding to perpetuate a temporary injunction, is put upon proof of his case by answer of general denial, although not sworn to. *Leach v. Thompson (Civ. App.) 192 S. W. 602.*

**Verification of answer.**—Under this and art. 4663, as to verification of pleadings in injunction cases, a verification of an answer denying allegations of the petition is insufficient if made only on information and belief. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co. (Civ. App.) 186 S. W. 446.*

**Parties.**—In a suit to enjoin the redistricting of a county brought by 48 out of 137 school districts, the remaining districts held not necessary parties. *Collin County School Trustees v. Stiff (Civ. App.) 190 S. W. 216.*

**Evidence.**—In an action to enjoin the enforcement of a judgment upon land which plaintiff claimed was her individual estate, a deed not executed in favor of plaintiff until after the institution of the injunction suit, and not referred to in the pleadings, is inadmissible. *Childress v. Robinson (Civ. App.) 161 S. W. 78.*

In an action for damages and to enjoin breach of a contract whereby defendant had sold a livery business and its good will, evidence showing the sale and defendant's agreement not to engage in that business in the town for five years held to support a judgment for plaintiff. *Kennedy v. Winfrey (Civ. App.) 163 S. W. 1018.*

In a suit to enjoin enforcement of a justice's judgment on the ground that it was satisfied by the satisfaction of certain other judgments, the pleadings in such other suits were admissible to determine whether the justice's judgment was involved in the issues therein. *Ferguson v. Fain (Civ. App.) 164 S. W. 1040.*

In an action to enjoin execution of a judgment for injuries rendering the judgment plaintiff impotent, the refusal of a temporary injunction held not error, where supporting affidavits of the falsity of such claim were strongly controverted. *Galveston, H. & S. A. Ry. Co. v. Harris (Civ. App.) 168 S. W. 388.*

In a suit where it was sought to enjoin a receiver appointed at the suit of stockholders of a corporation from continuing to act, and the stockholders from prosecuting their suit, evidence held insufficient to show that the stockholders were guilty of such fraud in procuring their stock that the receivership should be set aside. *Williams v. Watt (Civ. App.) 171 S. W. 266.*

In a wife's action to restrain an execution sale, based on a judgment against the husband, admission in evidence of deed which did not in terms limit the property to the wife's separate use held not error, though the pleadings, which did not set out the tenor of the deed, declared that it was so limited. *Molloy v. Brower (Civ. App.) 171 S. W. 1079.*

Evidence, in a wife's action to enjoin a sale of her property under an execution against her husband, held to sustain an implied finding that the writ of execution had been levied on her property. *Id.*

In a suit by a railroad company to restrain collection of taxes, evidence held insufficient to show that the assessment against it was based upon full value of the property, while that against other property was based on a third of its value. *Chicago, R. I. & G. Ry. Co. v. Ratliff (Civ. App.) 177 S. W. 571.*

In a suit by a railroad company to restrain collection of taxes, evidence held insufficient to show an agreement by the board of equalization to undervalue certain property in violation of Const. art. 8, § 1, requiring all property to be taxed according to its value. *Id.*

In a suit to restrain a sale under execution, evidence held to justify a temporary injunction and refusal to dissolve it. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

Evidence held sufficient to sustain issuance of injunction at suit of taxpayers to enjoin issuance of county warrants on the ground that tax levy was insufficient to pay interest and provide sinking fund for payment of such warrants on maturity, and on the further ground that there was not such competition in sale of warrants or letting of the contract for which the warrants were needed as is required by law. *Commissioners' Court of Trinity County v. Miles* (Civ. App.) 187 S. W. 378.

In a suit to enjoin redistricting of a county by county school trustees, evidence held to sustain a judgment granting an injunction pendente lite. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

In suit by the General Assembly of a church to restrain former preachers of a congregation from interfering with the congregation's use of church property, evidence held to show that defendants were disturbing the congregation. *Richardson v. General Assembly of the Church of the Living God* (Civ. App.) 191 S. W. 148.

#### Art. 4650. [2993] Judge's fiat to be indorsed on petition.

**Requisites of order.**—Issuance of temporary injunction to restrain sale on execution held unauthorized, where the order did not make plain precisely who was restrained thereby, whether the real owner of the claim and his agents or not. *Sanders v. Bledsoe* (Civ. App.) 173 S. W. 539.

**Extent of order.**—In suit by commissioner of police department to enjoin mayor of city and others, order that mayor cancel his previous orders appointing or assigning any one to duty in that department held too broad. *Uhr v. Brown* (Civ. App.) 191 S. W. 379.

**Restraining order; definition.**—A fiat, construed and held a temporary restraining order. *Ex parte Zuccaro*, 106 Tex. 197, 163 S. W. 579, Ann. Cas. 1917B, 121; *Ex parte Mussett*, 106 Tex. 200, 163 S. W. 580.

A "restraining order" is an interlocutory order, made by a court in equity upon an application for an injunction and as part of the motion for a preliminary injunction, by which the party is restrained pending a hearing of the motion. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

**Default.**—In a suit to enjoin a sheriff and a judgment creditor from levying on property under execution, the sheriff's default does not entitle the plaintiff to judgment. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

#### Art. 4651. [2994] Notice to opposite party, when.

**Power to issue ex parte injunction.**—While the district judge may grant an injunction without notice to the other party, yet, in all but the rarest cases a temporary order, as distinguished from a temporary injunction, restraining defendant and preserving the status until the application for temporary injunction can be heard after notice, is the proper practice. *Holman v. Cowden & Sutherland* (Civ. App.) 158 S. W. 571.

Under this article, held that the matter of notice of applications for temporary injunctions is within the discretion of the district judge, and that the judge did not err in granting without notice an injunction restraining interference with an irrigation ditch across defendant's land. *Houk v. Robinson* (Civ. App.) 160 S. W. 120.

A preliminary injunction should not ordinarily be granted without notice; the status quo being maintained in the meantime by the issuance of a restraining order. *Soto v. State* (Civ. App.) 171 S. W. 279.

A temporary injunction to restrain the prosecution of a suit in another county may be granted without notice when necessary. *McDade v. Vogel* (Civ. App.) 173 S. W. 506.

Under this article, it is within the judge's discretion whether there shall be a hearing on injunction application, and failure to grant it does not affect his jurisdiction. *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

A temporary injunction against dispossessing plaintiffs pending a suit to set aside for fraud the judgment on which the property was sold can be issued upon an ex parte hearing. *Hammond v. Hoffman* (Civ. App.) 192 S. W. 362.

**Rule as to mandatory injunction.**—Under the petition in an action to enjoin the obstruction of a channel and require the removal of an obstruction and restoration of prior conditions, held error to grant a mandatory injunction giving full relief on an interlocutory application, without notice to defendant. *Cartwright v. Warren* (Civ. App.) 177 S. W. 197.

While, under Rev. St. 1895, art. 2994, the issuance of an injunction without notice rests in the discretion of the court, such injunction should not be granted unless the right and necessity are clearly shown, and a temporary restraining order will not serve. *Id.*

Granting an ex parte mandatory injunction changing the status quo is authorized only where great and irreparable injury might follow delay for notice and hearing, and therefore not by inconvenience in having to travel by a less direct route. *Santa Fé Town-Site Co. v. Nornell* (Civ. App.) 187 S. W. 978.

#### Art. 4653. [2996] Writs, where returnable.

**Application.**—Where injunction is ancillary, the suit is not a suit for an injunction within this article. *Royal Amusement Co. v. Columbia Piano Co.* (Civ. App.) 170 S. W. 278.

This article does not apply to persons not parties to the suit in which the judgment sought to be enjoined was rendered, and does not apply where the injunction sought is only ancillary to the main purpose of the suit. *McDade v. Vogel* (Civ. App.) 173 S. W. 506.

Prohibition to prevent one district court from enjoining a judgment of another, affirmed by the Court of Civil Appeals, will not, in view of articles 4643, 4653, be denied, because the court hearing the injunction should properly administer the law on the facts. *Cattleman's Trust Co. of Ft. Worth v. Willis* (Civ. App.) 179 S. W. 1115.

**Jurisdiction and venue.**—Under this article, providing that writs of injunction granted to stay execution shall be returnable to the court where suit is pending or judgment was rendered, the county court of one county cannot enjoin the issuance of execution upon a judgment had in the court of another county. *Bullitt v. Jesse French Plano & Organ Co.* (Civ. App.) 158 S. W. 782.

In a suit to restrain an execution on account of fraud in obtaining the judgment, the writ should be made returnable, under the statute, to the court in which the judgment was rendered. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 161 S. W. 911.

An allegation of an attempt to sell exempt property in satisfaction of a county court judgment held sufficient to confer jurisdiction on the district court to issue an injunction restraining the sale regardless of the question of value and unaffected by this article. *Cotton v. Rea*, 106 Tex. 220, 163 S. W. 2.

A suit to enjoin a judgment alleged to be void for alteration and to remove the cloud cast by a record of such judgment upon plaintiff's land should be removed in its entirety to the county where the judgment was rendered, under this and art. 1830, subd. 17, fixing the venue of suits to enjoin execution upon judgment, and not retained as to the removal of the cloud in the county where the land was situated, under art. 1830, subd. 14, fixing the venue of suits to remove clouds upon title. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

This and article 1830, subd. 17, fixing the venue of suits to restrain the enforcement of judgments, do not apply where the judgment is void on its face or upon the record, but do apply where the alleged invalidity is an alteration which is not shown to be material. *Id.*

Where a suit to enjoin the execution of a judgment was not brought in the county in which the judgment was rendered, as required by this article, and article 1830, subd. 17, the objection is one of venue, and not of jurisdiction, and it was proper to transfer the suit to the proper county, instead of dismissing it. *Id.*

Under this article, the court rendering a judgment has, alone, jurisdiction to stay execution unless the judgment is void and its invalidity is apparent on the face of the record. *Meyers v. Hambrick* (Civ. App.) 167 S. W. 34.

Where the petition, in an action in the county court to foreclose a chattel mortgage, alleged that the property mortgaged was worth \$600 and the mortgage contained no recitation of value, a judgment of foreclosure was valid on the face of the record, and the county court alone could restrain execution on a showing that the property was worth an amount in excess of the jurisdiction of the county court. *Id.*

A district court other than that in which a judgment has been rendered has jurisdiction to enjoin its enforcement by execution. *Kruegel v. Murphy* (Civ. App.) 168 S. W. 983.

Under this article and art. 4643, subd. 3, district court of McLennan county held without jurisdiction to enjoin sale of land therein ordered sold by the district court of Hunt county. *Brown v. Fleming* (Civ. App.) 178 S. W. 964.

Where the main purpose of an action was to set aside a trust deed, and injunction against sale by the trustee was ancillary, suit was properly brought in county where land lay under article 1830, subd. 14, instead of in county of residence of trustee or beneficiary as provided for injunction cases by article 4653. *Palmer v. Jaggaers* (Civ. App.) 180 S. W. 907.

Where a writ of injunction, issued to restrain sale under order made in a suit in a different county, was returned to the court issuing it, such court has no jurisdiction, and cannot transfer the cause to the county wherein the suit was pending. *Thallman v. Buckholts State Bank* (Civ. App.) 181 S. W. 791.

Under this article, a writ of injunction from a district court to restrain a sale under an order of the district court of another county, should be returnable to the district court ordering the sale. *Id.*

Under this article, the district court has no jurisdiction to try a suit to enjoin execution on a judgment of the county court; it not affirmatively appearing that the judgment is void or that the property is exempt. *Baker v. Crosbyton Southplains R. Co.* (Sup.) 182 S. W. 287.

Under this article, temporary injunction to restrain sale of horses, etc., levied on under an execution, was returnable to the county court of the county in which the judgment was obtained. *Marshall v. Spiller* (Civ. App.) 184 S. W. 285.

Under this article, while a district judge may have authority to issue a temporary injunction to prevent the execution of a judgment in the county court, it should be made returnable to the county court, and the district court has no jurisdiction to pass on the question of making it permanent. *Hammack v. Schley* (Civ. App.) 186 S. W. 872.

A judgment by a county court duly constituted under article 1799, where it had jurisdiction over the amount and character of the action and power to grant relief prayed for by virtue of articles 1771, 1772, 1800, 1802, and 2128, was valid, and the district court had no jurisdiction under article 4653 to enjoin its enforcement. *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

#### **Art. 4654. [2997] The bond for injunction.**

**Provision mandatory.**—Under this article, a receiver is not entitled to an injunction restraining the sale of property in custodia legis without depositing the proper bond. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

A temporary injunction in a suit to restrain the sale of horses and cattle levied on under an execution, without requiring a bond, was void. *Marshall v. Spiller* (Civ. App.) 184 S. W. 285.

**Issuance without bond.**—Under this article, city held not required to give a bond as a condition of the issuance of a temporary injunction. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

**Specifying amount of bond.**—Issuance of temporary injunction against sale on execution held erroneous, where injunction failed to specify amount of petitioner's bond. *Sanders v. Bledsoe* (Civ. App.) 173 S. W. 539.

**Liability.**—Loss of time in preparing defenses held not recoverable on an injunction bond given on restraining collection of a judgment against plaintiff and in defendant's favor. *Cooper v. Golding* (Civ. App.) 176 S. W. 92.

Where sale of mules under execution was improperly enjoined, held that, though the judgment creditors were put to expense, they could not recover such expenses and those of readvertisement from the mortgagee, as such expenses would be deducted from the price obtained. *Wilkerson v. Stasny & Holub* (Civ. App.) 183 S. W. 1191.

#### Art. 4656. [2999] The writ and its requisites.

**Definiteness.**—An order in a taxpayers' suit, enjoining defendant city and its taxing officers from enforcing an illegal and unconstitutional plan of taxation held sufficiently definite to be enforced. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

#### Art. 4660. [3003] Duty of defendant upon service of writ.

Cited, *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

#### Art. 4662. [3005] Citation to issue to defendants.

**Necessary parties defendant.**—A school district is a necessary party to a suit to enjoin the collection of taxes assessed in the district, since, under art. 2853, a school district is a municipal corporation, and under art. 1835, all suits against such corporations must be against it in its corporate name. *Vance v. Miller* (Civ. App.) 170 S. W. 838, judgment reversed *Miller v. Vance* (Sup.) 180 S. W. 739; *Davis v. Payne* (Civ. App.) 179 S. W. 60.

The collection of county taxes could not be enjoined in a suit against the tax assessor, tax collector, county judge, and county commissioners, to which the county itself was not a party. *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129.

Court held not authorized to grant a permanent injunction in a suit originally filed by a single plaintiff, where a substituted petition made the original plaintiff and another parties plaintiff, and there was no citation or notice to defendants after it was filed and no answer filed or other appearance made. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 161 S. W. 911.

In a suit to restrain the holding of an election to abrogate a school tax, voted to supplement the general school fund, the commissioners' court and those petitioning for the election were not necessary parties. *Beeman v. Mays* (Civ. App.) 163 S. W. 358.

Persons whom defendant has contracted to furnish with water without any provision as to the source thereof, are not necessary parties to a suit to enjoin it from pumping from a lake more water than it pumps into it; an injunction not preventing it from fulfilling the contracts or prejudicing their rights thereunder. *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

Where petition in suit for injunction alleged that defendant's residence was unknown, but that he had agents and employes residing in the county upon whom process might be served, and the agents and employes were not made parties, injunction held properly denied, for failure to show parties and facts over which the court could exercise jurisdiction. *Acme Cement Plaster Co. v. Keys* (Civ. App.) 167 S. W. 186.

Defendant's agents and employes could not be enjoined, unless made parties by the petition. *Id.*

In suit to enjoin collection of an unequal and excessive tax, the fact that parts of such tax belonged to the state and county did not render them necessary parties to the suit. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

In a taxpayer's action to restrain the commissioners' court from transferring funds raised for county purposes to the road and bridge fund, holders of outstanding warrants against the road and bridge fund, issued before service of the temporary restraining order, were not necessary parties. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

To proceedings to declare invalid common school districts, as established by county school trustees through change of boundary, the trustees of the districts, by art. 2822, constituted bodies corporate, are necessary parties. *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

Paving company, whose bid for paving of public road was accepted by county officials, was a necessary party to a taxpayers' suit to enjoin such officials from making a contract with the company. *Orndorff v. McKee* (Civ. App.) 188 S. W. 432.

In suit to enjoin obstruction of alley, city, which had not closed it, but had passed ordinance merely to abandon any claim to it as a public alley and to allow owners of adjacent lots to close it, held not a necessary party. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

#### Art. 4663. [3006] The answer.

**Answer; verification and effect.**—Under this article and art. 4649, as to verification of pleadings in injunction cases, a verification of an answer denying allegations of the



petition is insufficient if made only on information and belief. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

Under this article, and arts. 4649 and 4671, as to injunction pleadings, plaintiff, in proceeding to perpetuate a temporary injunction, is put upon proof of his case by answer of general denial, although not sworn to. *Leach v. Thompson* (Civ. App.) 192 S. W. 602.

#### Art. 4664. [3007] Dissolution in term time or vacation.

**Order setting petition for injunction for hearing.**—Where a petition for an injunction was presented to the circuit court on January 27, 1912, the cause could not have come on for final hearing until the succeeding term unless an appearance was entered, so that, where none was entered, it could not be set for final hearing on February 3, 1912, so that an order setting it for hearing on that date could only have been intended to determine whether a temporary injunction should be issued operative until final hearing. *Ex parte Zuccaro*, 106 Tex. 197, 163 S. W. 579, Ann. Cas. 1917B, 121; *Ex parte Mussett*, 106 Tex. 200, 163 S. W. 580.

**Second injunction.**—Where an injunction has been dissolved, complainant by amendment or by supplemental bill may procure a second injunction, but not upon grounds set up in the first bill or which should have been set up therein. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Discretion of court.**—Where, after a sworn answer is filed showing changed conditions that no longer entitle complainant to the temporary restraining order, it may be dissolved. *Ross v. Veitmann* (Civ. App.) 161 S. W. 1073.

The court, in refusing to dissolve a temporary injunction, should require a case of probable right and probable danger to the right without the injunction. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

Temporary injunction preventing defendant from disposing of funds which he held as plaintiff's agent in trust for plaintiff, held erroneously dissolved. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

In an action to enjoin abolition of a school district and its annexation to two other districts by county school trustees, where court's action in dissolving a temporary injunction was not based on merits, but was upon theory that court was without jurisdiction, rule that dissolution of a temporary injunction is largely a matter of discretion is without force. *Price v. County School Trustees of Navarro County* (Civ. App.) 132 S. W. 1140.

**Dissolution on judgment in favor of defendant.**—There can be no error in dissolution of a temporary injunction issued at the beginning of a suit, for plaintiff, in the absence of reversible error in the final judgment which was adverse to him. *Thorne v. Dashiell* (Civ. App.) 189 S. W. 986.

#### Art. 4667. [3010] Damages for delay.

**Jurisdiction.**—This article, providing that the court dissolving an injunction, if satisfied that it was only for delay, may assess damages at a percentage on the amount released by the dissolution, confers on the trial court jurisdiction to determine the question of delay on final hearing. *Hicks v. Murphy* (Civ. App.) 162 S. W. 925.

**Right to damages in general.**—The damages from wrongfully restraining a sale under a deed of trust other than those assessed by virtue of the statute must be alleged and proved with the same certainty as in other suits. *Hicks v. Murphy* (Civ. App.) 172 S. W. 1135.

**Measure and amount of damages.**—Value of use of land held not recoverable as damages for wrongfully restraining sale under deed of trust. *Hicks v. Murphy* (Civ. App.) 172 S. W. 1135.

Interest on value of land held recoverable as damages from injunction restraining sale under deed of trust, if the land was of insufficient value to pay the debt, but otherwise only the expense of advertising the sale was recoverable. *Id.*

#### Art. 4670. [3013] Persons guilty to be imprisoned.

**Sufficiency of evidence.**—Evidence on habeas corpus held sufficient, if it was the same as that introduced in the contempt proceedings, to authorize a judgment that the applicant was in contempt for the violation of its injunction against removing his children from the jurisdiction of the court. *Ex parte Ellerd*, 71 Cr. R. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

#### Art. 4671. [3014] General principles of equity applicable, when.

**Right to injunction.**—Under art. 4643, authorizing a writ of injunction where it appears that applicant is entitled to relief which requires the restraint of some prejudicial act, the right to injunction is not confined to rules of equity jurisprudence. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Effect of general denial.**—Under this article, and arts. 4649 and 4663, as to injunction pleadings, plaintiff, in proceeding to perpetuate a temporary injunction, is put upon proof of his case by answer of general denial, although not sworn to. *Leach v. Thompson* (Civ. App.) 192 S. W. 602.

**Dissolution.**—Under this article, the court may determine the dissolution of temporary injunction on the pleadings, but to justify dissolution the answer should deny the material allegations of the petition. *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562.

## INJUNCTIONS IN PARTICULAR CASES

**Art. 4674. Unlawful sale, etc., of liquors may be enjoined.**

Cited, *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000.

**Sufficiency of petition.**—Petition held not to show present, actual, threatened, or contemplated pursuit of liquor business without license, so as to authorize injunction under this article, as for a nuisance, but rather a violation some time in the past. *Union Men's Fraternal & Beneficiary Ass'n v. State* (Civ. App.) 190 S. W. 242.

**Liability of club.**—In view of this article, and Const. art. 4, § 22, held that a suit brought primarily to abate a nuisance, in sale of intoxicating liquors without license by an incorporated club, although an abatement of the nuisance might incidentally restrain corporation from exercising powers not authorized by law, was properly brought by county attorney. *McLean v. State* (Civ. App.) 193 S. W. 430.

In a suit by a county attorney to enjoin sale of intoxicating liquors without a license by incorporated club, where there was evidence that defendant was a bona fide club and incidentally furnished intoxicating liquors to its members without profit which did not require license or constitute a nuisance under this article, an issue of fact was raised for jury, and giving of a peremptory instruction was error. *Id.*

In view of Const. art. 4, § 22, in a suit by a county attorney to enjoin sale of intoxicating liquors by a club without a license, and to restrain it from using its stock, etc., for a purpose not authorized by its charter, a judgment in so far as it enjoined corporation from commission of acts simply ultra vires held erroneous. *Id.*

In a suit by a private citizen under authority of this article, to enjoin an incorporated club from maintaining a liquor nuisance, a special exception to paragraphs of complaint constituting an inquiry into defendants' charter rights, and an effort to prevent it from exercising a power not authorized by law, should have been sustained. *Rowan v. Stowe* (Civ. App.) 193 S. W. 434.

In such suit under this article, if club desired to avail itself of a misnomer in petition, it should have pleaded it in abatement, and, having appeared and answered in its proper name, it is concluded from objecting to misnomer, and court properly entered judgment against it by its proper name. *Id.*

Under this article, held, that a private citizen could maintain an action to enjoin sale of intoxicating liquors to public generally, without a license, by an incorporated athletic club, which was not a bona fide club, but was incorporated as a sham to evade law. *Id.*

The fact that Attorney General alone may bring a suit to forfeit charter of a corporation and inquire into its charter rights does not affect right given a private citizen by this article, to bring suit to enjoin an incorporated club from maintaining a liquor nuisance. *Id.*

In a suit by a private citizen under this article, to enjoin an incorporated club from maintaining a liquor nuisance, where petition does not allege that club permitted playing of cards or games to be played with cards upon its premises, and proof does not show such acts, that part of decree enjoining club from permitting such games on its premises was error. *Id.*

Under the direct provisions of this article, a county attorney may enjoin a public nuisance created by a private corporation's unlawfully selling intoxicating liquors, although Const. art. 4, § 22, requires suits inquiring into corporate charter rights to be brought by the Attorney General, for abating the nuisance would only incidentally affect the corporate powers. *Ætna Club v. State* (Civ. App.) 193 S. W. 1106.

Where defendant in suit to enjoin illegal sale of liquor claimed to be club organized in good faith for relieving distress, etc., evidence that gambling was permitted upon its premises is admissible to contradict such claim. *Id.*

**Disorderly houses.**—A municipality, though by its charter authorized to suppress and keep bawdy and disorderly houses in a designated locality, cannot, in view of Pen. Code 1911, arts. 496, 500, and this article and arts. 4689 and 4690 of Vernon's Sayles' Tex. Civ. Stats. 1914, license them. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Art. 4682. General reputation evidence.**

**Inadmissibility.**—In suit to enjoin pursuit of business of selling intoxicating liquors at place not in local option territory, evidence of reputation of such place of business held not admissible under this article. *Trayhan v. State* (Civ. App.) 180 S. W. 646; *Anderson v. State* (Civ. App.) 180 S. W. 648.

**Art. 4685. Use of premises for gaming enjoined.**

Cited, *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

**Art. 4689. Use of premises for bawdy houses enjoined.**

Cited, *Moore v. State* (Sup.) 181 S. W. 438 (in dissenting opinion).

**Constitutionality.**—Granting authority to enjoin crime, as the keeping of a bawdy-house, as does this article, is in the power of the Legislature, and invades no rights of property. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

Any unconstitutionality of an exception to this article, as to enjoining the keeping of bawdyhouses, does not invalidate the remainder. *Id.*

The invalidity of the proviso in this article and art. 4690, relating to enjoining bawdy and disorderly houses, that home rule cities might regulate bawdyhouses, does not carry with it the entire act. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

Under Const. art. 1, § 28, declaring that laws shall not be suspended save by the Legislature, and in view of Pen. Code 1911, art. 500, the proviso in this article and art. 4690 of Vernon's Sayles' Tex. Civ. Stats. 1914, authorizing enjoining the maintenance of bawdyhouses, that the statute should not apply where the municipality, acting under its own charter, has confined them in a designated locality, is void. *Id.*

**Pleading.**—It is immaterial that the complaint, in a suit under this article, in addition to stating that plaintiff is a citizen, all that is necessary, describes him as the head of a neighboring school. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

Plaintiff in a suit under this article, to enjoin the keeping of a bawdyhouse, need not plead that he has no adequate remedy at law. *Id.*

A petition held sufficient to bring the case within this article, and art. 4690, providing for enjoining the maintenance of disorderly and bawdyhouses. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Bawdyhouses.**—An ordinance of a city attempting to except bawdyhouses from the operation of a general statute is void, since the Legislature cannot delegate its power to except a class from the operation of a general statute. *Coman v. Baker* (Civ. App.) 179 S. W. 937.

Under this article, plaintiff is not entitled to maintain his action to enjoin disorderly houses in the city of Houston, where bawdyhouses are restricted by ordinance to a certain locality. *Id.*

A municipality, though by its charter authorized to suppress and keep bawdy and disorderly houses in a designated locality, cannot, in view of Pen. Code 1911, arts. 496, 500, and this article and arts. 4674 and 4690 of Vernon's Sayles' Tex. Civ. Stats. 1914, license them. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

Despite the proviso in this article, authorizing enjoining the maintenance of bawdy and disorderly houses, as to bawdyhouses, maintenance of a bawdyhouse wherein intoxicants were sold without a license, may be enjoined as a disorderly house. *Id.*

A rental agent, who knowingly permits premises leased by him for the owner to be used as a disorderly house, being subject to criminal liability under Pen. Code 1911, art. 500, may be enjoined under this article. *Moore v. State* (Sup.) 181 S. W. 438.

— **Knowledge.**—In a proceeding under this article, held that the owner was properly made a party, and injunction was properly issued against her, though she did not know that the premises were being used as a disorderly house. *Moore v. State* (Sup.) 181 S. W. 438.

**Injury to private rights.**—Under this article and art. 4690, a citizen may maintain an action to enjoin a disorderly or bawdyhouse without showing personal damage. *Spence v. Fenchler* (Sup.) 180 S. W. 597; *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

#### Art. 4690. By whom brought; proceedings as in other injunction cases.

Cited, *Campbell v. Peacock* (Civ. App.) 176 S. W. 774; *Moore v. State* (Sup.) 181 S. W. 438 (in dissenting opinion).

**Validity.**—The invalidity of the proviso in this article and art. 4689, relating to enjoining bawdy and disorderly houses, that home rule cities might regulate bawdyhouses, does not carry with it the entire act. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Petition and answer.**—A petition held sufficient to bring the case within this article and art. 4689, providing for enjoining the maintenance of disorderly and bawdyhouses. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

In a proceeding to enjoin the maintenance of bawdy and disorderly houses, the answer held to admit that defendants were maintaining such places and to warrant the court in so finding on prayer for temporary injunction. *Id.*

Where the petition averred that plaintiffs were all of the city and county of El Paso, state of Texas, and were suing for themselves and other citizens, it sufficiently showed citizenship to entitle them to sue under this article and arts. 4689 and 4690, providing for the enjoining of bawdyhouses. *Id.*

**Personal damage.**—Under this article and art. 4689, a citizen may maintain an action to enjoin a disorderly or bawdyhouse without showing personal damage. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Delay.**—Where a statute authorizes the enjoining of disorderly houses by citizens, delay in seeking relief will not preclude an injunction. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Power of municipality.**—A municipality, though by its charter authorized to suppress and keep bawdy and disorderly houses in a designated locality, cannot, in view of Pen. Code 1911, arts. 496, 500, and this article and arts. 4674 and 4689 of Vernon's Sayles' Tex. Civ. Stats. 1914, license them. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

## TITLE 70

## INJURIES RESULTING IN DEATH—ACTIONS FOR

Art.	Art.
4694. Action for injuries resulting in death, brought when.	4699. Who may bring the action.
4695. Character of wrongful act.	4701. Suit does not abate by death of either party.
4698. For whose benefit action to be brought.	4704. Damages to be apportioned by jury.

**Article 4694. [3017] Actions for injuries resulting in death, brought when.**

Cited, *Coca-Cola Co. v. Williams* (Civ. App.) 164 S. W. 1032; *El Paso & S. W. Co. v. La Londe* (Sup.) 184 S. W. 498; *Elliott v. City of Brownwood* (Civ. App.) 166 S. W. 932 (in dissenting opinion).

$\frac{1}{2}$ . **Constitutionality.**—Construing this article as amended by Acts 33d Leg. c. 143, so as to create a right of action for death by wrongful act where the injury occurred before its passage and the death thereafter, would render it retroactive and invalid under Const. art. 1, § 16. *Slate v. City of Ft. Worth* (Civ. App.) 193 S. W. 1143.

1. **Right of action in general.**—Under the common law, in force until changed by this article, damages were not recoverable for death by wrongful act. *Elliott v. City of Brownwood*, 166 S. W. 1129, 106 Tex. 292, answering certified questions (Civ. App.) 166 S. W. 932.

A defendant cannot be held liable for wrongful death under Rev. St. 1895, art. 3017, cl. 2, unless the cause of death was the defendant's own immediate act or omission, or the act or omission of some agent representing him in the performance of a nondelegable duty. *Horton & Horton v. Hartley* (Civ. App.) 170 S. W. 1046.

A parent cannot recover for the death of a child unless defendant was guilty of a breach of duty. *Missouri, K. & T. Ry. Co. of Texas v. Moore* (Civ. App.) 172 S. W. 568.

At common law a parent could recover for loss of a child's services caused by injuries not resulting in death, or for expenses incurred and loss of services between the injuries and the death, where that was appreciable, but could not recover where her death resulted instantaneously, or practically so. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

The right of action for death caused by wrongful act given by this article, as amended by Acts 33d Leg. c. 143, is purely statutory, since none existed at common law. *Slate v. City of Ft. Worth* (Civ. App.) 193 S. W. 1143.

Under this article, subd. 2, amended by Acts 33d Leg. c. 143, giving a right of action for death by wrongful act, the foundation of the action is the act causing the injury, although article 5687, subd. 7, making the two-year limitation statute applicable, provides that the cause of action is deemed to have accrued upon death of injured party. *Id.*

6. **"Any railroad" defined.**—Under this article, an electric company having separate corporate existence and not owning or operating street railroad, though furnishing it power, etc., held not liable for death of one killed by negligence of railroad's motorman. *Corsicana Transit Co. v. Walton* (Civ. App.) 189 S. W. 307.

9. **Negligence of municipal corporation.**—Under this article, a municipal corporation is not liable for the death of a person caused by its negligent failure to maintain its streets. *Elliott v. City of Brownwood*, 166 S. W. 1129, 106 Tex. 292, answering question certified from (Civ. App.) 166 S. W. 932.

This article as amended Acts 33d Leg. c. 143, rendering municipalities liable for negligently causing death, does not apply to an injury occurring before its passage, although the injured party died thereafter. *Slate v. City of Ft. Worth* (Civ. App.) 193 S. W. 1143.

Subdivision 2 of this article, giving a right of action where death is caused by negligence of "another," etc., did not make a municipality liable for negligently causing death until Acts 33d Leg. c. 143, amended the section to read "another person or corporation." *Id.*

13. **Negligence of owner or landlord of building.**—To permit a recovery for a death caused by negligently employing an elevator operator who had not had 10 days' actual experience under instruction, as required by city ordinance, would not enlarge this article, subd. 2, giving an action for damages for death caused by the "wrongful act, negligence, unskillfulness, or default of another." *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

15. **Liability for act of agent or employé.**—Under this article, authorizing a recovery for death, damages for death may be recovered from a business corporation only where death was caused by the wrongful act of the corporation itself. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

A local agent of an express company, with authority to displace unsuitable animals and procure temporarily others for driving, held, in the performance of the duty to remove an unsuitable animal to exercise a corporate duty, and his negligence is the negligence of the company within this article, authorizing a recovery for death caused by wrongful act. *Id.*

16. **Contributory negligence.**—Deceased, who knew that electric light wires were dangerous, and who saw a wire fall during a storm and burn the grass, and who, after warning, took hold of it with his hand, was guilty of contributory negligence. *Bowman v. Farmersville Mill & Light Co.* (Civ. App.) 158 S. W. 200.

Since under the express provisions of article 4695, the wrongful act sufficient to form the basis of recovery for wrongful death, under article 4694, must be such as would, if death had not ensued, have entitled the injured party to maintain an action, there can be no recovery for wrongful death proximately resulting from contributory negligence. *Stephenville, N. & S. T. Ry. Co. v. Voss* (Civ. App.) 159 S. W. 64.

Defendant held not liable for the death of plaintiff's wife, who fell from a wagon on which the personal property of plaintiff was being transported, and on which deceased was riding in direct violation of the orders of defendant's superintendent; she being a trespasser. *Aguinaga v. Medina Valley Irr. Co.* (Civ. App.) 168 S. W. 78.

21. **Fellow servants—Negligence of.**—In an action against a private corporation, not a common carrier for wrongful death of a servant, brought under subd. 2 of this article, the question is whether the negligence resulting in death was that of a vice principal. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

Acts 33d Leg. c. 143 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4694), amending R. C. S. 1911, art. 4694, did not impliedly repeal article 4695 so as to render an employer liable for death resulting from the negligence of a fellow servant. *Canode v. Sewell* (Civ. App.) 172 S. W. 142.

24. **Proximate cause of injury.**—Where the injuries sustained by a shipper of goods, while riding therewith in a box car, as a result of the road's negligence, were the efficient cause of his death, together with injuries subsequently received by him from a fall off his wagon, the damages caused by each accident not being separable, the road was liable for the death. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

27. **Measure and amount of damages.**—The measure of a father's damages for the death of a minor son was the net value of the son's services during minority, less the expense of maintaining him during that period. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

For the wrongful killing of a minor child, parent's damages should not exceed a sum equal to the value of the services of the child during minority, less an allowance for expense of maintenance and education. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

29. — **Excessive damages.**—See arts. 2022 and 6648.

An award of \$20,000 for the wrongful death of a husband and father, who at times earned as much as \$60 a week, less expenses, in hauling freight, which earnings were devoted to the upkeep of his family, consisting of his wife and four minor children, was not excessive. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

In an action under the death statute as surviving children of one whose injuries resulted in his death, held, that a verdict of \$1,000 for each of the adult plaintiffs who were themselves earning money was not excessive. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954.

A verdict of \$10,000 to the widow and a like amount to each of the two minor children of one killed at defendant's crossing held not excessive. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

In an action for death of a person 41 years old, and earning \$100 a month, \$15,000, distributed \$8,000 to the widow, \$5,000 to a minor child, and \$2,000 to his mother, held not so excessive as to show passion and prejudice. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

In an action for death, a verdict of \$8,000, apportioning \$4,000 to the widow and \$1,000 to each of the four children, was not excessive. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

In an action for the death of the plaintiff's son, a verdict of \$750 held not so excessive as to require reversal. *Houston Belt & Terminal Ry. Co. v. Lee* (Civ. App.) 185 S. W. 393.

31. **Elements of compensation—in general.**—Support and care given the wife, and education and care given the child, held an element of pecuniary damage in an action for death of the father. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

32. — **Loss of pecuniary benefits.**—The pecuniary loss caused by death of a husband to his wife and children is not limited by his earning capacity. *Southern Traction Co. v. Hulbert* (Civ. App.) 177 S. W. 551.

34. — **Grief and loss of society, care, counsel and training.**—In determining pecuniary damages which a minor sustains in loss of a parent, jury may consider reasonable value of nurture, care, and education child would probably have received from deceased parent. *Marshall & E. T. Ry. Co. v. Riden* (Civ. App.) 194 S. W. 1163.

35. — **Medical and funeral expenses.**—In an action for wrongfully causing death, there can be no recovery for funeral expenses paid, unless there is proof that the amounts charged were reasonable. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

39. **Defenses.**—An adult sister whom an 11 year old child was visiting with the consent of their parents has no implied authority to give consent for an operation on the child for which there is no immediate necessity. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

Surgeons cannot rely on the apparent authority of the sister of a child to give her parents' consent to an operation involving the use of a general anæsthetic, where there was no act on the part of the parents to lead them to believe the sister had such authority. *Id.*

42. **Pleadings of plaintiff.**—See notes under art. 1827.

Amendment of complaint under articles 4694, 4695, by alleging as ground for recovery negligence of fellow servant based on article 6640, held not to state new cause of action so as to bar recovery thereon under two-year statute of limitations (Rev. St. 1911, art. 5687, par. 7). *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

43. **Presumptions, burden of proof and admissibility of evidence.**—Under arts. 4694, 4695, there is such privity between the injured servant and his survivors that an admission made by the injured servant is admissible in his survivors' action for wrongful death. *Hovey v. See* (Civ. App.) 191 S. W. 606; see, also, notes under art. 3687.

44. **Weight and sufficiency of evidence.**—A father could not recover for the death of a minor son without proving the probable expense of maintaining him during minority, as the jury could not properly find such expense from their own experience and without evidence. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

Evidence held insufficient to show that two children, who were adults and self-supporting, suffered any pecuniary injury by reason of their father's death. *Houston & T. C. R. Co. v. Walker* (Sup.) 173 S. W. 208, reversing judgment (Civ. App.) 167 S. W. 199. Motion to retax costs granted (Sup.) 177 S. W. 954.

Evidence, in an action by a wife for death of her husband in a collision between two street railroad cars, held sufficient to sustain a verdict for \$12,000. *Southern Traction Co. v. Hulbert* (Civ. App.) 177 S. W. 551.

In an action for the death of plaintiff's minor daughter following an operation by surgeons to whom she had been taken by her adult sister, evidence held not sufficient to warrant the jury in finding that the sister had either express or implied authority to consent to the operation on behalf of the parents. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

45. — **Proximate cause.**—Evidence held insufficient to show that the death of plaintiff's husband was caused by germs or noxious odors thrown off from a pool of noisome water and refuse maintained by the defendant railway company. *Ft. Worth & R. G. Ry. Co. v. McMurray* (Civ. App.) 173 S. W. 929.

In a suit for injuries resulting in death, the plaintiff must show that the injuries were the proximate cause of the death. *Texas Traction Co. v. Nenny* (Civ. App.) 178 S. W. 797.

47. — **Contributory negligence.**—Evidence, in an action against an electric light company for the death of plaintiff's decedent by contact with one of its fallen wires, held to sustain a finding that defendant was not guilty of negligence. *Bowman v. Famersville Mill & Light Co.* (Civ. App.) 158 S. W. 200.

In the absence of evidence whether decedent looked or listened for train, the presumption was that he did both in the exercise of ordinary care. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

Where there are no witnesses of an accident whereby a servant is killed, the happening of the accident raises no presumption of negligence against servant or the master. *Hutcherson v. Amarillo St. Ry. Co.* (Civ. App.) 176 S. W. 856.

### Art. 4695. [3018] Character of wrongful act.

Cited, *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184; *Hovey v. See* (Civ. App.) 191 S. W. 606.

**Right of action of person injured.**—Since under the express provisions of this article, the wrongful act sufficient to form the basis of recovery for wrongful death, under article 4694, must be such as would, if death had not ensued, have entitled the injured party to maintain an action, there can be no recovery for wrongful death proximately resulting from contributory negligence. *Stephenville, N. & S. T. Ry. Co. v. Voss* (Civ. App.) 159 S. W. 64.

A minor child can recover against a surgeon performing an operation on her to which her parents did not consent, notwithstanding her own consent, even if only nominal damages, and therefore her parents can recover for her death resulting from such operation under this article. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

**Repeal.**—Acts 33d Leg. c. 143 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4694), amending R. C. S. 1911, art. 4694, did not impliedly repeal article 4695 so as to render an employer liable for death resulting from the negligence of a fellow servant. *Canode v. Sewell* (Civ. App.) 172 S. W. 142.

### Art. 4698. [3021] For whose benefit action to be brought.

See notes under art. 4699.

### Art. 4699. [3022] Who may bring the action.

**Relation to arts. 6648-6652.**—Arts. 6648-6652, relating to liability for negligence to railroad employes, held not to change the rule under arts. 4698 and 4699, giving an action for wrongful death, and permitting one or more beneficiaries to sue for all, that the plaintiff might join the other statutory beneficiaries for determination of their rights, though alleging that they had none, so that in an action by the widow and minor child for wrongful death of the husband and father there was no error in rendering judgment against the parents of the deceased who were not notified that they

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had been made parties to the suit. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

**Plaintiffs.**—Under the federal Employers' Liability Act, action for death of an employé from injury received while engaged in interstate commerce, maintainable only by the personal representative of deceased, must be by his administrator or executor, though he left no estate, and cannot be by relatives in their individual capacity. *St. Louis Southwestern Ry. Co. v. Brothers* (Civ. App.) 165 S. W. 488.

**Necessary parties.**—A wife held not a necessary party to an action by her husband for the death of their minor child, for this article, authorizes an action to be brought by any one of the parties entitled for the benefit of the others, and the proceeds are community property, which may be disposed of by the husband. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

Where defendant had settled with the wife and children of a deceased, they were not necessary parties to an action for loss of support by the mother. *Industrial Cotton Oil Co. v. Lial* (Civ. App.) 164 S. W. 40.

Under articles 4698, 4699, as to parties in death action, where surviving wife sues for her sole benefit, and it appears at the trial that deceased's parents are living, defendant is entitled to postponement to have them made parties. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 191 S. W. 599.

Under articles 4698, 4699, as to parties in death action, failure of surviving wife to join surviving parents of deceased in suit for his death is not excused by knowledge by defendant of parents' existence. *Id.*

**Authority to sue for others.**—Surviving parents of a deceased who are entitled to a right of action for his wrongful death cannot complain that, under this article, which is part of the act providing for actions for wrongful death, the widow has brought an action for the benefit of all, for they take the right subject to the remedy. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

**Art. 4701. [3024] Suit does not abate by death of either party.**

**Death of party to suit.**—A judgment in an action for death held subject to vacation in part on showing of the death of a beneficiary before judgment, without granting new trial. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

In an action by the widow, child, and mother of a deceased for wrongful death, the court is not in error in refusing a supplemental petition for new trial, based on information and belief that the mother, awarded damages by the verdict, died before judgment. *Id.*

**Art. 4704. [3027] Damages to be apportioned by the jury.**

Cited, *Houston & T. C. R. Co. v. Gant* (Civ. App.) 175 S. W. 745.

**Excessive damages.**—Verdict of \$5,500 for plaintiffs, in an action for the death of their son, in which a jury, under this article, might allow damages proportionate to the resulting injury, held excessive, unless a remittitur of \$4,400 was filed. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 166 S. W. 1190.

## TITLE 71

## INSURANCE

Chap.		Chap.	
1.	Incorporation of insurance companies.	10.	Mutual fire, lightning, hail, and storm insurance companies.
2.	Life, health and accident insurance companies.	12.	Mutual companies insuring against loss by burglary, etc.
3.	Investment in Texas securities and taxation of gross receipts.	13.	Fidelity, guaranty and surety companies.
4.	Assessment or natural premium companies.	14a.	Casualty and other insurance companies, except fire, marine and life insurance companies.
5.	Mutual assessment accident insurance home companies.	15.	General provisions.
7.	Fraternal benefit societies.	16.	Indemnity contracts.
8.	Fire and marine insurance companies.		
9.	State insurance commission.		

## CHAPTER ONE

## INCORPORATION OF INSURANCE COMPANIES

Art.		Art.	
4705.	Formation of company.	4711.	Capital stock shall consist of what.

**Article 4705. [3028] Formation of company.**

Cited, *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050; 179 S. W. 671.

**Consolidation—In general.**—Where defendant insurance company was consolidated with the P. Company, which offered to assume plaintiff's policy, which he refused, the P. Company was not liable to plaintiff for defendant's alleged breach of contract, arising out of such consolidation. *Provident Savings Life Assur. Society of New York v. Ellinger* (Civ. App.) 164 S. W. 1024.

Where such consolidation did not deprive defendant of ability to perform its contracts, and it was amply solvent when plaintiff elected to treat his policy as repudiated, he could not recover damages against the P. Company on the theory that it had absorbed all defendant's assets. *Id.*

**Stock subscription agreement—Liability in general.**—Where the promoters of an insurance company took a stock subscription and agreed that the company, if organized, would loan a certain sum to the stockholder, and the company accepted the contract, it was liable for refusal to make the loan as agreed. *American Home Life Ins. Co. v. Compere* (Civ. App.) 159 S. W. 79.

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

Cited, *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; *Commonwealth Bonding & Casualty Ins. Co. v. Hollfield* (Civ. App.) 184 S. W. 776.

**Issuing stock for note and trust deed.**—Although this article provides that the capital stock of insurance companies may consist of valid first mortgages on realty, an insurance company cannot, in view of Const. art. 12, § 6, issue stock for note and trust deed. *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513.

## CHAPTER TWO

## LIFE, HEALTH AND ACCIDENT INSURANCE COMPANIES

Art.		Art.	
4724.	Terms defined.	4737.	May reinsure.
4725.	Who may incorporate.	4741.	Policies shall contain what.
4726.	Charter to be approved by attorney general.	4742.	Policies shall not contain what.
4728.	Examination of commission before commencing business.	4744.	Venue of suits on policies.
4733.	Laws relating to corporations shall govern.	4746.	Losses shall be paid promptly.
4734.	May invest in what securities.	4749.	Deposit of securities.
4735.	May hold real estate, etc.	4751.	Policies shall have indorsed on face, what.
		4759.	Form of policy to be filed.



**Article 4724. Terms defined.**

Cited, *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060; *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

**Art. 4725. Who may incorporate.**

Payment for stock subscribed.—See *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

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

Payment for stock subscribed.—Art. 1146, relating to issue of corporate stock, is superseded by this act as to insurance companies. *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

Under Const. art. 12, § 6, and Acts 31st Leg. c. 108, giving of notes secured by a deed of trust for stock in an insurance company subsequently issued is not payment for the stock. *Id.*

Stock and note secured by deed of trust given in payment thereof were void, as violative of arts. 4725, 4726, 4728. *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825.

Liability for acts of promoter.—Notwithstanding Rev. St. 1895, art. 3096h, a corporation held not liable for material ordered by the promoter and delivered to an officer, where the acts of the corporators and of the directors and officers were void. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

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

See *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; note under art. 4726.

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

Requirement as to notice.—Allegation in suit on policy of life insurance that beneficiary complied with all of the provisions of the policy is sufficient allegation in the absence of special exception that proofs of death were duly furnished, in view of arts. 4733, 5714. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

Receiving notes for stock.—Const. art. 12, § 6, and this article, subd. "e," 4733, and 1146, prohibiting the issuance of stock except for money received, labor done, or property received, held not to prevent a life insurance company from contracting to sell an increase of its capital stock and from taking notes of the subscribers in payment therefor, where the stock was not issued until the notes were fully paid. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

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

Cited, *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; *Commonwealth Bonding & Casualty Ins. Co. v. Hollfield* (Civ. App.) 184 S. W. 776.

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

Cited, *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

**Art. 4737. May reinsure.**

Cited, *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

**Art. 4741. Policies shall contain what.**

Cited, *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

Application.—Articles 4741, 4947, 4948, 4951, 4954, held to apply to surety or fidelity bonds. *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

Arts. 4741 and 4959 apply to contracts of life insurance, despite arts. 4951, 4947, and 4948, and a life policy will not be avoided for immaterial misrepresentations. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

Conditions—Validity in general.—This article, requiring life policies to require all premiums to be paid in advance, and article 4954, prohibiting discrimination as to the premiums charged, held not to avoid a policy because the company extended credit for, and received another's obligation as, payment of the first premium. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

In a paid-up policy loan note, an agreement that on nonpayment the amount of paid-up insurance guaranteed, should be reduced in the same proportion as the debt bore to the cash surrender value is valid and in harmony with the policy indicated by this article. *Hartford Life Ins. Co. v. Benson* (Civ. App.) 187 S. W. 351.

—Suicide of insured.—Neither in *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4741, stating what a policy shall contain, nor in article 4742, specifying what a policy shall not contain, is there any intimation that a clause may be inserted in a policy relieving the insurer of all liability because of the suicide of the insured. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

**Representations and warranties.**—Under a policy providing, as required by this article, subd. 4, that statements in the application, in the absence of fraud, should be representations, and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty. *American Nat. Ins. Co. v. Anderson* (Civ. App.) 179 S. W. 66.

A "warranty" enters into and forms a part of the contract itself, defining the limits of the obligation beyond which no liability arises; a "representation," made before or at the time of the contract, presents the elements on which the risk to be assumed is to be estimated. *Id.*

**Fraud.**—Where it was not permissible, because of the incontestable clause in a life policy, to show that the insured committed fraud in obtaining the policy, it was not permissible to show that the beneficiary participated in such fraud. *Southern Union Life Ins. Co. v. White* (Civ. App.) 188 S. W. 266.

Under this article, a life policy providing, "This policy shall be incontestable after it has been in force one year, providing premiums have been duly paid," was not contestable four years after it was issued, on the ground that it was obtained by fraudulent representations of the insured as to his health and use of alcoholic drinks. *Id.*

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

Cited, *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

**Constitutionality.**—Subdivision 3 is not violative of either state or federal Constitution. *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

**Suicide of insured in general.**—Under this article suicide of the insured cannot be set up as a complete bar to an action on the policy. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

Under this article which permits the insurer to pay a less sum if the insured dies by his own hand, it is not necessary that the policy state specifically what sum will be paid in such case. *Id.*

A clause in a life insurance policy limiting payment if insured's death occurs by his own hand to the amount of mortuary contributions made is no defense to recovery of the full face of the policy, where the amount of mortuary contribution in no way appears. *Id.*

Neither in art. 4741, nor in this article is there any intimation that a clause may be inserted in a policy relieving the insurer of all liability because of the suicide of the insured. *Id.*; and notes under art. 4741.

**Invalid provisions—in general.**—Under this article a provision that if insured should die from heart disease within one year from its date liability would be limited to one-fourth of principal sum named, held not enforceable and to present no defense to claim for full amount. *First Texas State Ins. Co. v. Bell* (Civ. App.) 184 S. W. 277.

Under subd. 3, clause of life policy, following schedule stating amount of insurance, which provided that half only should be payable if death occurred within six months, held void. *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

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

**Venue.**—See art. 1830 and notes.

Under article 1830, subd. 30, and this article, a suit on an accident certificate held maintainable in the county where the insured died, though the certificate and the company's by-laws provided that all suits should be instituted in Dallas county, Tex. *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389.

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

**Constitutionality.**—The statute providing for damages and attorney's fees for refusal to pay an insurance policy within the time specified in the statute, if liability thereon be established, is constitutional. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

**Application to accident insurance company.**—A casualty insurance company, carrying on business on the assessment or annual premium plan, under Rev. St. tit. 71, is not exempt from penalties prescribed by this article, since article 4957 only exempts it from the provisions of chapter 15. *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389.

In action on accident and health policy, brought after time provided by statute for payment, where jury found for plaintiff, award of statutory penalty and reasonable attorney's fee is proper. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

**Application to insurance of live stock.**—Penalty and attorney's fees provided by this article, held properly allowed in a suit on a policy insuring live stock. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

**Application to burglary insurance.**—The provision of this article authorizing a recovery of 12 per cent. as damages and attorneys' fees held not to apply to an action on a burglary insurance policy. *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

**Liability—in general.**—Where the beneficiary under a policy of life insurance, after death of the insured, demanded the amount of the policy, and refused the amount offered by the insurer, and began suit for and recovered the amount of the policy, she was entitled to attorney's fees. *First Texas State Ins. Co. v. Jiminez* (Civ. App.) 163 S. W. 656.

Where insured, while insane, surrendered his policies of life insurance, and his personal representatives after his death notified the insurer of their election to rescind such

surrender, insurer having refused to pay the policies within 30 days after such notice and demand became liable under this article for damages and attorney's fees. *New York Life Ins. Co. v. Hagler* (Civ. App.) 169 S. W. 1064.

Where an insurance company fails to pay a loss within 30 days after a proper demand and proofs of death, it becomes liable for the penalty and attorney's fee prescribed by this article, though its omission was not willful, but in good faith. *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

Under this article, insurance company, which failed to pay beneficiary under \$450 policy, after her demand for payment of \$225, represented by insurer's division superintendent to be all that was due, held liable in damages of 12 per cent. of the face amount of policy, which was in fact the amount. *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

Where the beneficiary, under an accident insurance policy, made demand for the amount due, which was refused, and thereafter made a settlement which was set aside for fraud, the court in an action on the policy can allow the beneficiary attorney's fees. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

**Demand.**—In an action on a life policy, where demand for the payment of loss was not made 30 days before filing of original petition, but an amended petition, alleging such demand was filed more than 30 days after the demand, plaintiff could recover the 12 per cent. statutory penalty and attorney's fees. *Southern Union Life Ins. Co. v. White* (Civ. App.) 188 S. W. 266.

Under this article held, that demand can be made upon any agent of company authorized to act in premises. *American Nat. Ins. Co. v. Hollingsworth* (Civ. App.) 189 S. W. 792.

Under this article proper demand on insurance company for payment of loss is a prerequisite to demand for penalty and attorney's fees, and proof of loss and filing suit is not sufficient. *Id.*

The demand by the beneficiary for payment of a disputed claim on a policy of life insurance, sufficient to entitle him to recover 12 per cent. damages and attorney's fee, may be made after bringing action on the policy and be shown by amendment. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

The demand by the beneficiary for payment of a disputed claim on a life policy sufficient to entitle him to recover 12 per cent. damages and attorney's fee may be made after bringing action on the policy. *Id.*

**Interest.**—On a petition claiming indemnity specified in a policy, and an attorney's fee, and the 12 per cent. damages allowed by this article, recovery of interest held properly denied. *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 177 S. W. 1008.

**Effect of filing interpleader.**—Where life insurance company in good faith is in doubt as to whom policy should be paid, on account of conflicting claims, and places its refusal to pay on that ground, company has right to interpleader, and if it proceeds promptly to make known its decision, it is not liable for penalties under Rev. St. 1911, art. 4746. *New York Life Ins. Co. v. Veith* (Civ. App.) 192 S. W. 605.

Where life insurance company refused to pay policies to insured's wife on ground she had murdered him, maintaining its position for a year before filing interpleader in which it admitted liability, it was liable, under this article, for penalty of 12 per cent. for failure to pay policies within 30 days after demand. *Id.*

**Evidence—Weight and sufficiency.**—In action on health and accident insurance policy, evidence held to support a verdict for \$100 as attorney's fees under this article. *Commonwealth Bonding & Casualty Ins. Co. v. Wright* (Civ. App.) 171 S. W. 1043.

— **Admissibility.**—In action on accident policy, letters written insurer by plaintiff's attorney held admissible as a basis for the recovery of attorney's fees and the statutory damages for failure to pay. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 168 S. W. 1007.

In determining whether a life insurance company was liable for the statutory penalty for failing to make payment within a specified time after the filing of proofs of death, only such proofs as were submitted to the insurer could be considered. *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

On issue of attorney's fees allowed by this article, upon failure of insurance company to pay loss after demand, in absence of proof of services performed by attorneys, held improper, in interrogating expert witnesses, to recite what was done by counsel in preparation of case. *American Nat. Ins. Co. v. Hollingsworth* (Civ. App.) 189 S. W. 792.

**Verdict and judgment.**—In action on insurance policy verdict for specified amount, "with 12 per cent. interest." held to justify judgment for 12 per cent. damages for delay, under this article. *Commonwealth Bonding & Casualty Ins. Co. v. Wright* (Civ. App.) 171 S. W. 1043.

**Excessive damages.**—Where, in a suit to set aside the surrender of life insurance policies, and to recover thereon, it was finally held that plaintiffs were entitled to recover \$19,876.23, together with a penalty and attorney's fees, a verdict fixing such fees at \$5,000 was not excessive. *New York Life Ins. Co. v. Hagler* (Civ. App.) 169 S. W. 1064.

### Art. 4749. Deposit of securities.

**Situs of property for purpose of taxation.**—Prior to enactment of Acts 31st Leg. c. 108, making personal property of a home insurance company taxable at the company's home office, where notes, securities in which insurance company's capital was invested, were deposited with state Treasurer as permitted by Acts 30th Leg. c. 170, to enable the company to obtain better financial standing held, their situs was in Austin, and they were

taxable there, under Const. art. 8, § 11, and Rev. St. arts. 7505, 7510. *Guaranty Life Ins. Co. of Houston v. City of Austin* (Sup.) 190 S. W. 189.

**Art. 4751. Policies shall have indorsed on face, etc.**  
Misstatement in application.—See notes under art. 4947.

**Art. 4759. Form of policies to be filed.**  
Cited, *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

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### CHAPTER THREE

#### INVESTMENT IN TEXAS SECURITIES AND TAXATION OF GROSS RECEIPTS

##### Article 4775. Investment in Texas securities.

Situs of property for purpose of taxation.—See notes under art. 4749.  
See *Guaranty Life Ins. Co. of Houston v. City of Austin* (Sup.) 190 S. W. 189; note under art. 4749.

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### CHAPTER FOUR

#### ASSESSMENT OR NATURAL PREMIUM COMPANIES

##### Articles 4791–4793.

Cited, *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

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### CHAPTER FIVE

#### MUTUAL ASSESSMENT ACCIDENT INSURANCE HOME COMPANIES

<p>Art. 4800. Notice of by-laws, how given.</p> <p>4804. Certificate of membership; reserve fund; admission fee; expense fund.</p>	<p>Art. 4807. Policy shall specify what; liability on.</p> <p>4808a. Insurance against disability from sickness or disease; funeral benefit.</p>
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##### Article 4800. Notice of by-laws, how given.

Sufficiency of notice—In general.—A notice to members of a mutual assessment accident association that amendments to the by-laws would be considered at the next regular meeting of the board of directors, Saturday, December 9th, is insufficient under this article, requiring the notice to specify the time and place of consideration. *Hackler v. International Travelers' Ass'n* (Civ. App.) 165 S. W. 44.

— Who may question.—Where the notice that amendments to the by-laws of a mutual assessment accident association would be acted upon was defective because not specifying the place of meeting, it is immaterial that a member, asserting the invalidity of the amendment as to him, knew the location of the home office of the association at which place the meeting actually was held. *Hackler v. International Travelers' Ass'n* (Civ. App.) 165 S. W. 44.

**Art. 4804. Certificate of membership; reserve fund; admission fee; expense fund.**—Each certificate of membership, policy or other contract of insurance issued by such company shall bear on its face in red letters the following words: "The payment of the benefit herein provided for is conditioned upon its being collected by this company from assessments and other sources as provided in its by-laws"; provided, that nothing in this chapter shall be construed to prevent the creation of a reserve fund by any such organization, which fund, or its accretions, or both, are to be used only for the payment of losses or benefits, as provided in

the by-laws of such corporation; provided, further, that such corporation may charge a membership or admission fee of not exceeding three dollars upon each policy issued, the proceeds of which may be placed in the expense fund, and that at least sixty per cent of all amounts realized from any other sources shall be used only for the payment of losses or benefits as they occur, or the balance thereof remaining after paying such losses or benefits transferred to such reserve fund; provided, further, that such membership fee may also apply as a payment or credit upon the initial assessment or premium, if the by-laws of the corporation so provide. [Acts 1905, p. 311, § 9; Act April 5, 1915, ch. 149, § 1.]

**Explanatory.**—The act amends art. 4804, and adds art. 4808a. It became a law April 5, 1915.

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

**“Legal defenses” defined.**—Under this article, the term “legal defenses” means those which defeat a recovery. *International Travelers’ Ass’n v. Branum* (Civ. App.) 169 S. W. 389.

**Amount to be paid.**—Under this article, providing that an accident insurance corporation shall be liable for the payment of the amount specified in full, etc., such amount is the amount specified in the certificate, which is promised to be paid on the happening of the contingency insured against; and hence the insurer may not limit such amount by any by-law. *International Travelers’ Ass’n v. Branum* (Civ. App.) 169 S. W. 389.

**Limiting amount of recovery.**—A by-law of an accident insurance association, limiting the recovery to \$500 for death resulting from apoplexy caused by accident, held unavailable to limit the amount recoverable for apoplexy resulting from accident, under a certificate providing for the payment of \$5,000 in case of death, and not referring to the by-law. *International Travelers’ Ass’n v. Branum* (Civ. App.) 169 S. W. 389.

**Art. 4808a. Insurance against disability from sickness or disease; funeral benefits.**—Any corporation now existing or hereafter organized under the provisions of this chapter for the purpose of transacting the business of a mutual assessment accident insurance company shall have and is hereby vested with the authority under its corporate powers to engage in the business, on the assessment plan, as defined in this chapter, of insuring against disability resulting from sickness or disease, and to pay to the beneficiaries of its deceased members a funeral benefit which shall not exceed the sum of one hundred (\$100) dollars in event of death of any member resulting from sickness or disease. Provided, however, that in enforcing compliance with the requirements of Article 4796, applications for insurance against disability or death resulting from sickness or disease shall not be taken into consideration. [Act April 5, 1915, ch. 149, § 2.]

See note under art. 4804.

## CHAPTER SEVEN

### FRATERNAL BENEFIT SOCIETIES

Art.	Art.
4827. Fraternal benefit societies defined.	4832. Beneficiaries.
4830. Exemptions.	4832a. Religious, eleemosynary, or educational associations may be named as beneficiaries.
4831. Benefits.	4834. Certificate.
4831a. Benefits to members for death of children; branches for such purpose; scale of benefits.	4835. Funds.
4831b. Medical examination; amount of business; contributions; waiver in case of surplus.	4839. Organization.
4831c. Reserve; cancellation and exchange of certificates; rights as to new certificate.	4841. Mergers and transfers.
4831d. Separate financial statements, reports, etc.	4844. Power of attorney and service of process.
4831e. Payments to expense or general fund.	4847. Waiver of the provisions of the laws—Separate jurisdiction.
4831f. Continuation of children’s certificates on death of parent or member.	4848a. Benefit not attachable.
	4849. Constitution and laws—Amendments.
	4850. Annual reports.

**Article 4827. Fraternal benefit societies defined.**

Cited, *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.  
Laws 1901, ch. 86; 1903, ch. 113; and 1905, ch. 106, cited, *Green v. Grand United Order of Odd Fellows*, 106 Tex. 225, 163 S. W. 1071.

**Art. 4830. Exemptions.**

Cited, *Loesch v. Supreme Tribe of Ben Hur* (Civ. App.) 190 S. W. 506.

**Art. 4831. Benefits.**

**Optional benefits.**—Under the constitution of a brotherhood enumerating disabilities giving a member right of recovery on his beneficiary certificate, and providing that claim for any other disability is addressed merely to the benevolence of the brotherhood, such other claim, being rejected, gives no right of recovery. *Rieden v. Brotherhood of Railroad Trainmen* (Civ. App.) 184 S. W. 689.

**Art. 4831a. Benefits to members for death of children; branches for such purpose; scale of benefits.**—Any Fraternal Benefit Society authorized to do business in this State and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years at next birthday, for whose support and maintenance a number of such Society is responsible. Any such Society may at its option organize and operate branches for such children and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the Society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively as follows:

Between the ages of	amount	Between the ages of	amount
2 and 3	\$34	8 and 9	\$200.00
3 and 4	40	9 and 10	240.00
4 and 5	48	10 and 11	300.00
5 and 6	58	11 and 12	380.00
6 and 7	140	12 and 13	460.00
7 and 8	160	13 and 16	520.00
		16 and 18	600.00

[Act April 4, 1917, ch. 192, § 1.]

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

**Art. 4831b. Medical examination; amount of business; contributions; waiver in case of surplus.**—No benefit certificates as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the Society, nor shall any such benefits certificate be issued unless the Society shall simultaneously put in force or have in force at time of issue of said certificate at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by like certificates falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Industrial Mortality Table" or the "English Life Number Six" and a rate of interest not greater than 4 per cent per annum, or upon a higher standard; provided that contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws, and provided further that extra contributions shall be made if the reserves hereafter provided for become impaired. [Id., § 2.]

**Art. 4831c. Reserve; cancellation and exchange of certificates; rights as to new certificate.**—Any Society entering into such insurance

agreement shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions, as provided in Section 2 [Art. 4831b], and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized; provided, that a society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society, provided that such surrender will not reduce the number of lives insured in the branch below five hundred, and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contribution, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. [Id., § 3.]

**Art. 4831d. Separate financial statements, reports, etc.**—An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the Commissioner of Insurance and Banking by any Society availing itself of the provisions hereof. The separation of assets, funds and liabilities required hereby shall not be terminated, rescinded or modified, nor shall the funds be diverted for any use other than as specified in Section 3, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition of the status of the society. [Id., § 4.]

**Art. 4831e. Payments to expense or general fund.**—Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society as its constitution and by-laws may provide. [Id., § 5.]

**Art. 4831f. Continuation of childrens' certificates on death of parent or member.**—In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided, the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions. [Id., § 6.]

#### **Art. 4832. Beneficiaries.**

**Beneficiaries in general.**—Acts 26th Leg. c. 115, § 1, construed in connection with section 5, subds. 1, 23, 24, merely names the classes from which a member of a benefit society may select the beneficiary and does not require distribution to such classes in the order in which they are named, irrespective of the member's designation. *Green v. Grand United Order of Odd Fellows* (Civ. App.) 163 S. W. 1068, certified questions answered by Supreme Court, 106 Tex. 225, 163 S. W. 1071.

Acts 26th Leg. c. 115, § 1, held not to deny to member of fraternal beneficiary association the right to designate a beneficiary within the classes mentioned, especially in view of section 11, exempting such benefits from liability for the debts of "any beneficiary named in such certificate." *Green v. Grand United Order of Odd Fellows*, 106 Tex. 225, 163 S. W. 1071, answering certified questions (Civ. App.) 163 S. W. 1068.

Where defendant issued a benefit certificate insuring the life of deceased in favor of

her husband, and they were divorced, he was not a necessary or indispensable party in a suit by her children on the certificate. *United Benevolent Ass'n of Texas v. Lawson* (Civ. App.) 166 S. W. 713.

"Adopted children," as used in a law of a beneficial association authorizing the making of adopted children beneficiaries, held to include the foster mother of the insured, whom he had legally adopted as his heir. *Mellville v. Wickham* (Civ. App.) 169 S. W. 1123.

The word "children," as used in this article, held to designate the relationship and not the age of the beneficiary, and to include the foster mother of the insured, whom he adopted as his legal heir. *Id.*

Where insured adopted M. as his legal heir, she being thereby rendered competent to take under a benefit certificate in accordance with this article, an agreement that the certificate should be made payable to W., and that she on collecting it should pay the money to M., was valid and enforceable. *Id.*

Under the constitution of a fraternal insurance society, authorizing the designation of a member's legal representatives as beneficiaries, nieces and nephews will be treated as legal representatives. *Wright v. Grand Lodge K. P., Colored* (Civ. App.) 173 S. W. 270.

Under this article, nephews and nieces may be designated as beneficiaries of fraternal insurance certificates. *Id.*

Under a mutual benefit association, policy designating one as beneficiary by name, followed by the words, "bearing relationship of husband," and expressly subject to the association constitution and laws, limiting beneficiaries to husband or wife or certain relatives, a divorced husband cannot take as beneficiary. *Lawson v. United Benev. Ass'n* (Civ. App.) 185 S. W. 976.

Where a mutual benefit policy, limiting beneficiaries to husband and wife and relatives, was payable to a husband, who was later divorced, no right to recover on the policy was given him by the will of his former wife in his favor. *Id.*

A divorced husband has no insurable interest in the life of his former wife. *Id.*

In a suit on a certificate, failure to make plaintiff's father, originally named as a beneficiary, and through whom she claimed by assignment by his heirs, a party, held not error where it appeared that he was dead. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

Under this article, and constitution and by-laws of defendant, where no benefit certificate had ever been issued to deceased either before or after marriage, held, that payment of death benefits should be made to her husband, and plaintiff whom she had intended to make a beneficiary had no claim. *Carr v. Grand Lodge United Brothers of Friendship of Texas* (Civ. App.) 189 S. W. 510.

Where beneficiary under mutual benefit insurance policy died, insured's failure to name another beneficiary held not to cause amount of policy to revert to the order where insured left children surviving him. *International Brotherhood of Maintenance of Way Employés v. Duncan* (Civ. App.) 194 S. W. 956.

**Oral appointment of beneficiaries.**—Where the constitution and by-laws of defendant fraternal insurance association provide for the appointment of beneficiaries by issuance of certificate, oral statements and declarations of insured as to who would receive benefit, held not to constitute a legal designation. *Carr v. Grand Lodge United Brothers of Friendship of Texas* (Civ. App.) 189 S. W. 510.

In an action on a policy of fraternal benefit insurance, where it was undisputed that no certificate had been issued naming plaintiff beneficiary, evidence held insufficient to support a finding that plaintiff was named as beneficiary in obligation when deceased joined the lodge. *Id.*

**Change of beneficiary.**—In the absence of any statutory provision to that effect, where the father and mother of a member of a benefit society were designated as beneficiaries, his subsequent marriage did not change the beneficiary. *Green v. Grand United Order of Odd Fellows* (Civ. App.) 163 S. W. 1068, certified questions answered by Supreme Court, 106 Tex. 225, 163 S. W. 1071.

**Evidence—In general.**—Under this article, evidence that deceased, when asked by witness to pay his July assessment, said that he would not keep it up, or did not want to keep it up, held admissible against the beneficiary. *Cole v. Knights of Maccabees of the World* (Civ. App.) 188 S. W. 699.

**Art. 4832a. Religious, eleemosynary, or educational associations may be named as beneficiaries.**—That Fraternal Benefit Societies, heretofore or hereafter incorporated by the State of Texas or licensed to do business therein, shall be authorized to provide in their constitutions, by-laws or fundamental laws for the issuance of benefit Certificates to their members, wherein any association, Society or Corporation, organized and operated for Religious, eleemosynary or educational purposes may be named as beneficiary. [Act March 30, 1917, ch. 162, § 1.]

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

#### Art. 4834. Certificate.

See notes to art. 4947.

**Application.**—Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent re-



covery on the benefit certificate unless shown to be material, does not govern a certificate on a member reinstated before the act took effect. Supreme Ruling of Fraternal Mystic Circle v. Hansen (Civ. App.) 161 S. W. 54.

A by-law of a beneficial association changing rights of one becoming permanently disabled, not indicating contrary intention, does not apply to one previously a member. Smith v. Our United Brotherhood (Civ. App.) 191 S. W. 199.

Act May 1, 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 36) § 8, declaring members of beneficial associations bound by changes in by-laws after becoming members held not to apply to one, intended to apply only to those subsequently becoming members. Id.

**Construction in general.**—"Material to the risk," as used in this article, means any fact concerning the health, condition, or physical history of the applicant which would naturally have influenced the insurer in determining whether to issue the certificate. Modern Brotherhood of America v. Jordan (Civ. App.) 167 S. W. 794.

The ordinary rules governing construction of contracts would apply to construction of a contract of benefit insurance unless changed or abrogated by statute. Loesch v. Supreme Tribe of Ben Hur (Civ. App.) 190 S. W. 506.

Where questionable language arises in constitution and by-laws of insurance association, repugnancy will be construed to benefit of insured. Home Benefit Ass'n of Angelina County v. Jordan (Civ. App.) 191 S. W. 725.

**Assignment of certificate.**—Where beneficiary in a fraternal benefit policy assigned in writing all his rights under policy, the assignee was vested with both legal and equitable title, and he alone could sue. American Ins. Union v. Allen (Civ. App.) 192 S. W. 1087.

**Forfeiture of certificate of membership.**—Member of fraternal benefit association, summarily suspended by local lodge, held not to forfeit endowment right thereby, where laws of association provided procedure with notice and hearing for suspension of members. Grand Court of Texas Independent Order of Calanthe v. Johns (Civ. App.) 181 S. W. 869.

Under by-laws of a mutual benefit insurance association, held that no affirmative action or notice to assured of forfeiture on part of association was necessary to forfeit the certificate. Cole v. Knights of Maccabees of the World (Civ. App.) 188 S. W. 699.

— **Nonpayment of dues or assessments.**—A provision in the by-laws of a lodge that, on a member's failure to pay his dues, the lodge "shall suspend him," rendered him subject to suspension, but did not, on his failure to pay, ipso facto suspend him, without any action of the lodge. Grand Lodge, F. & A. M. of Texas, v. Dillard (Civ. App.) 162 S. W. 1173.

On forfeiture of a benefit certificate for default in payment of an assessment and suspension of members, held that beneficiaries could not recover where the member died during such suspension. Tabor v. Modern Woodmen of America (Civ. App.) 163 S. W. 324.

Benefit certificate held forfeited by default in payment of assessment, and that legal representatives of deceased were not allowed 60 days after such forfeiture to reinstate the policy by payment of such assessment after deceased's death. Id.

Where a member at large of a fraternal order paid dues and assessments to a third person, who remitted them to the supreme officers, who received them without objections, and the officers did not instruct the member not to make payments to such person, and the member continued to do so until her death, and such person did not remit them all, a recovery on the certificate could not be defeated on the ground that dues and assessments had not been paid. Supreme Hive of Ladies of Maccabees of the World v. Owens (Civ. App.) 167 S. W. 233.

Beneficiary of member in fraternal association held entitled to funeral benefits, notwithstanding the member was in arrears to the general society, and also in arrears in payment of dues to the local society. Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve (Civ. App.) 171 S. W. 489.

Under this article, a death benefit cannot be recovered where the member was in default in his assessments, and the certificate provided that no benefit could be recovered in such event. Id.

Collecting officer in arrears to local lodge of mutual benefit society held not to forfeit policy under his obligation to not knowingly wrong or defraud the lodge. Knights of the Maccabees of the World v. Parsons (Civ. App.) 179 S. W. 78, judgment reversed (Sup.) 182 S. W. 672.

Member of fraternal association having until January 30th to pay endowment dues, and who died on February 29th without paying, held not in arrears under provision forfeiting endowment right for being in arrears one month. Grand Court of Texas Independent Order of Calanthe v. Johns (Civ. App.) 181 S. W. 869.

Where benefit association's laws provided forfeiture of funeral benefits of member in arrears for different assessments to amount of three months' dues, held, that forfeiture thereunder could be only for arrears in all such assessments for three months. Id.

In an action on a benefit policy, where a by-law provided that a member failing to pay his monthly rate within the month, shall be suspended without notice, held that obscurity in other by-laws pleaded would have no bearing upon issue of failure to pay monthly rate. Cole v. Knights of Maccabees of the World (Civ. App.) 188 S. W. 699.

Where constitution of mutual benefit association, which levied assessments only upon death of members, required secretary to notify by postal card all members liable, and insured failed to receive postal card mailed by secretary, notifying him of an assessment, such failure excused his failure to pay the assessment. Home Benefit Ass'n of Angelina County v. Jordan (Civ. App.) 191 S. W. 725.

— **False statements in application or examination.**—An application for reinstatement in a fraternal mutual benefit association held a warranty that the member had had none of the diseases mentioned in the original application after the certificate was issued. *Supreme Ruling of Fraternal Mystic Circle v. Hensen (Civ. App.) 161 S. W. 54.*

False statements that one had never had dysentery or any disease of the genital organs or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) c. 36. *Id.*

In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership in a fraternal mutual benefit association which has issued a benefit certificate on his life, that he has not had certain diseases, the breach works a forfeiture of the contract. *Id.*

Where it appeared that insured had only been given electric treatments for a stiff back, a denial that he had been treated by a physician for any disease within five years held not a representation material to the risk within this article. *National Council of the Knights and Ladies of Security v. Sealey (Civ. App.) 162 S. W. 455.*

Proof that decedent had been attended by a physician at a natural childbirth held not to show that her negative answer to a question, "Have you consulted or been attended by a physician during the past five years?" was false. *Ladies of Maccabees of the World v. Kendrick (Civ. App.) 165 S. W. 110.*

A negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental disease?" was not made false by proof that insured had been operated on by a physician by surgical instruments at her home. *Id.*

A comma will not be supplied by construction after the word "performed" in order to make false a negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital \* \* \* or any public or private institution for the treatment of \* \* \* disease?" where the proof showed that insured had been operated on at her home. *Id.*

False statements by the applicant for mutual benefit insurance as to the condition of her health held, under the provisions of the application and certificate, to have been warranties and to preclude recovery by the beneficiary. *The Homesteaders v. Briggs (Civ. App.) 166 S. W. 95.*

The act of a medical examiner in writing false answers in the application for a policy to be issued by a fraternal insurer held not to estop the insurer from relying on the falsity of such representation to avoid the insurance. *Sovereign Camp Woodmen of the World v. Lillard (Civ. App.) 174 S. W. 619.*

Where the application to a fraternal insurer contained a provision whereby the applicant warranted that all representations were true, false representations as to his use of intoxicants and previous medical history will avoid the certificate, where they were such that it would not have been issued had the truth been told. *Id.*

It is the duty of one applying for a policy, to be issued by a fraternal insurer, to read over the answers written in the application before signing, and, in case of failure to read over such application, the applicant is bound by the answers as written. *Id.*

As statements of family history in an application for fraternal insurance cannot be held to be warranties, such statements, when believed to be true, would not necessarily vitiate a certificate, warranting truth of applicant's answers. *Loesch v. Supreme Tribe of Ben Hur (Civ. App.) 190 S. W. 506.*

In view of the provisions of constitution of defendant fraternal society, held that warranties in relation to family history in application for certificate were intended to protect society only against misrepresentations of facts material to risk. *Id.*

That an applicant for a certificate of benefit insurance stated in application that she had one sister dead would put on notice as to cause of deceased sister's death. *Id.*

Application for fraternal insurance showing applicant's age to be under 45 years would be binding on beneficiary as representation of material fact. *Collins v. United Brothers of Friendship and Sisters of the Mysterious Ten (Civ. App.) 192 S. W. 800.*

— **Waiver.**—A mutual benefit insurance association by receiving money on dues and assessments, subsequent to their due date, waived the forfeiture clause of the policy. *International Brotherhood of Maintenance of Way Employés v. Duncan (Civ. App.) 194 S. W. 956.*

— **Evidence.**—Evidence held not to show that a false statement made by insured in her application that she had never had malaria was material to the risk. *Modern Brotherhood of America v. Jordan (Civ. App.) 167 S. W. 794.*

Evidence held to warrant a conclusion that insured by his intemperate habits was not a proper subject for relief in the matter of carrying sick or indigent members, and, in view of art. 4847, to justify a refusal to render judgment for him, notwithstanding the findings of a local custom to carry sick and indigent members. *Bennett v. Sovereign Camp, Woodmen of the World (Civ. App.) 168 S. W. 1023.*

In an action on a certificate of benefit insurance, evidence held insufficient to show that it was not family history that insured's mother died of typhoid fever, that applicant willfully concealed knowledge of death of sister, or to establish suicidal death of sister, or to show that real facts, as disclosed by evidence would have been material or affected risk. *Loesch v. Supreme Tribe of Ben Hur (Civ. App.) 190 S. W. 506.*

In action on life policy, evidence held to sustain finding that insured was in good health at time of making his application for insurance. *Brotherhood of American Yeomen v. Hickey (Civ. App.) 191 S. W. 162.*

In action on policy of fraternal insurance by beneficiary named, evidence held insufficient to support a jury finding that insured had falsely represented her age to be less

than 45 years. *Collins v. United Brothers of Friendship & Sisters of the Mysterious Ten* (Civ. App.) 192 S. W. 800.

In action on policy of fraternal benefit insurance by beneficiary named, in which defendant alleged that insured committed suicide, evidence held insufficient to sustain a verdict for plaintiff for amount of policy. *Knights of Maccabees of the World v. Hair* (Civ. App.) 192 S. W. 801.

In an action on a fraternal benefit certificate, evidence held to sustain a jury finding that insured did not commit suicide by drinking carbohc acid. *Sovereign Camp of Woodmen of the World v. McCulloch* (Civ. App.) 192 S. W. 1154.

**Reinstatement.**—Where a mutual benefit certificate or the by-laws of the association do not require the insured to be in good health as a condition to reinstatement upon the payment of arrears, it is not necessary that he be in good health in order to be so reinstated. *Mutual Life Ins. Ass'n of Donley County v. Rhoderick* (Civ. App.) 164 S. W. 1067.

Where the by-laws of a mutual benefit association required the payment of dues for reinstatement after suspension to be accompanied by a certificate that the insured was in good health, a tender not accompanied by such certificate does not entitle a member to reinstatement. *Sovereign Camp Woodmen of the World v. Wagnon* (Civ. App.) 164 S. W. 1082.

It is a contractual right of a member of a mutual benefit association to reinstatement on compliance with the laws of the order as to reinstatements. *Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy* (Civ. App.) 188 S. W. 447.

Under provisions of endowment policy issued by fraternal order, where insured was suspended, reinstated, and died within 12 months thereafter, held he was to be classed as a new member, and beneficiary was entitled to recover only \$300. *Grand Lodge, Colored Knights of Pythias, v. Horace* (Civ. App.) 191 S. W. 398.

**Questions for jury.**—See notes under art. 1971.

**Verdict and findings.**—See notes under art. 1895.

### Art. 4835. Funds.

**Payment of assessments, premiums, and dues.**—Evidence, in an action upon a fraternal beneficiary certificate, held sufficient to sustain a finding that notices of certain assessments were not mailed at such a time as to justify a forfeiture prior to the time insured actually tendered such assessments, three days before her death. *State Division, Lone Star Ins. Union, v. Blassengame* (Civ. App.) 162 S. W. 6.

Where the holder of certain certificates in a benefit society changed them for a single certificate in another class, and to do so agreed to surrender all his right, title, and interest therein, he was only entitled to recover, after he had become uninsurable, for defendant's breach of the contract assessments and interest paid subsequent to the change. *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835.

That a mutual benefit certificate holder pays illegal assessments does not estop him or his beneficiary from questioning the legality of subsequent similar assessments. *Id.*

Deposit of total amount of assessments collected by officer of mutual benefit society without retention of commission held to be payment of assessments due on his own policies. *Knights of the Maccabees of the World v. Parsons* (Civ. App.) 179 S. W. 78, judgment reversed (Sup.) 182 S. W. 672.

— **Evidence of payment.**—In an action on a policy, defended on the ground of default in the payment of dues, evidence held to show that the plaintiff was depending on a local officer to pay the dues, and not upon the custom to send written notices of dues. *Bennett v. Sovereign Camp, Woodmen of the World* (Civ. App.) 168 S. W. 1023.

In an action upon a policy of an order whose constitution fixed the amount each member should pay monthly, held, on findings, that the assessment claimed to be due was unpaid, etc., that the court, in the absence of evidence to the contrary, might assume that there was an assessment due at the death of insured. *Id.*

Evidence held to warrant a finding by the court, notwithstanding a finding of the jury, that the local camp never in effect undertook to carry insured, but that that was done in his behalf as a private undertaking of the local officer. *Id.*

**Recovery of premiums paid.**—Voluntary payments of premiums by one not a beneficiary cannot be recovered. *Lawson v. United Benev. Ass'n* (Civ. App.) 185 S. W. 976.

### Art. 4839. Organization.

**Constitution, by-laws, and rules.**—Limitations as to losses in the constitution and by-laws of an accident fraternity held to control the description of injuries for which losses were payable. *Eminent Household of Columbian Woodmen v. Hancock* (Civ. App.) 174 S. W. 657.

A by-law of a fraternal beneficiary society declaring that a member's disappearance should be no evidence of his death, and that the by-law should be construed as a waiver of any statute, etc., thereon, held invalid, as a stipulation as to the admission of evidence ousting the court of its jurisdiction. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.

A by-law of a fraternal beneficiary association, to be valid, must be reasonable. *Id.* Mutual benefit association's by-laws, levying assessment by letters written by members of committee held illegal and assessments nonenforceable. *International Brotherhood of Maintenance of Way Employés v. Duncan* (Civ. App.) 194 S. W. 956.

— **Change of rates.**—Under the constitution of a fraternal benefit association, providing that if the assessment provided for is inadequate, then "further assessment"

should be made as might be necessary to fully meet the benefits due, the association may require payment of such increased rate of assessment as might be necessary to meet the benefits due, as by requiring an increased rate payable per month by each member. *Supreme Lodge of Fraternal Union of America v. Ray* (Civ. App.) 166 S. W. 46.

Right of mutual benefit society to amend its constitution and by-laws at will and the obligation of a certificate holder to pay monthly assessments as levied held not to authorize it to change the terms of a member's insurance contract by an increase in the assessment rate. *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835.

#### Art. 4841. Mergers and transfers.

**Liability of consolidated association in general.**—Defendant mutual benefit society, having absorbed the membership and entire insurance business of a prior corporation and of an unincorporated society which succeeded it, held answerable for a breach of certificates issued by such prior corporation and society. *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835.

A beneficial association with which another consolidated held liable for benefits to a member of the other. *Smith v. Our United Brotherhood* (Civ. App.) 191 S. W. 199.

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

Cited, *Southern Benev. League v. English* (Civ. App.) 174 S. W. 659.

**Service in general.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4844, service of process on a fraternal benefit society, whether incorporated or not, can be made only by serving the insurance commissioner. *International Order of Twelve, Knights and Daughters of Tabor, v. Brown* (Civ. App.) 190 S. W. 251.

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

**Estoppel or waiver affecting right of forfeiture.**—Under this article, prohibiting waiver of the constitution or laws of a fraternal beneficiary association by a subordinate body, an agreement by the clerk not authorized by the by-laws to pay the assessments of a member is no defense to his suspension. *Sovereign Camp Woodmen of the World v. Wagnon* (Civ. App.) 164 S. W. 1082.

Where the by-laws of a mutual benefit association required it to pay the dues of a member who was insane and financially unable to pay his dues, but provided that such payments should not be made if the member was in arrears more than three months, the association was not required to pay the dues, where no proof of the insanity of a member was offered until six months after his suspension for nonpayment and more than three months after his death. *Id.*

The failure of the collecting officer of the insurer to comply with a custom of sending out notices not required by the policy held available as excuse for the nonpayment of fixed dues only as ground for an estoppel, and that, unless a member in default or the one assuming to pay his assessments relied on a continuance of the custom, and was misled by failure to receive such notice, there was no estoppel. *Bennett v. Sovereign Camp, Woodmen of the World* (Civ. App.) 168 S. W. 1023.

Evidence held to warrant a conclusion that insured by his intemperate habits was not a proper subject for relief in the matter of carrying sick or indigent members, and, in view of this article, to justify a refusal to render judgment for him, notwithstanding the findings of a local custom to carry sick and indigent members. *Id.*

Acceptance by insurer's agent of the arrearages after the member's death held to have no retroactive effect to revive a forfeited policy. *Id.*

In an action on a policy providing for fixed assessments, and that defaulted payments should suspend the member and avoid the policy, held, that findings that there was a custom of the order generally to carry sick and indigent members, and that such custom prevailed in the local camp, did not, as a matter of law, require a judgment for the plaintiff. *Id.*

Under this article, the association cannot be estopped by the conduct of a local body. *Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve* (Civ. App.) 171 S. W. 489.

Benefit society, by failing to suspend member who disappeared, and continuing to accept dues and assessments, held to have waived its right to suspend him pursuant to its laws, and estopped from asserting a suspension. *Supreme Ruling of Fraternal Mystic Circle v. Hoskins* (Civ. App.) 171 S. W. 812.

Whether the local agent of an insurance company was authorized to waive the forfeiture provisions of the policy is immaterial, where the jury found that the general manager waived such conditions. *Lone Star Ins. Union v. Brannan* (Civ. App.) 184 S. W. 691.

Where the policy or benefit certificate provides for termination on failure to pay premiums or dues, without affirmative act of the insurer, conduct of the insurer misleading the insured to his expense or harm may estop the insurer from asserting forfeiture. *Id.*

Evidence held to make a strong case against the insurer of estoppel to plead forfeiture on account of acts of its general manager, though conditions of the policy as to forfeiture may have been self-executing. *Id.*

An association is not estopped to deny the rights of a divorced husband as beneficiary on his wife's policy by the fact that it accepted payments of premiums thereon from him after divorce, or that it paid him, after her death, a funeral benefit. *Lawson v. United Benev. Ass'n* (Civ. App.) 185 S. W. 976.

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

See *Green v. Grand United Order of Odd Fellows*, 106 Tex. 225, 163 S. W. 1071, answering certified questions (Civ. App.) 163 S. W. 1068; notes under art. 4832.

**Not exempt from administration.**—Fund due under policy of insurance to one of joint beneficiaries who survived the insured held not exempt from administration under this article, at the death of a deceased beneficiary. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

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

**Change of rules of evidence.**—No person has a vested right in the rules of evidence, which may be changed by the state, if its action relates only to evidence, without violating the contract clause of the Constitution. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.

**Art. 4850. Annual reports.**

See *Green v. Grand United Order of Odd Fellows* (Civ. App.) 163 S. W. 1068, certified questions answered by Supreme Court, 106 Tex. 225, 163 S. W. 1071; notes under art. 4832.

## DECISIONS RELATING TO SUBJECT

**Agents of association.**—While camp officers in the Woodmen of the World are agents of the Sovereign Camp for certain purposes, they cannot bind the camp in dealing with local members by acting merely within the apparent scope of their authority; that rule having no application where the member knows, or is presumed to know, the extent of the agent's powers. *Bennett v. Sovereign Camp, Woodmen of the World* (Civ. App.) 168 S. W. 1023.

In a mutual benefit association, such as the Woodmen of the World, in which the powers of the Sovereign Camp officers are prescribed by the constitution, accessible to any member, and a part of every insurance contract, a member will be presumed to know them, and in his dealings with the general officers must take cognizance of the limitations placed upon their powers. *Id.*

The officers of a local lodge of a fraternal beneficial insurance association are, when in the discharge of their duties, agents of the order, and it is liable to a member negligently injured by the officers of a local lodge when initiating him. *Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve v. Johnson* (Civ. App.) 171 S. W. 490.

A private physician who, in the absence of the regular examiner, examined the applicant for a policy to be issued by a fraternal insurer, is not the agent of the insurer, where he was procured by a friend of the applicant. *Sovereign Camp Woodmen of the World v. Lillard* (Civ. App.) 174 S. W. 619.

**Contingency upon which benefits become payable.**—"Loss of one arm" in an insurance policy covered total disability of an arm by an injury causing paralysis. *Eminent Household of Columbian Woodmen v. Hancock* (Civ. App.) 174 S. W. 657.

— **Evidence.**—A finding that a member of a fraternal insurance association died before a designated date held authorized by the evidence. *Supreme Lodge of Pathfinder v. Johnson* (Civ. App.) 168 S. W. 1010.

In an action on a beneficiary certificate providing that there should be no recovery if insured died in consequence of violation or attempted violation of law, evidence held to warrant judgment against the insurer not showing that insured so met his death. *Sovereign Camp of Woodmen of the World v. Bailey* (Civ. App.) 183 S. W. 107.

**Proof of death.**—It is not necessary that the evidence conclusively show the death of assured. *Knights of the Maccabees of the World v. Parsons* (Civ. App.) 179 S. W. 78, judgment reversed (Sup.) 182 S. W. 672.

Evidence in an action on mutual benefit certificates, held to authorize a finding that assured was dead. *Id.*

## CHAPTER EIGHT

## FIRE AND MARINE INSURANCE COMPANIES

Art.

4870. Shall file bond.

4871. May deposit securities in lieu of bond.

4874. Policy shall be considered a liquidated demand.

Art.

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

4874b. Provisions not affected.

**Article 4870. Shall file bond.**

**Bond—Form and sufficiency.**—A bond given by a foreign insurance company in strict compliance with this article, being limited by article 4871 to obligations arising out of contracts of insurance, was a valid statutory bond, though it did not contain such limitation in express terms. *Ross v. Southern Surety Co.* (Civ. App.) 169 S. W. 1056.

— **Right of action on.**—A judgment against a foreign insurance company on a contract of agency, and not on a contract of insurance, gives no right of action on a bond given pursuant to arts. 4870 and 4871. *Ross v. Southern Surety Co.* (Civ. App.) 169 S. W. 1056.

**Art. 4871. May deposit securities in lieu of bond.**

See notes under art. 4870.

**Art. 4874. [3089] Policy shall be considered a liquidated demand.**

**Real or personal property.**—A dwelling held not "personal property" within the proviso to this article, as to valued policy, though insured sells the land under it. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731.

**Total loss.**—The provision that the sum for which the insurer was liable should be payable 60 days after the receipt of proof of loss held not to apply, where there was a total loss and a denial of liability, and the action could be brought without waiting 60 days. *Northern Assur. Co., Limited, of London v. Morrison* (Civ. App.) 162 S. W. 411.

**Liquidated demand.**—Under articles 4874, 4948, policy for \$4,000 held a liquidated demand for that amount, where there was a total loss, though property was not worth such amount, where the insurance was induced by no representation by insured. *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20.

**Measure of recovery.**—Under this article, where insured building was totally destroyed, interest held recoverable from the date of the fire. *Camden Fire Ins. Ass'n v. Bomar* (Civ. App.) 176 S. W. 156.

In action on indemnity policy against loss of stock dividends by fire, judgment for plaintiff deducting his proportion of accrued earnings from the whole earnings, less expenses from face of policy, held proper. *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

**Notice or proof of loss.**—Under this article, where property insured is totally destroyed by fire, the liability of the insurance company accrues immediately after the occurrence of the fire, regardless of stipulations as to notice and proof of loss. *Fire Ass'n of Philadelphia v. Richards* (Civ. App.) 179 S. W. 926; *St. Paul Fire & Marine Ins. Co. v. Laster* (Civ. App.) 187 S. W. 969.

**Burden of proof.**—Under articles 4874, 4962, agent sued on policy written by him in unauthorized company held to have the burden of negating the loss asserted. *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20.

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

**Constitutionality.**—This article and art. 4874b are not violative of the constitutional provision that, "no \* \* \* bill shall contain more than one subject, which shall be expressed in its title." *McPherson v. Camden Fire Ins. Co.* (Civ. App.) 185 S. W. 1055; *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833; *Providence Washington Ins. Co. v. Levy & Rosen* (Civ. App.) 189 S. W. 1035. And this is true as to the act when construed to render inoperative as a "technical" provision a provision forfeiting the policy for taking out additional insurance. *Ætna Ins. Co. v. Waco Co.* (Civ. App.) 189 S. W. 315.

This article and art. 4874b, held constitutional. *McPherson v. Camden Fire Ins. Co.* (Civ. App.) 185 S. W. 1055; *Ætna Ins. Co. v. Waco Co.* (Civ. App.) 189 S. W. 315; *Providence Washington Ins. Co. v. Levy & Rosen* (Civ. App.) 189 S. W. 1035.

The act does not violate the Constitution of Texas and of the United States by depriving an insurance company of the right of contract. *Ætna Ins. Co. v. Waco Co.* (Civ. App.) 189 S. W. 315.

**Application.**—*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4874a, 4874b, providing that no breach by insured of any provision of any fire insurance policy upon personalty shall avoid it unless it contributed to cause the loss, has no application to permit insured, who has broken the stipulation of his policy, insuring his stock of goods, that he should keep books, etc., in an iron fireproof safe, to recover on the policy, although the failure to keep the books did not contribute to bring about the destruction of the property. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833.

*Vernon's Sayles' Ann. Civ. St. 1914*, art. 4874a, refers to warranties to be performed before the fire, and does not apply to a warranty requiring the production of books and accounts after the fire, breach of which could not contribute to, or occur until after, the loss. *McPherson v. Camden Fire Ins. Co.* (Civ. App.) 185 S. W. 1055.

The breach of a provision of a fire insurance policy, requiring the insured to take an annual inventory and to keep a complete record of his business, bars a recovery; the provisions of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4874a, providing that recovery shall not be defeated by breach of provisions which did not contribute to the loss or destruction of the insured property, not being applicable. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 188 S. W. 25.

**Effect of breach in general.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4874a, 4874b, providing that no breach by the insured of any fire insurance policy on personalty shall avoid it unless contributing to cause the loss, the keeping of gasoline in contravention of the policy on a stock of goods did not avoid it, where the breach did not contribute to bring about the loss. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833,

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4874a, and section 3, insurer of personalty destroyed by fire held unable to escape liability for failure of insured to comply with provision of policy that he would furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss; there being no question as to the good faith of insured. *Springfield Fire & Marine Ins. Co. v. Nelms* (Civ. App.) 184 S. W. 1094.

The breach of mere technical or immaterial provisions in an insurance policy which does not contribute to the loss will not defeat or forfeit a right under the policy. *McPherson v. Camden Fire Ins. Co.* (Civ. App.) 185 S. W. 1055.

#### Art. 4874b. Provisions not affected.

See notes under art. 4874a.

## CHAPTER NINE

### STATE INSURANCE COMMISSION

Art.	Art.
4876. Companies deemed to have accepted provisions of law.	4882. Powers of fire marshal.
4878. Compensation; expenses; payment; maximum expenditure.	4891. Commission to establish uniform policies, etc.
4879. Insurance commission to fix rates; expenses; fire statistics.	4893. Co-insurance clauses.
4880. Secretary and fire marshal.	4897. Unlawful to accept rebate.
4881. Duties of fire marshal.	4903. Gross premiums tax; limitation on amount.

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

**Right to assall constitutionality.**—A foreign insurance company cannot assail the constitutionality of this article, since by the terms thereof it is deemed to have consented to its provisions. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 663.

**Art. 4878. Compensation; expenses; payment; maximum expenditure.**—The members of the commission other than the Commissioner of Insurance and Banking, shall each receive as compensation for their services the sum of thirty-six hundred dollars (\$3,600.00) per annum; and the Commissioner of Insurance and Banking shall receive as compensation or salary for his services under this Act, the sum of fixe hundred dollars (\$500.00) per annum, in addition to his compensation as now fixed by law. Such salary of the two appointed members of said commission and the said five hundred dollars (\$500.00) salary of the Commissioner of Insurance and Banking, together with the necessary compensation of experts, clerical force, and other persons employed by said Commission, and all necessary traveling expenses, and such other expenses as may be necessary, incurred in carrying out the provisions of this Act, shall be paid by warrants drawn by the Comptroller upon the State Treasurer upon the order of said Commission; provided, that the total amount of all salaries and said other expenses shall not exceed the sum produced by the assessment of one and one-fourth (1- $\frac{1}{4}$ ) per cent of the gross premiums of all fire insurance companies doing business in this State as provided in Section 29 of said Act [Art. 4903]. [Acts 1913, p. 195, § 5; Act March 10, 1917, ch. 73, § 1.]

**Explanatory.**—The act amends sec. 5 of ch. 106, general laws, regular session, 33rd Leg. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 4879. Insurance commission to fix rates; expenses; fire statistics.**—The State Fire Insurance Commission shall have the sole and exclusive power and authority and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. As soon as practicable after this Act shall take effect, the State Fire Insurance Commission shall begin the work of fixing and determining and

promulgating the rates of premiums to be charged and collected by fire insurance companies throughout the State, and the making and adoption of its schedules of such rates, and then until such time as this work shall have been fully completed, said Commission shall have full power and authority to adopt and continue in force the rates of premiums which may be lawfully charged and collected when this Act shall take effect, or any portion thereof, for such time as it may prescribe, or until the work of making such schedules for the entire State shall be completed. Said Commission shall also have authority to alter or amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said Commission shall have authority to employ clerical help, inspectors, experts and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this Act; provided that such expenses, including the salaries of the members of the Commission, shall not exceed in the aggregate, for any fiscal year, the sum of one hundred and thirty thousand dollars (\$130,000.00).

It shall be the duty of said Commission to ascertain as soon as practicable, the annual fire loss in this State; to obtain, to make and maintain a record thereof and collect such data and information with respect thereto as will enable said Commission to classify the fire losses of this State, the causes thereof, and the amount of premiums collected therefor for each class of risks and the amount paid thereon, in such manner as will be of assistance in determining equitable insurance rates, methods of reducing such fire losses and reducing the insurance rates of the State, or sub-divisions of the State. [Acts 1913, p. 195, § 6; Act March 10, 1917, ch. 73, § 2.]

**Explanatory.**—The act amends sec. 6, ch. 106, general laws, regular session, 33rd Legislature. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 4880. Secretary and fire marshal.**

Duties of State Forester, see arts. 2676d-2676i.

**Art. 4881. Duties of fire marshal.**—It shall be the duty of the Fire Marshal of the State Fire Insurance Commission, who, for the purpose of this Act, shall be referred to as the State Fire Marshal, at the discretion of the board, and upon the request of the mayor of any city or village, or the chief of a fire department of any city or village, or any fire marshal where a fire occurs within such city or village, or of a county or a district judge, or of a sheriff or county attorney of any county where a fire occurs within the district or county of the officers making such request, or of any fire insurance company, or its general, state or special agent, interested in a loss, or of a policy holder sustaining a loss, or upon the direction of the State Fire Insurance Commission to forthwith investigate at the place of such fire before loss can be paid, the origin, cause and circumstances of any fire occurring within this State, whereby property has been destroyed or damaged, and shall ascertain if possible whether the same was the result of any accident, carelessness or design, and shall make a written report thereof to the State Insurance Commission. The State Fire Marshal shall have the power to administer oaths, take testimony, compel the attendance of witnesses and the production of documents. When, in his opinion, further investigation is necessary, he shall take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts, or to have knowledge in relation to the matter under investigation, and shall cause the same to be reduced to writing, and if he shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson, or with the attempt



to commit arson, or of conspiracy to defraud or criminal conduct in connection with such, he shall arrest or cause to be arrested such person, and shall furnish to the proper prosecuting attorney all evidence secured, together with the names of witnesses and all information obtained by him, including a copy of all pertinent and material testimony taken in the case, and it shall be the duty of the State Fire Marshal to assist in the prosecution of all such complaints filed by him. Provided, that all investigations held by or under the direction of the State Fire Marshal may, in his discretion, be private and persons other than required to be present may be excluded from the place where such investigation is held, and the witnesses may be kept separate and apart from each other and not allowed to communicate with such others until they have been examined; and all testimony taken in an investigation under the provisions of this Act may, at the election of the State Fire Marshal, be withheld from the public. [Acts 1913, p. 195, § 8; Act March 10, 1917, ch. 73, § 3.]

**Explanatory.**—The act amends sec. 8, ch. 106, general laws, regular session, 33rd Legislature. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 4882. Powers of fire marshal.**—The State Fire Marshal is hereby authorized to enter at any time any buildings or premises where fire occurred or is in progress, or any place contiguous thereto, for the purpose of investigating the cause, origin and circumstances of such fire. The State Fire Marshal, upon complaint of any person, shall, at all reasonable hours, for the purpose of examination, enter into and upon all buildings and premises within this State, and it shall be his duty to enter upon and make or cause to be entered upon or made, at any time, a thorough examination of mercantile, manufacturing and public buildings, and all places of public amusement, or where public gatherings are held, together with the premises belonging thereto. Whenever he shall find any building or other structure which, for want of repair or by reason of age or dilapidated condition, or which for any cause is liable to fire, and which is so situated as to endanger other buildings or property, or is so occupied that fire would endanger persons or property therein, and whenever he shall find an improper or dangerous arrangement of stoves, ranges, furnaces or other heating appliances of any kind whatsoever, including chimneys, flues and pipes with which the same may be connected, or dangerous arrangement of lighting systems or devices, or a dangerous storage of explosives, compounds, petroleum, gasoline, kerosene, dangerous chemicals, vegetable products, ashes, combustible, inflammable and refuse materials, or other conditions which may be dangerous in character, or liable to cause or promote fire, or create conditions dangerous to firemen or occupants, he shall order the same to be removed or remedied, and such order shall be forthwith complied with by the occupant or owner of such building or premises, and the State Fire Marshal is hereby authorized, when necessary, to apply to a court of competent jurisdiction for the necessary writs or orders to enforce the provisions of this Section, and in such case he shall not be required to give bond. [Acts 1913, p. 195, § 9; Act March 10, 1917, ch. 73, § 4.]

**Explanatory.**—The act amends sec. 9, ch. 106, general laws, regular session, 33rd Legislature. Took effect 90 days after March 21, 1917, date of adjournment.

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

Cited, *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334.

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

**Validity in general.**—Under Act Sept. 6, 1910 (Acts 31st Leg., 4th called Sess., c. 8) § 18, concurrent policy of fire insurance with a stipulation prohibiting an insurance in

excess of \$15,000, which was the policy contracted for, could not support assured's recovery, though they had carried excess insurance, on the theory that it was a coinsurance policy, in view of the classification of the property by the state insurance board. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 180 S. W. 668, denying rehearing 178 S. W. 966.

Under *Vernon's Sayles'* Ann. Civ. St. 1914, art. 4893, provision in policy covering piano that insurer should not be liable for more than three-fourths of its cash value at time of loss, so making insured a coinsurer, held void. *Fireman's Ins. Co. v. Jesse French Piano & Organ Co.* (Civ. App.) 187 S. W. 691.

**Amount of recovery.**—Under Acts 31st Leg. (4th Called Sess.) c. 8, § 18, insured, under policy containing an 80 per cent. coinsurance clause, held entitled to that per cent. of the policy, less the amount of his premium note, expense of adjustment, etc., with interest. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

#### Art. 4897. Unlawful to accept rebate.

Cited, *Myers v. Colquitt* (Civ. App.) 173 S. W. 993.

**Rebate—Recovery of premiums.**—Plaintiff entering into an insurance contract where-by he was to receive the benefits of a rebate offered in violation of *Vernon's Sayles'* Ann. Civ. St. 1914, arts. 4897, 4954, while the contract was executory, might recover the premiums paid thereunder. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

**Art. 4903. Gross premiums tax; limitation on amount.**—That there shall be assessed and collected by the State of Texas an additional one and one-fourth (1¼) per cent of the gross fire insurance premiums of all fire insurance companies doing business in this State, according to the reports made to the Commissioner of Insurance and Banking as required by law; and said taxes when collected shall be placed in a separate fund with the State Treasurer to be expended during the current year in carrying out the provisions of this Act; provided that such expenditures, including the salaries of the members of the Commission, shall not exceed in the aggregate the sum of one hundred and thirty thousand (\$130,000.00) dollars per annum; and should there be an unexpended balance at the end of any year, the State Fire Insurance Commission shall reduce the assessment for the succeeding year so that the amount produced and paid into the State Treasury, together with said unexpended balance in the Treasury, will not exceed the amount appropriated for the current year, to pay all necessary expenses of maintaining the Commission, which funds shall be paid out upon requisition made out and filed by a majority of the Commission, when the Comptroller shall issue warrants therefor. [Acts 1913, p. 195, § 29; Act March 10, 1917, ch. 73, § 5.]

**Explanatory.**—The act amends sec. 29, ch. 106, general laws, regular session, 33rd Legislature. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER TEN

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

Art.	Art.
4905. Incorporation; for what purposes.	4907a. Supervision of commissioner of insurance and banking, etc.
4906. Application for permit; contents of application, etc.	4908-4913. [Repealed.]
4907. Conditions, etc., for obtaining charter, etc.	

#### Article 4905. Incorporation; for what purposes.

Cited, *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

#### Art. 4906. Application for permit; contents of application, etc.

Cited, *Oglesby v. Durr* (Civ. App.) 173 S. W. 275; *Myers v. Colquitt* (Civ. App.) 173 S. W. 993.

#### Art. 4907. Conditions, etc., for obtaining charter, etc.

Cited, *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

**Art. 4907a. Supervision of commissioner of insurance and banking, etc.**

**Cancellation of permit—Effect.**—A mutual fire, storm, and lightning insurance company, whose permit to do business has been canceled by the commissioner of insurance, has ceased to be a going concern. *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

**Arts. 4908–4918.**—Repealed. See Art. 4907p. *Vernon's Sayles' Civ. St. 1914.*

**Garnishment.**—See notes under art. 271.

Under arts. 4909, 4910, the funds deposited with the treasurer by an insurance company, which has become insolvent and ceased to be a going concern, cannot be garnished by a judgment creditor. *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

Art. 4910, when construed with other sections of the same act, authorizes garnishment only when the corporation is a solvent going concern. *Id.*

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## CHAPTER TWELVE

### MUTUAL COMPANIES INSURING AGAINST LOSS BY BURGLARY, ETC.

**Article 4922. What companies entitled to license.**

Cited, *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

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## CHAPTER THIRTEEN

### FIDELITY, GUARANTY AND SURETY COMPANIES

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

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

**Contracts of indemnity.**—A corporation organized under this article, and authorized to guarantee contracts, has no authority to enter into contracts of indemnity. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (Civ. App.) 184 S. W. 238.

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## CHAPTER FOURTEEN A

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

Art.  
4942a. May be incorporated for what purposes.

Art.  
4942c. Commissioner of insurance and banking to submit, etc.

**Article 4942a. May be incorporated for what purposes.**

**Contract to indemnify employé.**—Transportation corporation cannot contract as insurance company to indemnify employé for the amount spent by him for hospital accommodations, medical treatment, etc., because the statute expressly authorizes insurance corporations to so contract. *Gulf, C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

**Art. 4942c. Commissioner of insurance and banking to submit, etc.**

Cited, *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

## CHAPTER FIFTEEN

## GENERAL PROVISIONS

Art.	Art.
4947. Misrepresentation must be material to avoid contract.	transact one or more kinds of insurance business.
4948. No defense based upon misrepresentation valid, unless.	4957. Chapter not to apply to fraternal beneficiary associations.
4949. Shall not constitute defense unless shown.	4959. Policy shall not be defeated.
4951. Policies of insurance to be accompanied by copies of questions, etc.	4960. Insurance shall be unlawful unless authorized by commissioner of insurance.
4953. Policies shall contain entire contract.	4961. Who are agents.
4954. Companies shall not discriminate.	4962. Taxes to be assessed against, when.
4955. Shall apply to all companies.	4972. Foreign corporations held to accept provisions of this title.
4956. Corporations may be incorporated to	

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

**Construction in general.**—Articles 4741, 4947, 4948, 4951, 4954, held to apply to surety or fidelity bonds. *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

Articles 4741, 4959, apply to contracts of life insurance, despite articles 4951, 4947, and 4948, and a life policy will not be avoided for immaterial misrepresentations. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

**Warranties.**—A warranty in an insurance application that applicant was in whole and sound condition, mentally and physically, is not breached by failure to state that he had a leg amputated at the knee. *Great Eastern Casualty Co. v. Smith* (Civ. App.) 174 S. W. 687.

In view of the conflict between the policy and application, held, that immaterial misrepresentations could not be construed as warranties, and hence would not avoid the policy. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

**Avoidance of policy for misrepresentation or breach of warranty or condition.**—A misrepresentation "material to the risk" is one concerning a fact which would induce the insurer to decline the insurance or to charge a higher premium. *St. Paul Fire & Marine Ins. Co. v. Huff* (Civ. App.) 172 S. W. 755.

Under this article, an insurer is not entitled to judgment upon a special verdict that misrepresentations by the insurer were not material to the risk. *Id.*

In determining the question of falsity, the questions and answers in the application for insurance must be construed liberally in favor of the insured. *Great Eastern Casualty Co. v. Smith* (Civ. App.) 174 S. W. 687.

Where, as part of family history, application called for number of brothers, answer which apparently included the applicant as one of the brothers in the family held not to invalidate the policy. *Blackstone v. Kansas City Life Ins. Co.* (Sup.) 174 S. W. 821, reversing judgment *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

In view of form of printed application for insurance, statement that applicant was born and resided at B. held substantially true, though he was born and resided seven miles from B. on a farm. *Id.*

Failure of applicant for life insurance to include half-brothers and half-sisters in stating number of brothers and sisters living and dead held not to invalidate policy. *Id.*

Where defendant surety company did allege, in conformity with this article, the materiality or contributory nature of untrue statements in the application, it cannot complain on appeal of lack of evidence to support the court's finding that they were not material. *National Surety Co. v. Murphy Walker Co.* (Civ. App.) 174 S. W. 997.

Insured's statement to agent that he had sold property to H. held not to invalidate policy, he having been told by real estate agents that H. was the purchaser. *Camden Fire Ins. Ass'n v. Bomar* (Civ. App.) 176 S. W. 156.

Under this article, statement in policy indemnifying against loss of dividends from burning of corporation plant, that for three years the corporation had earned dividends of 25 to 30 per cent., held not material to the risk, so that its falsity was no defense. *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

Where an insurer would have issued an indemnity policy knowing the truth as to the matters claimed to have been misrepresented, and was not influenced by the representations made, their falsity would not avoid the contract. *Id.*

Misstatements made in good faith after issuance and delivery of a policy of burglary insurance held not to affect the insured's rights. *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

Evidence held to show that answers did not avoid the policy under this article, not being material to the risk or affecting the policy's issuance. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

To avoid a policy for misrepresentation the false statement must have been made willfully and with the intent to deceive, and relied upon by the insurer; and a misrepresentation made innocently and in the belief of its truth will not avoid the policy. *American Nat. Ins. Co. v. Anderson* (Civ. App.) 179 S. W. 66.

— **Title or interest.**—Under this article held, that false statements as to the ownership of a safe and the price paid for it were no defense to an action on a burglary

policy, in the absence of proof that they contributed to the loss or mere material to the risk. *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

Where a policy holder stated absolutely that he owned the automobile destroyed, the insurer is not bound to make further inquiries to ascertain whether the statement was true. *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173.

A fire policy's provision that it be void if insured's interest be not unconditional and sole ownership, or if insured does not own in fee simple the land, refers only to the date of its issuance. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731.

Provision of a fire policy to be void if fee-simple title of insured to the land be not evidenced by deed held a valid condition precedent to insurance. *Merchants' & Bankers' Fire Underwriters v. Williams* (Civ. App.) 181 S. W. 859.

— **Concealment.**—The failure to communicate to the insurance company upon insuring a sanitarium the fact that the cook, because of a mere personal grievance against the manager, threatened to burn the sanitarium would not avoid a policy as a concealment of a material fact concerning the subject of the insurance. *Washington Fire Ins. Co. v. Cobb* (Civ. App.) 163 S. W. 608.

— **Health and physical condition.**—The burden was not on one, suing on a life policy, to show that she was in sound health at the issuance of the policy, which provided that no obligations were assumed unless insured was in sound health, in view of the provisions of arts. 4947, 4948. *American Nat. Ins. Co. v. Fawcett* (Civ. App.) 162 S. W. 10.

If insured was given credit for the first premium before he became in bad health, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery on the policy. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

In an action on a life policy, evidence held insufficient to show that insured knowingly made false answers to questions in the application, or that at that time he realized he was affected with cancer of the stomach. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

That insured was not in sound health at time of delivery of a life insurance policy as required by its provisions held a good defense to suit thereon. *American Nat. Ins. Co. v. Anderson* (Civ. App.) 179 S. W. 66.

Misstatement as to insured's health made in his application held, under article 4751, subd. 4, and article 4947, not excused by his ignorance. *Id.*

Misstatement as to insured's health made in his application held material to the risk. *Id.*

— **Habits and age.**—Representation that applicant had never been engaged in, or connected with, manufacture of liquors held not to invalidate policy, though, when a boy, he had worked about his father's still. *Blackstone v. Kansas City Life Ins. Co.* (Sup.) 174 S. W. 821, reversing judgment *Kansas City Life Ins. Co. v. Blackstone* (Civ. App.) 143 S. W. 702.

A statement by insured as to his habits with reference to intoxicants must be construed as to his habits at the time of his application, not before or after. *Order of United Commercial Travelers v. Simpson* (Civ. App.) 177 S. W. 169.

In a suit on an accident policy, evidence held to warrant a finding that insured's statement that he did not use intoxicating liquors was not a misrepresentation. *Id.*

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

Cited, *American Nat. Ins. Co. v. Anderson* (Civ. App.) 179 S. W. 66; *Loesch v. Supreme Tribe of Ben Hur* (Civ. App.) 190 S. W. 506.

**Liquidated demand.**—See *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20; note under art. 4874.

**Health and physical condition.**—See *American Nat. Ins. Co. v. Fawcett* (Civ. App.) 162 S. W. 10; note under art. 4947.

**Notice.**—Under this article, misrepresentations of insured held not a defense where notice of insurer's refusal to be bound was not given within 90 days after notice of the misrepresentations. *Commonwealth Bonding & Casualty Ins. Co. v. Wright* (Civ. App.) 171 S. W. 1043; *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997; *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169; *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170; *Order of United Commercial Travelers v. Simpson* (Civ. App.) 177 S. W. 169.

Under arts. 4948, 4962, agent for unauthorized insurance company held bound by the company's failure to give notice of its refusal to be bound by the policy because of misrepresentations. *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20.

Under this article, held, that the defense that the insured made misrepresentations in his application came too late when raised more than 90 days after discovery thereof. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

#### Art. 4949. Shall not constitute defense, unless shown, etc.

**Misrepresentations in general.**—Under this article, the fact that an insured in her proof of loss misrepresented the value of a stove could not affect the liability of the company, where the total value of the property destroyed, exclusive of the stove, was largely in excess of the amount of the policy. *Camden Fire Ins. Ass'n of Camden, N. J., v. Puett* (Civ. App.) 164 S. W. 418.

Under this article, a defense of fraud and misrepresentations in proofs of loss held unavailable, where there was no pleading or proof that the insurer had been misled, or had been caused thereby to waive or lose any valid defense to the policy. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334.

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

**Effect on prior acts.**—Arts. 4741 and 4959 apply to contracts of life insurance, despite arts. 4951, 4947, and 4948, and a life policy will not be avoided for immaterial misrepresentations. *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

**Application to surety or fidelity bonds.**—See *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997; note under art. 4947.

**Constitutionality.**—Acts 28th Leg. c. 69, held not to contravene Const. art. 3, § 35, requiring expression of subject in title of a bill, as to that provision subsequently incorporated in this article, requiring insurance policies to be accompanied by a copy of the application. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

**Failure to attach application, etc., to policy.**—Under arts. 4951, 4953, the effect of failure to attach application and questions and answers to a policy is to exclude them from the contract. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

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

**Failure to attach application, etc., to policy.**—See *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671; note under art. 4951.

**Parts of policy.**—A letter of insurer, to insured that a note would be accepted "as settlement of premium" did not alter the legal effect of provisions in note and policy that on nonpayment of note at maturity, the policy would cease. *Wichita Southern Life Ins. Co. v. Roberts* (Civ. App.) 186 S. W. 411.

Fact that description of goods contained in paper sent to insured was not part of policy did not prevent the making of a contract of insurance, where application containing description was made part of policy. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

Paper containing an iron-safe clause inclosed in envelope, in which policy on stock of goods, etc., was sent to insured, held no part of policy. *Id.*

Where employer's liability policy did not refer to application and did not recite that it was issued in consideration of the representations made in the application, such application could not be considered in construing the contract. *Maryland Casualty Co. v. W. C. Robertson & Co.* (Civ. App.) 194 S. W. 1140.

— **Parol promise.**—Under this article, life insurance company was not bound by parol promise of agent that there would be no forfeiture of policy for nonpayment of premium, policy containing provision therefor, unless beneficiary was first notified and thereafter defaulted, and by agent's statement that application and policy contained such clause. *Knodel v. Equitable Life Ins. Co.* (Civ. App.) 193 S. W. 1138.

Under this article, if agent for life insurance company could bind it by parol promise that there would be no forfeiture for nonpayment of premium, unless beneficiary were notified and defaulted, etc., court could not read promise into policies and enforce them as amended. *Id.*

**Assignment of policy—Effect of insured's consent.**—Under this article, the insurer, consenting to assignment of life policy by insured held estopped to contest payment of renewed policy to assignees, on ground of material false statements in application for insurance. *State Mut. Life Ins. Co. v. Rosenberry* (Civ. App.) 175 S. W. 757.

**Oral evidence.**—Oral evidence to establish fact disclosed by policy itself which was unambiguous is properly excluded. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

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

Cited, *AmariHo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658; *Great Eastern Casualty Co. v. Thomas* (Civ. App.) 178 S. W. 603.

**Application to surety or fidelity bonds.**—See *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997; note under art. 4947.

**Rebate in general.**—Defendant having executed a note for the first premium, an agreement with an agent that defendant should not be required to pay the note if he would assist in procuring other insurance held an offer of rebate in violation of this article. *Security Life Ins. Co. of America v. Allen* (Civ. App.) 170 S. W. 131. See, also, notes under arts. 4741 and 4897.

**Recovery of premiums.**—See *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607; note under art. 4897.

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

Cited, *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050.

**Constitutionality.**—Rev. St. 1911, Final Title, § 16, under Const. art. 3, §§ 35, 36, 43, held not to enact or re-enact this article so as to make it effectual as to all insurance companies. *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

Under Const. art. 3, § 35, this article held not germane to title of act, and hence ineffectual as to a surety company issuing fidelity or guaranty bonds. *Id.*

**Art. 4956. Corporations may be incorporated to transact one or more kinds of insurance business.**

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Hollfield* (Civ. App.) 184 S. W. 776.

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

Cited, *Loesch v. Supreme Tribe of Ben Hur* (Civ. App.) 190 S. W. 506.

**Application.**—A casualty insurance company, carrying on business on the assessment or annual premium plan, under Rev. St. tit. 71, is not exempt from penalties prescribed by article 4746, which is a part of chapter 2, since this article only exempts it from the provisions of chapter 15. *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389.

— **Prior acts.**—Laws 1909, c. 108, § 65, exempting assessment companies from liability for penalties and attorney's fees for failure to pay losses within 30 days after proofs and demand, held changed by the incorporation of such provision in the statute of 1911, as article 4957, so that thereafter assessment companies were subject to such liability. *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

**Art. 4959. Policy shall not be defeated.**

Cited, *National Council of the Knights and Ladies of Security v. Sealey* (Civ. App.) 162 S. W. 455; *Modern Brotherhood of America v. Jordan* (Civ. App.) 167 S. W. 794; *Parker v. Busby* (Civ. App.) 170 S. W. 1042; *Guarantee Life Ins. Co. v. Evert* (Civ. App.) 178 S. W. 643.

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

**Application to agent of foreign insurance company.**—See *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898; note under art. 4961.

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

See notes under art. 4972f.

**Application to agent of foreign insurance company.**—Arts. 4960, 4961, have no application to agents of a foreign insurance company selling the company's stock in Texas. *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898.

**Authority of agent.**—A person authorized by an agent of a fire insurance company to represent him in negotiations for insurance has the same power to bind the insurance company to a contract of insurance as has the agent. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

The act of insured, who procured a fire policy on a stock of merchandise while located in a designated building, in removing the stock to another building, was not a breach of the policy, and an agent may agree to a modification of the policy so as to make it apply to the stock while in the second building. *Texas Nat. Fire Ins. Co. v. White, Blakeney & Fuller Dry Goods Co.* (Civ. App.) 165 S. W. 118.

Person dealing with insurance agent without knowledge of limitation of authority held entitled to assume that he was authorized to issue particular policy and company was estopped to assert the contrary. *International Fire Insurance Co. v. Black* (Civ. App.) 179 S. W. 534.

An insurance agent soliciting and obtaining applications, collecting premiums, and delivering policies has implied authority to state to applicants with binding effect on the insurer what the amount of the annual premium will be. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

Evidence held to show that the agent soliciting insurance had power to bind insurer by a statement of what the annual premium would be. *Id.*

A provision in a fire policy that policy could be continued by renewal, in consideration of premium for renewed term, did not authorize an agent's oral agreement to contract in future to renew policy on its expiration, and company was not bound by such agreement. *Westchester Fire Ins. Co. v. Robinson* (Civ. App.) 192 S. W. 793.

Where agent of an insurance company was not authorized to make an agreement to contract for a renewal of fire policy in future, an oral agreement to do so was individual promise of agent. *Id.*

Evidence that insurer's agent also handled insured's fire insurance business for a long period is insufficient to establish an agency to receive notices of cancellation, where such notices had always been given directly to insured. *Globe Fire Ins. Co. v. Limburger* (Civ. App.) 193 S. W. 222.

A letter from general agents of a fire insurance company stating, in response to inquiry from insurance brokers, the terms on which they would write certain insurance, held not to give such brokers power to write the insurance stated and extend credit for the payment of the premium. *St. Paul Fire & Marine Ins. Co. v. McMillan* (Civ. App.) 194 S. W. 1157.

**Agent of insured or insurer.**—Under arts. 4961, 4962, an insurance agent, who at an owner's request procured insurance through a broker in a company not authorized to do

business in the state, which he had never before represented, held the agent of such company. *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20.

The local agent of a life insurance company could become the custodian of the policy for insured, notwithstanding his agency for the company. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

Evidence held to show that agent writing employer's indemnity insurance was the agent of the insurer, so that a notice to such agent of the occurrence of the injury was sufficient. *Maryland Casualty Co. v. W. C. Robertson & Co.* (Civ. App.) 194 S. W. 1140.

**Liability of agent.**—An agent held personally liable on a policy procured by him in a company not authorized to do business in the state. *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20.

Under arts. 4961, 4962, any legal defense available to an insurance company is available to a person held personally liable as its agent pursuant to such articles. *Id.*

Where an insurance broker undertook to keep properties insured and after expiration of the policies neglected to secure new policies for a period during which the property was destroyed by fire, he was liable for the loss. *Diamond v. Duncan* (Sup.) 172 S. W. 1100, affirming judgment (Civ. App.) 138 S. W. 429 and rehearing denied (Sup.) 177 S. W. 955.

Where a broker undertook to keep property insured, the fact that a policy in an insolvent company did not expire until three months after the destruction of the property by fire did not relieve the broker of liability for the loss sustained by the insured. *Diamond v. Duncan* (Sup.) 177 S. W. 955, denying rehearing 172 S. W. 1100.

Where an insurance agent took the applicant's note for a premium, and, when the insurer declined the risk, refused to return the note and negotiated it, his acts were a conversion, giving the applicant a right of action. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

**Liability of insurer.**—An insurance company is responsible for the acts and declarations of their local agents within the scope of their employment. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

Though insurance agents violate the instructions of the company in taking policies, the company is liable if the act is within the apparent scope of the agent's authority. *Id.*

If insurance agents are not authorized to effect insurance, it cannot be made effective by being ratified by insured after the fire. *Norwich Union Fire Ins. Society v. Dalton* (Civ. App.) 175 S. W. 459.

— **Waiver and estoppel.**—Formal notice that if a policy were in force on annual premium date, a certain premium would be payable, with statement on the back that it was not a waiver of default, sent out by a subordinate employé, did not waive right to forfeit policy on nonpayment of note. *Wichita Southern Life Ins. Co. v. Roberts* (Civ. App.) 186 S. W. 411.

A local agent of a fire company, authorized to solicit insurance, deliver policies, and collect premiums, may waive conditions and forfeitures in the policy regardless of authority conferred by insurer, unless insured knows of such limitations. *New Jersey Fire Ins. Co. v. Baird* (Civ. App.) 187 S. W. 356.

Where the company agent was notified of death and viewed the body and said he was satisfied and that loss would be paid, and the adjuster recognized his authority until suit was brought, and then denied it, the company was estopped to deny the agency. *American Nat. Ins. Co. v. Nuckols* (Civ. App.) 187 S. W. 497.

In action on fire insurance policy, defended on ground of concurrent insurance not indorsed on the policy, as required thereby, evidence as to the opinion given by insurer's employé in charge that property was a coinsurance risk was material as showing employé's waiver of written notice as to additional insurance. *Mechanics' & Traders' Ins. Co. v. Dalton* (Civ. App.) 189 S. W. 771.

Condition of insurance policy requiring that insurer's written consent for insurance in excess of the amount of concurrent insurance stipulated therein must be indorsed on or attached to such policy, may be waived by a duly authorized agent of the insurer. *Id.*

If an insurance agent states that the insurance will cost a stated sum per year, and applicant relying thereon, pays such amount, and the company issues the policy without informing him that the sum is not a full year's premium, the company is estopped to assert forfeiture for nonpayment of an assessment of which insured had no notice. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

**Estoppel of agent.**—Insurance agent, by acquiescence and practical construction of his contract, held thereafter estopped to insist that he was working upon a salary basis. *Generes v. Security Life Ins. Co. of America* (Civ. App.) 163 S. W. 386.

**Discharge of agent.**—Typewritten provision, of contract of employment between superintendent of agents and insurance company, that it should remain in force for five years, held to control printed provision recognizing company's right to discharge at pleasure. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

In suit by its superintendent against insurance company for breach of contract of employment, evidence held to show the parties intended that the employment was for five years, and that the company was not to have the right to discharge at pleasure. *Id.*

Where superintendent of insurance company violated his contract of employment or was unfaithful in discharge of his duties, the company could dismiss him, though the contract provided it should run for five years, provided the superintendent made a stipulated increase in business. *Id.*



The contract of employment of superintendent of insurance company, which, after providing it should run five years, if the superintendent made an increase in business, provided the compensation to which he would be entitled if the contract were terminated by "dismissal," referred to dismissal for cause besides a breach of the stipulation as to increase in business. *Id.*

— **Right of recovery in general.**—In an action for breach of a contract employing plaintiff to act as an insurance agent, plaintiff was not barred from recovering profits he would have made out of the commissions on premiums, on the ground that the amount was to a considerable extent speculative. *Oklahoma Fire Ins. Co. v. Ross* (Civ. App.) 170 S. W. 1062.

In insurer's action against insurance broker for negligence in not keeping property insured, damages recoverable held to be diminished by the amount of the unpaid premiums. *Diamond v. Duncan* (Sup.) 177 S. W. 955, denying rehearing 172 S. W. 1100.

An agent cannot recover a balance of commissions included in notes not yet paid. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

In an action for breach of an insurance company's contract to make advances to the agent to enable him to continue work, plaintiff could not recover for the loss of the business, given up by him to accept employment with the insurance company. *Id.*

In insurance agent's contract for bonus on business procured during the year, the words "sixty days allowed for settlements" held not to give interest in business done in the additional 60 days. *Reliance Life Ins. Co. v. Beaton* (Civ. App.) 187 S. W. 743.

#### Art. 4962. [3094] Taxes to be assessed against, when.

See *Drummond v. White-Swearingen Realty Co.* (Civ. App.) 165 S. W. 20; notes under arts. 4874, 4948, 4961.

Cited, *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

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

**Right to question validity of statute.**—Under this article, foreign insurance companies could not question the validity of article 4951, requiring application to accompany policy. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

## CHAPTER SIXTEEN

### INDEMNITY CONTRACTS

Art.	Art.
4972a. Subscribers may exchange reciprocal contracts of indemnity.	risks and obligations of subscribers.
4972b. Execution of contracts by attorney in fact.	4972f. Reserve fund.
4972c. Declaration under oath to be filed with insurance commissioner.	4972g. Annual report by attorney in fact; examinations.
4972d. Consent to service of process on insurance commissioner; process, how served.	4972h. Power of corporations to exchange insurance contracts.
4972e. Statements as to amount of single	4972i. Attorney to procure certificate of authority annually; revocation.
	4972j. Certificate fee.
	4972k. Insurance laws not to apply.

**Article 4972a. Subscribers may exchange reciprocal contracts of indemnity.**—That individuals, partnerships and corporations of this State hereby designated subscribers are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. [Acts 1913, p. 210, § 1; Act April 9, 1915, ch. 156, § 1.]

**Explanatory.**—Sec. 13 of the act repeals ch. 109, Acts regular session, 33rd Legislature (Vernon's Sayles' Civ. St. 1914, arts. 4972a-4972f), and all other laws in conflict. The act took effect 90 days after March 20, 1915, date of adjournment.

**Compliance in general.**—In an action on a fire insurance policy, testimony of a witness held not to show that defendant insurance company complied with this act. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

**Personal liability.**—If defendant reciprocal insurance association was not organized under this act, and issued a policy without authority, those acting in its name might

be personally liable, and should be sued individually at their places of residence as partners. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

**Art. 4972b. Execution of contracts by attorney in fact.**—That such contracts may be executed by a duly appointed attorney in fact duly authorized and acting for such subscribers. The office or offices of such attorney may be maintained at such place of places as may be designated by the subscribers in the power of attorney. [Acts 1913, p. 210, § 2; Act April 9, 1915, ch. 156, § 2.]

See note under art. 4972a.

**Art. 4972c. Declaration under oath to be filed with Insurance Commissioner.**—That such subscribers, so contracting among themselves, shall, through their attorney, file with the Insurance Commissioner of this State a declaration verified by the oath of such attorney setting forth:

(a) The name or the title of the office at which such subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Insurance Commissioner is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

(b) The kind or kinds of insurance to be effected or exchanged.

(c) A copy of the form of policy, contract or agreement under or by which such insurance is to be effected or exchanged.

(d) A copy of the form of power of attorney or authority of such attorney under which such insurance is to be effected or exchanged.

(e) The location of the office or offices from which such contracts or agreements are to be issued.

(f) That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one-half million dollars as represented by executed contracts or bona fide applications to become concurrently effective, or in case of liability or compensation insurance, covering a total pay roll of not less than two thousand employes.

(g) That there is on deposit with some State or National bank as a depository for the payment of losses not less than the sum of ten thousand dollars. [Acts 1913, p. 210, § 3; Act April 9, 1915, ch. 156, § 3.]

See note under art. 4972a.

**Art. 4972d. Consent to service of process on Insurance Commissioner; process, how served.**—That concurrently with the filing of the declaration provided for by the terms of Section 3 hereof [Art. 4972c], the attorney shall file with the Insurance Commissioner an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificates of authority provided for in Section 10 hereof [Art. 4972i], service of process may be had upon the Insurance Commissioner in all suits in this State arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Insurance Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. [Acts 1913, p. 210, § 4; Act April 9, 1915, ch. 156, § 4.]

See note under art. 4972a.

**Art. 4972e. Statements as to amount of single risks and obligations of subscribers.**—That there shall be filed with the Insurance Commissioner of this State by such attorney a statement under the oath of such attorney showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with the Insurance Commissioner a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than 10 per cent of the net worth of such subscriber. [Acts 1913, p. 210, § 5; Act April 9, 1915, ch. 156, § 5.]

See note under art. 4972a.

**Art. 4972f. Reserve fund.**—That there shall at all times be maintained as a reserve a sum in cash or convertible securities equal to 50 per cent of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements for expenses and reinsurance. Said sum shall at no time be less than ten thousand dollars, and if at any time 50 per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. [Acts 1913, p. 210, § 6; Act April 9, 1915, ch. 156, § 6.]

**Art. 4972g. Annual report by attorney in fact; examinations.**—That such attorney shall make an annual report to the Insurance Commissioner for each calendar year, which report shall be made on or before March the first for the previous calendar year ending December 31, showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein, and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amounts retained for expenses; provided, however, that such attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of said reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by the Insurance Commissioner. [Act April 9, 1915, ch. 156, § 7.]

**Art. 4972h. Power of corporations to exchange insurance contracts.**—That any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. [Act April 9, 1915, ch. 156, § 8.]

**Note.**—Sec. 9 makes it an offense for an attorney in fact to exchange contracts without compliance with this act, and is set forth in Vernon's Pen. Code 1914 as art. 693i.

**Art. 4972i. Attorney to procure certificate of authority annually; revocation.**—That each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to in this Act shall procure from the Insurance Commissioner annually a certificate of authority, stating that all of the requirements of this Act have been complied with, and upon such compliance and the payment of the fees required by this Act, the Insurance Commissioner shall issue such certificate of authority. The Insurance Commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this Act after reasonable notice has been given said attorney, in writing, so that he may appear and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder shall renew same annually thereafter; provided, however, that any certificate of authority shall continue in full force and effect until the new certificate of authority be issued or specifically refused. [Act April 9, 1915, ch. 156, § 10.]

**Art. 4972j. Certificate fee.**—That such attorney shall pay as a fee for the issuance of the certificate of authority herein provided for the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatsoever character in this State. [Act April 9, 1915, ch. 156, § 11.]

**Art. 4972k. Insurance laws not to apply.**—That except as herein provided, no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned. [Act April 9, 1915, ch. 156, § 12.]

#### DECISIONS RELATING TO TITLE OF INSURANCE IN GENERAL

**3. Insurable interest in property.**—A contractor for a building may have an insurable interest sufficient to sustain a policy on the building under construction to the extent of whatever is due him, even though he is to be paid by the week and has no rights other than the statutory one of filing a mechanic's lien. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

A husband has no insurable interest in wife's separate property, and insurance contract issued to a husband on property owned by wife is void. *St. Paul Fire & Marine Ins. Co. v. McQuary* (Civ. App.) 194 S. W. 491.

Where insured property was under trust deed, purchaser agreeing to deed property back to trustee, insured ceased to have any interest therein, and the policy became void. *Springfield Fire & Marine Ins. Co. v. Boon* (Civ. App.) 194 S. W. 1006.

The existence of an interest in the insured in property covered by the fire insurance policy is indispensable to its validity, since the contract is one of indemnity. *Id.*

**4. Insurable interest in human life.**—An illegitimate daughter has an insurable interest in the life of her father. *Maxey v. Franklin Life Ins. Co.* (Civ. App.) 164 S. W. 438.

Illegitimate children, recognized and maintained by their putative father, have an insurable interest in his life. *Overton v. Colored Knights of Pythias* (Civ. App.) 173 S. W. 472.

Wife, on being divorced, ceased to have any interest as beneficiary in policy on husband's life. *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Civ. App.) 188 S. W. 22.

**5. Existence of contracts.**—Where the application under which an accident policy was issued permitted applicant to reject and return the policy, if not satisfactory, there was no contract, where applicant rejected the policy within the time provided. *Business Men's Accident Ass'n of Texas v. Webb* (Civ. App.) 163 S. W. 380.

Where assured's application had been rejected, his silence regarding company's proposal to later accept him is not an acceptance, since he was under no duty to speak. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

**6. Executory agreement to insure.**—A parol agreement by agent of an insurer with insured that agent would keep insurance in force by renewing policy, insured to pay premium for renewal, held an executory contract to contract in future to renew policy which would require interposition of equity to enforce. *Westchester Fire Ins. Co. v. Robinson* (Civ. App.) 192 S. W. 793.

Contracts to insure in the future are valid. *Id.*

Contracts to insure in future are valid, and specific performance thereof may be compelled even after a loss which would be recovered by the policy if issued. *Id.*

**7. Oral contracts.**—A preliminary oral contract of insurance will bind the insurer. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

A "binder" is a verbal contract of insurance in presenti, of which the insurance agent makes a memorandum, temporary in its nature, and intended to take the place of an ordinary policy till the same can be issued. *Norwich Union Fire Ins. Society v. Dalton* (Civ. App.) 175 S. W. 459.

An insurance company, through its authorized agent, may contract by parol for renewal of a policy. *Westchester Fire Ins. Co. v. Robinson* (Civ. App.) 192 S. W. 793.

9. **Acceptance of application.**—Evidence held to sustain a verdict that a fire insurance policy was intended to become effective without waiting for its approval by the insurance company's general agents. *Fire Ass'n of Philadelphia v. Powell* (Civ. App.) 188 S. W. 47.

Where an application for fire insurance provided that no liability should attach until the application was actually approved by the home office, there can be no recovery where the jury found that the application had not been approved. *Merchants' & Bankers' Fire Underwriters v. Parker* (Civ. App.) 190 S. W. 525.

11. **Policy.**—Where live stock insurance policies did not provide that the policy was in force only while the horse was in a certain town, and insured requested a similar renewal policy, insured could assume that the policy issued did not contain a provision so limiting the company's liability. *Indiana & O. Live Stock Ins. Co. v. Keiningham* (Civ. App.) 161 S. W. 384.

Where a live stock policy made the application a part of it, the application would control if the policy provided that the horse should be insured only while it remained in a certain county and the application did not so limit the liability. *Id.*

Where a policy was payable at insured's death to his wife, there could be no breach by the insurer by a failure to perform prior to insured's death. *Provident Savings Life Assur. Society of New York v. Ellinger* (Civ. App.) 164 S. W. 1024.

A negro who applied for insurance in an Indiana corporation and gave his note for the first premium to the agent was not charged with notice that the company's constitution and by-laws provided only for the insurance of white people. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

Where an insurer agreed to and made an indorsement on the policy, naming the first beneficiary's sister as the beneficiary, it was bound by it, even though the request to do so was not made on the form provided by it. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Under provisions of employer's liability policy issued to plaintiff railway and to an engineering company, held, that it was immaterial whether an employé, when injured, was in the employ of the plaintiff or of the other insured. *Ætna Life Ins. Co. v. El Paso Electric Ry. Co.* (Civ. App.) 184 S. W. 628.

Where full amount of premium was deducted from amount awarded insured, including the premium due on a warehouse which was not destroyed, insured had a paid-up policy on warehouse, for time covered by premium. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

Fact that insured did not know that there was to be an iron-safe clause in policy would be immaterial, if it was in fact a part of the policy accepted by him. *Id.*

13. — **What law governs.**—Though a contract of accident insurance was made in a foreign state, the statute of the forum providing for the recovery of damages and attorney's fees governs an action thereon. *Travelers' Ins. Co. v. Harris* (Civ. App.) 178 S. W. 816.

14. — **Construction in general.**—A forfeiture clause in an insurance policy should be strictly construed. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816; *Dumphy v. Commercial Union Assur. Co., Limited, of London* (Sup.) 174 S. W. 814, reversing judgment (Civ. App.) 142 S. W. 116.

Under a policy providing for the deduction of the balance of dues for the current year of insured's death, held that the current year commenced on October 1st, and not on January 1st, though insured, after paying a quarterly premium, thereafter paid annual premiums for one year from January 1st, and hence, insured having died in December, the company was entitled to deduct the balance of the premium for the year ending the following October. *Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Zapp* (Civ. App.) 160 S. W. 139.

Every doubt must be resolved against the company in case of inconsistent provisions in an insurance policy. *Indiana & O. Live Stock Ins. Co. v. Keiningham* (Civ. App.) 161 S. W. 384.

A provision of an automobile fire policy that the machine should not be used to carry passengers for compensation held only to prohibit the use of the machine continuously for carrying passengers as a business. *Commercial Union Assur. Co. of London v. Hill* (Civ. App.) 167 S. W. 1095.

Provision of policy as to keeping inventory and set of books held not to be construed as applying to all the property, unless its express provisions compelled such construction. *State Mut. Fire Ins. Co. v. Kellner* (Civ. App.) 169 S. W. 636.

Where any reasonable construction can be placed on provisions of an insurance policy that will prevent a forfeiture, that construction should be adopted. *Insurance Co. of North America v. O'Bannon* (Civ. App.) 170 S. W. 1055.

Contracts of surety company indemnifying employer against dishonesty of employé held to be construed by the same rules as apply to other insurance contracts. *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

Insurance contracts are governed by the same rules as contracts between individuals. *Royal Ins. Co. v. Okasaki* (Civ. App.) 177 S. W. 200.

An automobile of a liveryman who serves all members of the public is the vehicle of a common carrier, within an accident policy providing for a double indemnity to one in-

jured in or on a public conveyance of a common carrier. *Fidelity & Casualty Co. v. Joiner* (Civ. App.) 178 S. W. 806.

A contract of insurance will be construed strictly against the insurer and liberally in favor of the insured. *Ætna Life Ins. Co. v. El Paso Electric Ry. Co.* (Civ. App.) 184 S. W. 628.

A contract of insurance should be construed most favorably to the insured, and where its language is fairly susceptible of any construction making the insurer responsible for the loss or injury, it is the duty of the court to so construe it. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615.

Insurance contracts should be literally construed. *Home Benefit Ass'n of Angelina County v. Jordan* (Civ. App.) 191 S. W. 725.

16. — **Delivery and acceptance.**—The retention of the policy by the local agent receiving it for delivery at insured's request was some evidence on the question of delivery to insured. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

Evidence held to sustain a verdict that a fire insurance policy was delivered to assured. *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036.

18. — **Property covered.**—An insurance policy upon household and kitchen furniture, which was to run for three years, includes furniture acquired subsequent to the issuance of the policy. *Delaware Ins. Co. v. Wallace* (Civ. App.) 160 S. W. 1130.

A fire policy held not to cover either electrotype plates, from which pictures of the articles insured were reproduced, or a traveling salesman's trunk. *Agricultural Ins. Co. v. Collins* (Civ. App.) 175 S. W. 1120.

"Furniture" and "fixtures," as used in a fire insurance policy, include light fixtures and globes, ceiling fans, electric meters, mirror door, and wiring of a building. *Fire Ass'n of Philadelphia v. Powell* (Civ. App.) 188 S. W. 47.

A policy of employer's liability insurance payable to "R. & Co." will support suit by such company, which owned all stock in the "P. G. Co.," and had agreed to satisfy any judgment obtained by an injured employé against such company, and it paid the judgment, where pinned to the face of the policy was a rider providing that "notice is accepted that the gin plants named are owned and operated by 'W. C. R. & Co.,' being named and designated as the 'P. G. Co.'" *Maryland Casualty Co. v. W. C. Robertson & Co.* (Civ. App.) 194 S. W. 1140.

20. — **Estoppel of insured as to objections.**—Insured is ordinarily bound by the terms of the policy, whether he reads it or not. *Indiana & O. Live Stock Ins. Co. v. Keeningsham* (Civ. App.) 161 S. W. 384.

In absence of fraud or mistake, the applicant for insurance, accepting the policy, is bound by its provisions, whether read or not. *Great Eastern Casualty Co. v. Thomas* (Civ. App.) 178 S. W. 603.

Insured's retention of policy held a ratification thereof estopping him from pleading fraud inducing him to take the insurance as a defense to an action on notes given for the premiums. *Ribble v. Roberts* (Civ. App.) 180 S. W. 620.

22. — **Reformation.**—An insurance policy will not be reformed to conform to the alleged actual intent of parties, unless there was mutual mistake, or mistake on one side and fraud on the other. *Great Eastern Casualty Co. v. Thomas* (Civ. App.) 178 S. W. 603.

23. — **Renewal.**—A renewal of a life insurance policy, containing a clause providing that it shall be incontestable after one year, revives such clause, from the date of renewal, and the company is not barred from contesting the policy within one year after the revival, although several years have elapsed since the first issuance. *State Mut. Life Ins. Co. v. Rosenberry* (Civ. App.) 175 S. W. 757.

Where a contractor orally arranged that an industrial policy should be extended on payment of premiums, he is not bound by a limitation of liability in the new policy, which was not delivered, and which the agent merely told him was more extensive. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

A contract of insurance or for renewal of a policy is an executed contract, which can be enforced at law. *Westchester Fire Ins. Co. v. Robinson* (Civ. App.) 192 S. W. 793.

Evidence held sufficient to show that life policy sued on was in force at insured's death as a renewal of a former policy. *Great Eastern Casualty Co. v. Kelley* (Civ. App.) 194 S. W. 172.

25. **Premiums.**—Under an employer's liability policy stating that the premium placed therein was estimated upon data in the schedule and that the premium would be subject to further adjustment if the compensation paid employés was greater or less than the estimated amount, held, that insurer could recover any additional amount shown to be due. *Fidelity & Casualty Co. of New York v. J. W. Crowdus Drug Co.* (Civ. App.) 166 S. W. 1186.

Whether time for payment of premiums on an accident policy is of the essence depends on the wording thereof, and it cannot be said that as a matter of law time is of the essence. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

29. — **Liability for premiums paid by creditor or insurance agent.**—In insurance agent's action for first premium due on policy delivered to, received for, and accepted by defendant, alleged to be due under the agent's contract with his company, and his advance of a part of the premium, evidence held to sustain a verdict for him. *Just v. Herry* (Civ. App.) 174 S. W. 1012.

32. — **Evidence as to payment.**—In suit by an employer's liability insurer for a premium, evidence held sufficient to support the finding that defendant rendered true statements of its pay roll in compliance with its policies, and paid all premiums from it under the policies. *Fidelity & Casualty Co. v. Tyler Cotton Oil Co.* (Civ. App.) 184 S. W. 304.

33. — **Refunding or recovery of premiums paid.**—That a rejected applicant for insurance who had given the agent his note for the first premium allowed the agent to apply to another company for insurance did not cancel the first company's debt for the money received by its agent. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

Failure of assured under an employer's liability policy to include the salaries of its manager and bookkeeper in reports to the insurer of compensation paid held not to entitle the insurer to recover premiums based thereon. *Fidelity & Casualty Co. v. Tyler Cotton Oil Co.* (Civ. App.) 184 S. W. 304.

34. **Right to assign policy.**—Assignable nonnegotiable instruments, see notes to art. 583.

44. **Effect of transfer.**—An assignee of a fire insurance policy held precluded from claiming that the building was not properly classified and that the provisions in the policy in regard to additional insurance were invalid. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

45. **Cancellation of policy.**—In an action on an insurance policy, finding of the court that the minds of the parties had not met on cancellation held supported by the evidence. *National Union Fire Ins. Co. v. Akin* (Civ. App.) 160 S. W. 669.

The retention by an insured of an express money order mailed to him by the company for unearned premiums, with a notice of cancellation, until after a fire, when it was returned by the insured's attorney, he having previously refused a check, and demanded money, held not a waiver by the insured of his right under the policy to receive a legal tender of the unearned premium. *Niagara Fire Ins. Co. v. Mitchell* (Civ. App.) 164 S. W. 919.

Consolidation of defendant insurance company with the P. Company, without surrender of defendant's corporate existence, etc., held not to show defendant's repudiation of a policy with plaintiff so as to entitle plaintiff to recover damages therefor. *Provident Savings Life Assur. Society of New York v. Ellinger* (Civ. App.) 164 S. W. 1024.

A cancellation of a fire policy upon mortgaged property held ineffective as to the mortgagee, who consented to the cancellation solely on faith of the unintentional misrepresentation by the agent of the insurer that the policy was avoided by the institution of foreclosure proceedings, under a clause which he incorrectly stated was in the policy. *Glens Falls Ins. Co. v. Walker* (Civ. App.) 166 S. W. 122.

The mere request of insured to insurance agents to keep him protected may authorize them, without notice to him, to cancel a binder in one company, and issue one in another company, if in so doing they are following the custom of all insurance offices. *Norwich Union Fire Ins. Society v. Dalton* (Civ. App.) 175 S. W. 459.

Evidence held to sustain a verdict that a fire insurance policy was not canceled by mutual consent. *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036.

On cancellation of a policy of fire insurance at any time before loss, by agreement between the parties, independent of the terms of the policy, immediate payment of the unearned premium may not be required in order to make cancellation valid. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 188 S. W. 25.

A policy of fire insurance may be canceled at any time before loss, by agreement between the parties, independent of the terms of the policy. *Id.*

Under provisions of fire insurance policy, cancellation held not binding upon the mortgagee, to whom loss was payable, but to whom no notice of cancellation was given. *Glascock v. Liverpool, London & Globe Ins. Co.* (Civ. App.) 188 S. W. 281.

Where insured signed a cancellation of the policy, he waived a provision allowing five days' notice of cancellation. *Globe Fire Ins. Co. v. Limburger* (Civ. App.) 193 S. W. 222.

Evidence that insured did not know what he was signing is insufficient to justify setting aside his written cancellation of a policy because of fraud. *Id.*

That insured did not understand he was signing a cancellation of his policy, and did not know the insurer's agent had been instructed to secure such cancellation, is insufficient to invalidate the instrument in absence of fraud. *Id.*

Whether insured canceled his policy is not dependent upon the insurer's agent canceling a premium charge, where insured trusted such agent, who also handled his real estate business, to do so. *Id.*

Cancellation of a premium charge against insured by the insurer's agent does not affect insured's legal rights, when made without his knowledge or consent. *Id.*

48. **Rescission of policy by agreement.**—Where insured, though knowing the effect of his act, was induced, by an insane delusion that his children were about to murder him for his insurance, to surrender his policies in consideration of payment of the surrender value, such surrender was voidable after his death at the instance of his personal representatives. *New York Life Ins. Co. v. Hagler* (Civ. App.) 169 S. W. 1064.

Regardless of the provisions of a policy as to cancellation, the policy may be canceled by mutual consent. *Polemanakos v. Austin Fire Ins. Co.* (Civ. App.) 160 S. W. 1134.

49. **Condition precedent to action to rescind policy.**—Under a provision of policy authorizing cancellation and providing that the unearned portion of the premium should be returned, held that, unless waived, the repayment of the proper proportion of the premium was essential to a valid cancellation. *Polemanakos v. Austin Fire Ins. Co.* (Civ. App.) 160 S. W. 1134.

Under a provision of a fire policy authorizing cancellation, and providing that the unearned premium should be returned, held, that a legal tender of the unearned premium was essential to a valid cancellation. *Niagara Fire Ins. Co. v. Mitchell* (Civ. App.) 164 S. W. 919.

51. **Damages recoverable from insurer on cancellation or breach of contract.**—In an action for an insurance company's breach of an ordinary life policy, the insured's meas-

ure of damages is the difference between what it would cost insured to mature the policy from the time of breach to the time of expectancy, had there been no breach, and what it would cost him to mature a like policy in a solvent company for the same period, and not the amount of premiums paid, with interest thereon. *Provident Savings Life Assur. Society of New York v. Ellinger* (Civ. App.) 164 S. W. 1024.

Where there is a mere refusal, not amounting to total repudiation of the contract, to pay sick benefits to which insured is entitled under a policy of health insurance, his measure of damages is the amount of the payments to which he is entitled. *American Nat. Ins. Co. v. Wilson* (Civ. App.) 176 S. W. 623.

Complete repudiation by insurance company of policy of health insurance held to entitle plaintiff to rescind and to recover as damages amount of premiums paid, with interest, less any payments made to him while ill. *Id.*

**52. Forfeiture of policy for breach of promissory warranty, covenants or condition subsequent.**—When insured property is removed from the location specified in the policy without the knowledge or consent of the insurer, the insured cannot ordinarily recover, but there may be a waiver of the provision limiting liability to such location or the insurer may be estopped to set it up. *Delaware Ins. Co. v. Wallace* (Civ. App.) 160 S. W. 1130.

**56. — Change in occupancy of building.**—The term “occupied” as used in a fire policy, implies an actual use by some person according to the purpose for which it is designed, and does not imply that some one shall remain in the building all of the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time. *Washington Fire Ins. Co. v. Cobb* (Civ. App.) 163 S. W. 608.

A provision in a policy insuring a building occupied as a sanitarium, “while occupied as the Park Terrace Sanitarium,” in absence of provisions qualifying such intent, constituted a warranty that the building would be occupied as a sanitarium during the life of the policy. *Id.*

A sanitarium which consisted of some 22 rooms and several cottages was not “occupied” during the months preceding the fire, where during that time there was no attending physician, matron, or servants, and no facilities for heating the building, which then only contained three people, who were not authorized to receive patients or work for them, and who left about 26 hours before the fire, after which the building was in charge of a watchman. *Id.*

A fire policy on a building “while occupied as Park Terrace Sanitarium” does not warrant such use to continue; a clause allowing vacancy for ten days, and another contemplating change of occupancy, except to one more hazardous. *Southern Nat. Ins. Co. v. Cobb* (Civ. App.) 180 S. W. 155.

**57. — Building becoming vacant.**—In an action on a fire policy, evidence held to show that the condition that the policy should be void if the building should be vacant or unoccupied for ten days was not broken. *Home Ins. Co. v. Peterman* (Civ. App.) 165 S. W. 103.

A provision, in a so-called union mortgage clause, that the mortgagee should notify the insurer of a change in occupancy held not violated by failing to notify the insurer of the owner's neglect to occupy the house when completed. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

That insurance company allowed insured to move his building held not to estop it from relying upon the breach of a condition declaring that the policy should be void if the premises were unoccupied for over 10 days. *Fireman's Fund Ins. Co. v. Lyon* (Civ. App.) 171 S. W. 801.

“Vacant,” in a fire policy, means empty, while cessation of “occupancy” means change of use. *Southern Nat. Ins. Co. v. Cobb* (Civ. App.) 180 S. W. 155.

**61. — Additional insurance.**—Under a policy of fire insurance, held, that act of husband of purchaser from insured in obtaining other insurance on the property did not forfeit the first insured's rights in the policy. *Dumphy v. Commercial Union Assur. Co., Limited, of London* (Sup.) 174 S. W. 814, reversing judgment (Civ. App.) 142 S. W. 116.

Parol evidence is admissible to show that an insurance company has lost its right to invoke a stipulation in the policy, avoiding it if insured shall procure other insurance without the consent of the company. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

A contract of insurance upon a house in a certain amount, and upon household furniture in another amount, is divisible, so that the procurement of additional insurance upon the personal property did not affect the validity of the insurance upon the house. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

A provision that a policy should be void, in the absence of agreement, if insured procured other insurance, was not nullified by a concurrent insurance clause which did not provide for forfeiture for its violation. *Ætna Ins. Co. v. Waco Co.* (Civ. App.) 189 S. W. 315.

The taking of additional insurance without permission being indorsed on a policy, as required thereby, does avoid the policy, if the insurer consents thereto. *Mechanics' & Traders' Ins. Co. v. Dalton* (Civ. App.) 189 S. W. 771.

Clause in an insurance policy forbidding concurrent insurance in excess of amount allowed is a promissory warranty, the breach of which, in the absence of waiver or estoppel, will avoid the policy. *Id.*

**62. — Taking inventory and keeping books and safe.**—Provision of policy on stock of merchandise requiring taking of inventory, and declaring that noncompliance would avoid policy, held valid and enforceable. *Hartford Fire Ins. Co. v. Adams* (Civ. App.) 158 S. W. 231.

Where a policy of insurance on a stock of merchandise required the taking of an inventory and provided that it should be void unless this was done, the insurer could not



be compelled to accept the invoices of the goods purchased by the insured in lieu of an inventory. *Id.*

Policy held avoided by failure to take inventory within 30 days as required therein, and not capable of being revived without the insurer's consent by taking the inventory subsequently. *Id.*

An invoice of goods bought during three months, some time before issuance of a fire policy, does not satisfy a provision of the policy that it shall become void, if a complete, itemized inventory be not taken within a certain time, unless one has been taken within a certain time prior to the policy. *Mechanics' & Traders' Ins. Co. v. Davis* (Civ. App.) 167 S. W. 175.

Fire insurance policy, specifying different amounts of insurance on building, furniture and fixtures, and stock of merchandise, held severable, and failure to take inventory or keep books, as required therein, did not avoid the insurance on the building, furniture, and fixtures. *State Mut. Fire Ins. Co. v. Kellner* (Civ. App.) 169 S. W. 636.

In an action on a burglary insurance policy, evidence held sufficient to support finding that the insured had accurately determined his loss from his books with reasonable certainty, as required by the policy. *National Surety Co. v. Silberberg Bros.* (Civ. App.) 176 S. W. 97.

Where a fire insurance policy required the insured to take and preserve in a fire-proof safe an inventory of the insured stock, the failure to preserve such inventory or an equivalent thereof forfeits the insurance. *Royal Ins. Co. v. Okasaki* (Civ. App.) 177 S. W. 200.

Where the owner of an insured stock of goods negligently left his inventory outside the safe the night of the fire, and 15 per cent. of it was thereby rendered unintelligible, there can be no recovery. *Id.*

The requirement of a fire insurance policy that the insured shall keep a set of books showing his business is complied with where the books preserved contain a complete record of the business though the journal was burned. *Id.*

Provision of fire insurance policy that insured should take a complete inventory of stock held met by inventory showing number of pieces of lumber and dimensions of each piece of different kinds and total number of each kind separately, without showing the class or value. *Camden Fire Ins. Co. v. Yarbrough* (Civ. App.) 182 S. W. 66.

Insured's failure to substantially comply with the provision of a fire insurance policy by failing to keep his books in a fireproof safe will defeat his recovery on the policy; the provision being material. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833.

A condition in a fire policy requiring assured to keep his books in a secure place when store was not "actually open for business" held violated by failure to place books in a safe place while he was home for dinner and while store was locked. *Merchants' & Bankers' Fire Underwriters v. Foster* (Civ. App.) 192 S. W. 811.

**63. — Change of title, interest or possession.**—As regards the provision of a fire policy voiding it in the event of any change in interest, title, or possession of the subject-matter of insurance, insured having taken in two partners, put one in possession, and received part of the price, it is immaterial that he retained a lien on the goods for balance of price, and after the fire paid back the money to his partners. *Mechanics' & Traders' Ins. Co. v. Davis* (Civ. App.) 167 S. W. 175.

Under a policy on a building under construction, mistakenly naming the builder as the insured and the owner as the mortgagee and payee, and containing a mortgage clause requiring the mortgagee to notify the insurer of any change of ownership, held, that the ownership was that mentioned in a rate slip correctly designating the owner or occupant, so that the real mortgagee was not bound to give notice of the termination of the interest of the builder. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

In a policy insuring a dwelling house, provisions that it should be void if the interest of the insured was other than an unconditional ownership, or if the dwelling was on ground not owned by the insured, referred to the date of the policy, and it was not avoided by a subsequent sale of the ground. *Insurance Co. of North America v. O'Bannon* (Civ. App.) 170 S. W. 1055.

Under a policy on a dwelling providing that upon any change in the interest in the dwelling it should be void, a subsequent sale of the ground with reservation of title to the dwelling with right of removal within a fixed time held not to avoid the policy within the time for removal. *Id.*

Policy held not invalidated by deed to H., to which change of title insurance agent consented, though H. had not bought the land, the deed having been made by direction of real estate agents. *Camden Fire Ins. Ass'n v. Bomar* (Civ. App.) 176 S. W. 156.

In view of art. 5654, held, that there was an absolute sale of an automobile, avoiding a policy which declared that a change in title should invalidate it. *Hamilton v. Freeman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173.

A fire policy's provision, voiding it for any change in insured's interest or title, does not apply where he sells the land, retains title to the house, to be removed, balance of price to be then paid. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731.

Under a policy of fire insurance, a conditional sale held a change in the interest, title, and possession of the insured property avoiding the policy and defeating the insured's recovery thereon. *Fire Ass'n of Philadelphia v. Perry* (Civ. App.) 185 S. W. 374.

Evidence in an action on a policy of fire insurance, providing that a change in the interest, title, or possession of the subject of insurance should avoid the policy, held to show that the insured had made a conditional sale of the premises. *Id.*

Policy of fire insurance on stock of merchandise, etc., held not void on account of a

change in ownership after its issuance. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

In action on a fire policy, evidence held to show a violation of provisions forfeiting policy in case of change in insured's interest or vacancy of buildings. *Springfield Fire & Marine Ins. Co. v. Boon* (Civ. App.) 194 S. W. 1006.

**67. — Nonpayment of premiums or assessments.**—Under a policy providing that failure to pay premium will avoid the policy, a failure to pay a premium constitutes a forfeiture without the necessity of formal declaration thereof by the insurer. *Underwood v. Security Life & Annuity Co. of America* (Sup.) 194 S. W. 585.

Under a policy providing for forfeiture on nonpayment of premium, the forfeiture occurred ipso facto on the date when premium was due, when not paid, although by a further provision the insured might have avoided forfeiture by paying the premium with interest within 30 days. *Id.*

Under so-called "board contract," insured could not avoid forfeiture for nonpayment of premium on the ground that his policies entitled him to a sufficient commission from his premium to have paid it, where he did not in fact pay such premium. *Id.*

Where insured on due date gave note for premium, failure to pay the note when due was equivalent to failure to pay the premium, and worked a forfeiture. *Id.*

**69. — Reinstatement of lapsed policy.**—Where a life policy provided for reinstatement upon payment of back premiums, but that the insurer should not be liable for death occurring within five weeks from reinstatement, the beneficiary cannot recover unless there was a waiver, where the insured died within five weeks after the payment of the back premiums. *American Nat. Ins. Co. v. Gallimore* (Civ. App.) 166 S. W. 17.

After a policy has lapsed by its terms for nonpayment of premium, the beneficiary is bound by the act of insured in executing a note containing a new forfeiture condition to obtain a reinstatement. *Wichita Southern Life Ins. Co. v. Roberts* (Civ. App.) 186 S. W. 411.

In action on fire insurance policy, evidence held insufficient to show execution of a new contract after insured had parted with title. *Springfield Fire & Marine Ins. Co. v. Boon* (Civ. App.) 194 S. W. 1006.

**70. Estoppel or waiver of conditions or right of forfeiture.**—Where a life insurance company was informed about June, before insured's death in January, 1911, that she was in bad health when insured, and did not then cancel the policy, it was estopped from afterwards denying liability. *American Nat. Ins. Co. v. Fawcett* (Civ. App.) 162 S. W. 10.

Where the insurer in policy, covering a stock of merchandise while located in a designated building, agreed in a writing delivered to insured that the policy should cover the stock while in another building, it could not deny liability on the ground that the writing was not attached to the policy. *Texas Nat. Fire Ins. Co. v. White, Blakeney & Fuller Dry Goods Co.* (Civ. App.) 165 S. W. 118.

A life insurance company held estopped to claim that no application was made for the policy sued on, so that it was not a binding contract. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

An indemnity company, having refused to defend, held estopped to claim that it was not liable for attorney fees incurred by insured because the insurer's written consent to incur the fee was not first had. *Royal Indemnity Co. v. Schwartz* (Civ. App.) 172 S. W. 581.

The insurer's failure to cancel a policy and return the unearned premium held, in view of certain knowledge, to waive forfeiture of the policy. *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173.

An insurer, having refused to defend actions against an employer in accordance with the policy, held estopped to set up that provision of the policy declaring that no suit should be maintained but for expense incurred in satisfying the final judgment. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

Forfeiture of life policy for failure to seasonably pay a premium and provisions for manner of reinstatement are waived by an authorized agent receiving and retaining it with knowledge. *First Texas State Ins. Co. v. Capers* (Civ. App.) 183 S. W. 794.

Under policy providing for forfeiture on due date on failure to pay premium, insurer could waive forfeiture 11 days thereafter, despite provision by which insured could avoid forfeiture by payment of premium with interest within 30 days. *Underwood v. Security Life & Annuity Co. of America* (Sup.) 194 S. W. 585.

**71. — What conditions may be waived.**—Where the defense was that the goods had been taken from the location specified in the policy, the insured, upon showing that the insurer's agent agreed to his request to change the location of the policy to the place of the fire, is entitled to recover, even though the policy forbade waiver of any of its provisions except in writing upon or attached to the policy, and no change had actually been made on the policy. *Delaware Ins. Co. v. Wallace* (Civ. App.) 160 S. W. 1130.

Where a fire policy provided for an extension of time for the benefit of the mortgagee in case of cancellation, the mortgagee may waive that provision for his benefit. *Gleens Falls Ins. Co. v. Walker* (Civ. App.) 166 S. W. 122.

**72. — Authority of agent in general.**—See notes under art. 4961.

**74. — Knowledge or notice of facts.**—That persons other than the party to a preliminary oral contract of insurance owned interests in the property insured did not invalidate the contract where the insurer's agent knew the facts in relation to the ownership and that the contract was for the benefit of all the owners. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

Insurer issuing policy of indemnity with knowledge that statement therein as to dividends paid by company in which insured held stock was untrue, held estopped from avoiding policy on the ground that dividends were less than amount stated. *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

75. — **Delivering policy with knowledge of facts.**—An insurer, whose agent was fully informed of the interest of the party named in the policy as the insured, who in fact had an insurable interest, and that the party named as mortgagee and payee was in fact the owner, could not be heard to say that it delivered what it then knew to be an invalid policy, so as to defeat recovery by the party designated as the insured. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

78. — **Extension of time for payment of premium.**—Evidence held not to show an agreement to extend the payment of a premium note and the policy insurance during the month in which insured died. *Wichita Southern Life Ins. Co. v. Roberts* (Civ. App.) 186 S. W. 411.

81. — **Examination by adjuster.**—Inspection of safe, promise to pay loss, and an announcement that the loss had been adjusted held to constitute a waiver of any breach of warranty by the insured. *Ætna Accident & Liability Co. v. White* (Civ. App.) 177 S. W. 162.

83. — **Accepting proofs of loss.**—Where, under a provision of the application, providing that, if the certificate of membership was not satisfactory, applicant might return it to the association and receive back his membership fee, the applicant refused to accept the certificate, so that the contract never took effect, the association was not estopped to deny liability because it insisted on proof of loss and did not return the membership fee. *Business Men's Accident Ass'n of Texas v. Webb* (Civ. App.) 163 S. W. 380.

86. — **Weight and sufficiency of evidence.**—In an action on a life policy, defended on the ground that the first premium was not paid, so as to put the policy into effect, evidence held to sustain a finding that the company intended to extend credit for the premium to its general agent and to permit him to extend credit therefor to insured. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

In an action on a fire policy, facts held not to show a waiver of the provision requiring proof of loss. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334.

Evidence held to show a waiver by defendant's general agent of a private garage warranty in a policy insuring plaintiff's automobile. *Commercial Union Assur. Co. of London v. Hill* (Civ. App.) 167 S. W. 1095.

In an action on a fire policy, evidence held not to show that insured, on procuring permission to move a building, secured a waiver of a condition avoiding the policy if the premises remained vacant for over 10 days. *Fireman's Fund Ins. Co. v. Lyon* (Civ. App.) 171 S. W. 801.

In action on policy of fire insurance, facts found by jury, and the evidence also held sufficient to sustain findings for plaintiff on issues of waiver and estoppel as against defense of concurrent insurance without insurer's indorsement on policy. *Mechanics' & Traders' Ins. Co. v. Daiton* (Civ. App.) 189 S. W. 771.

Evidence held to show waiver by the insurer of forfeiture clause for nonpayment of premium. *Underwood v. Security Life & Annuity Co. of America* (Sup.) 194 S. W. 585.

89. **Risks and causes of loss—Insurance of property.**—In an action upon an automobile insurance policy, evidence held to warrant the jury in finding that misrepresentations as to the cost and length of service of the automobile were not material to the risk. *St. Paul Fire & Marine Ins. Co. v. Huff* (Civ. App.) 172 S. W. 755.

Policy covering house and furniture each to a specific amount held divisible, so that a breach of warranty as to either the house or the furniture would not affect the insurance on the remainder of the property. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

90. — **Indemnity insurance.**—An insurance policy, indemnifying insured against loss of rents caused by fire or lightning actually sustained on rented premises for and during such period as may be reasonably necessary to restore the premises to the same tenable condition as before the fire, held to cover such period as was necessary to place the contract for repairs, and was not limited to the time actually spent in the making of the repairs. *Hartford Fire Ins. Co. v. Pires* (Civ. App.) 165 S. W. 565.

In an action on a policy insuring against the loss of rents on property for the period reasonably necessary to restore the property, evidence held to sustain a finding that the time consumed was reasonably necessary to restore the building. *Id.*

An automobile policy exempting loss incurred in operating it in violation of law would have excepted a death caused while the car was driven by the insured's 16 year old son, contrary to ordinance, had the ordinance been valid. *Royal Indemnity Co. v. Schwartz* (Civ. App.) 172 S. W. 581.

An indemnity company held liable under an automobile accident policy for attorney fees incurred by the insured, but not paid, for services in defending an accident suit, which the insurer had declined to defend. *Id.*

Under employer's liability policy issued to plaintiff street railway and to an engineering company, injury to plaintiff's employé while engaged in repair work for engineering company through negligence of plaintiff's motorman held within its terms. *Ætna Life Ins. Co. v. El Paso Electric Ry. Co.* (Civ. App.) 184 S. W. 628.

Evidence, in a contractor's action on a policy of casualty insurance to recover the amount paid an employé, held to show that the judgment in favor of the employé against the insured was not the result of collusion and fraud. *United States Fidelity & Guaranty Co. v. Pressler* (Civ. App.) 185 S. W. 326.

The action of the agent of an insurance company in collecting premiums and failing

to account for same constituted a "misapplication" within a bond indemnifying the employer against loss sustained by any misapplication of such agent. *American Surety Co. of New York v. Johnston & Burnett* (Civ. App.) 194 S. W. 958.

That an agent had made a misapplication of funds before his indemnity bond was executed did not cancel the liability of the surety company, where it did not appear that the agent had been guilty of any crime, but had merely been in arrears in his prior payments. *Id.*

Evidence held to show that an injured employé was "engaged in ordinary repair work" within meaning of employer's liability policy insuring against injuries to employés so engaged. *Maryland Casualty Co. v. W. C. Robertson & Co.* (Civ. App.) 194 S. W. 1140.

Employer's liability policy insuring employer against actions resulting from injuries to employés, held to cover liability to an employé who was painting the roof of the gin to preserve the iron from rust, under clause "engaged in occupations connected with the business of cotton ginning." *Id.*

91. — **Life Insurance.**—Insured, who was killed while attempting to attract the attention of a porter and get him to open the vestibule of a train, held not unnecessarily on the roadbed within the policy, excepting accidents occurring on a railway roadbed. *Travelers' Ins. Co. v. Harris* (Civ. App.) 178 S. W. 816.

Where a policy was issued with a rider for preliminary short-term insurance to the date of the principal policy, on the same terms as the policy, the "first policy year, within the meaning of the suicide clause," began at the date of the issuance of the policy with the short-term insurance. *American Nat. Ins. Co. v. Thompson* (Civ. App.) 186 S. W. 254.

Evidence held insufficient to show that insured's death was caused by his motorcycle coming in contact with a moving vehicle within provisions of life policy sued on. *Great Eastern Casualty Co. v. Kelley* (Civ. App.) 194 S. W. 172.

92. — **Accident and health insurance.**—A provision for indemnity for total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation requires only such disability as prevents the performance of any substantial part of his duties. *Hefner v. Fidelity & Casualty Co. of New York* (Civ. App.) 160 S. W. 330.

In an accident policy providing that, for loss of entire sight of the eye, the insured shall receive not exceeding \$1,000, the word "entire" does not mean total blindness; but it is sufficient if the insured had practically lost the entire sight of the eye. *International Travelers' Ass'n v. Rogers* (Civ. App.) 163 S. W. 421.

Death from apoplexy, resulting from excitement caused by witnessing a man being burned to death in an accidental fire, held death by accident, within the terms of an accident certificate, and not from disease. *International Travelers' Ass'n v. Brnum* (Civ. App.) 169 S. W. 389.

Under an accident insurance policy not specifying when an accrued indemnity should be payable, the liability accrues when the accident occurs, and payment should be made when proof of this liability is made to the insurer. *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 177 S. W. 1008.

In an action on an accident policy excepting accidents while trying to enter a conveyance using steam as a motive power, evidence held not to sustain a verdict for plaintiff. *Id.*

Total disability to perform the duties of insured's occupation, for which an accident policy provided certain indemnities, held not necessarily physical inability to perform the duties. *Fidelity & Casualty Co. v. Joiner* (Civ. App.) 178 S. W. 806.

An accident policy, excepting injuries while on a railway grade or roadbed, did not except injuries where insured was necessarily on a railway roadbed in attempting to enter a train. *Travelers' Ins. Co. v. Harris* (Civ. App.) 178 S. W. 816.

In an accident policy insuring against death through accidental means, which included death resulting from sunstroke independently of other causes, "sunstroke" is to be deemed a form of personal injury rather than a disease. *Bryant v. Continental Casualty Co.* (Sup.) 182 S. W. 673.

Death of one by sunstroke, caused by exposure to the sun while pursuing his ordinary vocation, held due to accidental means, within a policy insuring against sunstroke due to accidental means. *Id.*

One need not be absolutely disabled to do some acts usually done by him in carrying on his occupation, to be totally disabled, within an accident policy. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

In an action on an accident insurance policy, evidence held to show that the cause of insured's death was an aneurism caused by an accidental blow not arterio sclerosis superinduced by disease. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

93. **Extent of loss and liability of insurer—Fire insurance.**—Policy as liquidated demand, see art. 4874 and notes.

In an action on a fire insurance policy, where the policy was not offered in evidence, and there was no proof of its contents, a judgment for plaintiff could not be sustained. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 159 S. W. 137.

Evidence held to sustain a finding that statements as to threats to burn a sanitarium which was insured had not been communicated to the insured when he applied for the policy. *Washington Fire Ins. Co. v. Cobb* (Civ. App.) 163 S. W. 608.

94. — **Accident insurance.**—Evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate. *Hefner v. Fidelity & Casualty Co. of New York* (Civ. App.) 160 S. W. 330.

Evidence held to warrant the finding by the jury that plaintiff's eye was injured by

external, violent, and accidental means. *International Travelers' Ass'n v. Rogers* (Civ. App.) 163 S. W. 421.

Evidence held to entitle insured to recover as for loss of the entire sight of an eye within the provision for a certain indemnity. *Id.*

In an action on an accident policy, evidence held to warrant a finding that deceased met his death through an accident contemplated by the terms of the policy. *Order of United Commercial Travelers v. Simpson* (Civ. App.) 177 S. W. 169.

In an action on an accident policy, evidence held to warrant a finding that insured, from the time of injury till his death, was totally disabled from performing his customary duties. *Fidelity & Casualty Co. v. Joiner* (Civ. App.) 178 S. W. 806.

In an action on an accident policy, evidence held not to show that insured was killed while attempting to enter a moving train, injuries from which cause were excepted. *Travelers' Ins. Co. v. Harris* (Civ. App.) 178 S. W. 816.

Before recovery on an accident policy can be denied on the theory that deceased voluntarily exposed himself to unnecessary danger, he must have apprehended the danger and entered the position of peril with the intention of exposing himself. *Id.*

In an action on a policy insuring a horse, where there was no testimony suggesting that the death of the animal was due to one of the excepted causes, the court is warranted in finding that the horse died from disease, or accidental injuries as covered by the policy. *National Live Stock Ins. Co. v. Warren* (Civ. App.) 181 S. W. 790.

Under provisions of accident insurance policy, the fact that insured was suffering from disease contributing to his paralysis would prevent the paralysis from being the "direct, independent," and exclusive result of the fall, though the fall hastened the paralysis. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615.

Under accident policy, insurer held not liable where insured's diseases caused the paralysis or concurred with the insured's fall in causing it, but liable if the fall alone caused the paralysis. *Id.*

Under an accident policy providing for payment for total disability due to bodily injuries, held, that insured was not entitled to payment until the period of disability had ceased. *Commonwealth Bonding & Casualty Ins. Co. v. Knight* (Civ. App.) 185 S. W. 1037.

Total disability under an accident insurance policy held such disability as prevented substantial performance of every part of the business, or as required the insured, in the preservation of his life and health, to desist from the transaction of his business. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

Insured held to have been immediately and continually disabled from performing every duty pertaining to his occupation, as superintendent of well drilling, within accident insurance policy, notwithstanding attempts to work for short periods separated by long intervals. *Id.*

The principal sum and weekly indemnity during total disability held, under the terms of an accident policy, both payable to the beneficiary after the death of insured from the accident after a period of total disability. *Id.*

95. — **Life insurance.**—Where policies, containing a provision that, in case of a failure to pay premiums, they should automatically be turned into policies for term insurance, were canceled under a contract voidable because of insured's insanity, the trial court, on vacating the surrender, should treat the policies as term insurance under such provision. *New York Life Ins. Co. v. Hagler* (Civ. App.) 169 S. W. 1064.

In an action on a life insurance policy with a suicide clause, evidence held sufficient to show that insured killed himself. *State Mut. Life Ins. Co. of Rome, Ga., v. Long* (Civ. App.) 178 S. W. 778.

95½. **Settlement with injured party.**—Where the insurer, having notice of an accident to the insured's employé, disclaims any liability and refuses to make any defense, it cannot when sued by insured, complain of a just settlement with the injured party. *United States Fidelity & Guaranty Co. v. Pressler* (Civ. App.) 185 S. W. 326.

96. **Notice and proof of loss.**—Validity of stipulations in policy, see notes to art. 5714. A delay of 10 months in giving an accident insurance company notice of an accident is unreasonable per se, under a clause of the policy requiring notice to be given as soon as may be reasonably possible. *Hefner v. Fidelity & Casualty Co. of New York* (Civ. App.) 160 S. W. 330.

A provision in a fire policy requiring proof of loss and a signed and sworn statement by insured showing the property lost or damaged and his knowledge and belief as to the time and origin of the fire was reasonable and valid. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334.

97. — **Necessity of proof.**—The fact that physicians who attended a person accidentally injured attributed his condition to disease, and not to accident, does not excuse his failure to give the company notice of the accident as soon as reasonably possible, as required by the policy. *Hefner v. Fidelity & Casualty Co. of New York* (Civ. App.) 160 S. W. 330.

Where a life policy required proofs of death as a condition precedent to recovery, there can be no recovery, where no proofs were made, and there was no waiver of the conditions. *American Nat. Ins. Co. v. Gallimore* (Civ. App.) 166 S. W. 17.

Under a life insurance policy making it a condition precedent to recovery that proofs of death be furnished as required therein, a failure to furnish such proofs, without claiming or showing any excuse, defeats a recovery. *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

Where insured fails to make the proof of loss required by his policy, there can be no recovery thereon, unless the insurer waives the defect. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

Failure of insured on demand after loss to furnish, as required by the policy bills, covering household goods destroyed by fire, held, under the circumstances in which the goods were acquired, not to defeat recovery on the policy. *Id.*

98. — **Estoppel or waiver as to proofs.**—A life insurance company which denied liability and refused to furnish blanks for proof of death cannot defend an action on the policy for failure to furnish proof of death. *American Nat. Ins. Co. v. Bird* (Civ. App.) 174 S. W. 939.

Where a fire company denied its liability in toto, there was a waiver of irregularities in the proof of loss. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

Failure of insurer of household goods to point out specifically defects in proof of loss held a waiver of any defects. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

Evidence, in an action on an accident policy, held sufficient to establish waiver as to furnishing proofs of continuance of disability. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

Proof of loss is waived when the insurer denies all liability under the policy. *Commonwealth Bonding & Casualty Ins. Co. v. Knight* (Civ. App.) 185 S. W. 1037.

Where the policy gave the insurer the right to an autopsy, but it was not demanded at the time of death, the insurer could not six weeks after interment insist on such right, especially where the only dispute was whether his neck was broken or dislocated by the accident. *American Nat. Ins. Co. v. Nuckols* (Civ. App.) 187 S. W. 497.

The insurer's waiver of formal proof of loss was to be dated from the time of its examination of the insured. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

99. — **Fraud, false swearing or misstatement.**—Where a policy provided that it should be void if insured concealed or misrepresented in writing any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing, the "writing," "fraud," or "false swearing" were referable to misrepresentations and misstatements in the proof of loss. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334.

Willful presentation by insured, with intent to defraud, of proof of loss containing items overvalued or not lost, will prevent recovery on a policy insuring household goods against fire. *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

100. — **Proofs of injury or loss.**—Where an animal insurance policy required notice of sickness or accident forthwith to the insurer with the name of the veterinarian employed, it being impossible for the assured to procure a veterinarian between the time of the serious sickness of the animal and its death, notice of death immediately thereafter was a compliance with the policy. *National Live Stock Ins. Co. v. Henderson* (Civ. App.) 164 S. W. 852.

A notice of illness of an insured animal given to the insurer's agent held sufficient compliance with the contract provision that notice be given the company at its home office, where the notice was immediately forwarded to and received by the insurer's home office. *Id.*

Affidavits held to constitute sufficient proofs of death of assured. *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

Where proof of loss was defective because the notary before whom it was sworn was interested, the insurer to raise that question must object to it on that ground. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

Provisions in a burglary insurance policy requiring visible marks of actual violence held to determine an evidentiary fact, and not to provide that it should be the sole proof. *National Surety Co. v. Silberberg Bros.* (Civ. App.) 176 S. W. 97.

In action on a burglary insurance policy, slipping back of bolt in door, locked the night before, which was seen through a narrow space, held visible evidence and visible marks of forceable entry. *Id.*

The sending to insurer by the beneficiary's attorney with the proofs of death of the coroner's finding of suicide is not an admission by the beneficiary, who knew nothing of the coroner's investigation or report of the fact of suicide. *De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* (Civ. App.) 180 S. W. 153.

Proof of loss held sufficient within a policy against theft, declaring "mere disappearance" insufficient evidence of theft. *Great Eastern Casualty Co. v. Boli* (Civ. App.) 187 S. W. 686.

Delay in giving insurer notice of injury to employé, held not a defense, where the insurer received notice in time to make full investigation and suffered no loss or injury by reason of the delay. *Maryland Casualty Co. v. W. C. Robertson & Co.* (Civ. App.) 194 S. W. 1140.

Where the employé of one taking employer's liability insurance was injured on July 15th, but made no claim until service of citation on August 25th, and the insured on August 27th gave the citation to insurer's agent, the requirement that notice of accident must be given immediately was sufficiently complied with. *Id.*

100½. **Right to autopsy or to exhume insured's body.**—Where insurer pleaded that doctors' conflicting statements that insured died from broken neck, and from dislocated neck, meant the same thing, it could not base its right to an autopsy on such conflicting statements. *American Nat. Ins. Co. v. Nuckols* (Civ. App.) 187 S. W. 497.

Insurer's right to exhume insured's body, if covered by right to autopsy, can be exercised only at once and upon showing that it will show fraud or mistake. *Id.*

To give the insurer the right of exhumation of the insured's body, such right must be clearly expressed in no uncertain words in the policy. *Id.*

102. **Adjustment of loss.**—In action on policy, agents of the insurer, who attempted to make an adjustment and who were being paid a salary by the insurer without reference to such adjustment, were properly disallowed their claim of \$10 per day as expenses of adjustment. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Civ. App.) 188 S. W. 243.

104. — **Waiver as to adjustment.**—A provision that the insured shall give opportunity to adjusters to examine the property is waived, where they made no examination for 10 days after request by the insured and disclaimed all liability under the policy. *Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co.* (Civ. App.) 159 S. W. 172.

105. — **Validity and effect of appraisal or award.**—Where neither the provisions of a fire insurance policy, nor the agreement appointing appraisers, prescribed the procedure before them, their failure to give notice of the hearing, and to take evidence, does not invalidate their award. *Orient Ins. Co. of Hartford, Conn., v. Harmon* (Civ. App.) 177 S. W. 192.

In an action on an award by appraisers appointed under a fire insurance policy, proof that the award was void for a reason not pleaded does not defeat recovery. *Id.*

An award of insurance appraisers, subject to the common-law rules of arbitration, is not void for failure to give notice and hear evidence, where the insurer made no request to present evidence. *Id.*

An umpire selected by fire insurance appraisers held authorized, under the policy, to fix an award exceeding that by either appraiser, where both appraisers agreed thereto. *Id.*

106. — **Settlement between parties.**—In an action on a fire policy, wherein it was contended that a settlement was obtained by duress, evidence held sufficient to sustain the plea thereof. *Fire Ass'n of Philadelphia v. Richards* (Civ. App.) 179 S. W. 926.

All that is required to validate a compromise on a life policy is that the beneficiary understand the settlement and that the insurer act in good faith in disputing the claim. *McDonald v. Aetna Life Ins. Co. of Hartford, Conn.* (Civ. App.) 187 S. W. 1005.

A settlement with the beneficiary, under accident insurance policy, held to have been procured by the fraud of the company's agent claiming to act in the beneficiary's interest, so as not to bar recovery under the policy. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

Where the beneficiary of an insurance policy had been induced by fraud to accept a settlement on the policy, and was unable to return the amount received, she may recover on the policy without tendering a return of the amount received for the settlement. *Id.*

The dismissal of an action on an accident insurance policy by the beneficiary, without knowledge that a fraudulent settlement by her could be set aside, held not a ratification of the settlement. *Id.*

107. — **Setting aside adjustment.**—An award by fire insurance appraisers will be disturbed only where fraud, partiality, misconduct, or gross mistake is shown. *Orient Ins. Co. of Hartford, Conn., v. Harmon* (Civ. App.) 177 S. W. 192.

Where the award of fire insurance appraisers does not show that they allowed for depreciation, but does not conclusively show that they failed to make such allowance, the award will be sustained. *Id.*

108. **Right to proceeds.**—Where, in a controversy between an illegitimate daughter and the wife of an insured as to the proceeds of a policy, the daughter charged that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary, and also that the insured was of unsound mind, evidence that the insured was very fond of the daughter, and expressed an intention at the time of changing the policy to provide for her in some method, was relevant to such issues. *Maxey v. Franklin Life Ins. Co.* (Civ. App.) 164 S. W. 438.

In a controversy between the wife of an insured and an illegitimate daughter as to the proceeds of an insurance policy, evidence held to sustain a finding that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary of the policy. *Id.*

Purchaser of land subject to a vendor's lien, but who assumed no personal liability on the purchase-money notes, and who insured premises for his own benefit, held entitled to proceeds as against owner of the lien. *Gassaway v. Browning* (Civ. App.) 175 S. W. 481.

One insured in an industrial policy held entitled, in a cross-action in the employé's suit, having contracted for expenses in defending an action, to recover the amount of such expenses, together with a conditional judgment for the amount of the indemnity in case the employé should recover. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

The purchaser of insured property is not entitled to indemnity provided by the policy unless it has been assigned to him with insurer's consent. *Springfield Fire & Marine Ins. Co. v. Boon* (Civ. App.) 194 S. W. 1006.

111. — **Trustee.**—Where the trustee, to whom insurance was payable as his interest might appear in action on the policy, by the owner, answered, disclaiming interest, the owner's right to recover the full amount due under the policy was established. *Camden Fire Ins. Ass'n v. Baird* (Civ. App.) 187 S. W. 699.

117. **Subrogation of insurer.**—The rights of a lienholder and of the insurance companies under a provision of a fire policy that whenever the company shall pay the mortgagee for any loss and claim that no liability existed toward insured, the company should be subrogated to the rights of the party receiving payment, were not affected by the payments of premiums by the owner. *Washington Fire Ins. Co. v. Cobb* (Civ. App.) 163 S. W. 608.

Where the parties of a fire policy understood that a provision that whenever the company paid the "mortgagee" any sum for loss and claimed that as to the mortgagor or owner, no liability existed, the company should be subrogated to the rights of the party receiving payment as to all collateral securities was intended to cover a mechanic's lien

on the premises, the insurance company, upon paying such lienor's claim, became subrogated to her rights as against the owner. *Id.*

Where one insured against damage to his automobile offered to assign his claim against the wrongdoer to an attorney for insurer, who refused for want of authority to act and because reasonable time had not elapsed to make investigations, and immediately afterwards insured filed a claim with the wrongdoer and settled, insurer did not waive his right to subrogation stipulated for in the policy. *Maryland Motor Car Ins. Co. v. Haggard (Civ. App.) 168 S. W. 1011.*

Where one procuring insurance on his automobile against damage by collision settled with wrongdoer, he could not recover on the policy stipulating that insurer on payment of the loss should be subrogated to all right of recovery by insured for the loss. *Id.*

In an action by an insurance company, which had paid the loss, held, that the insured, who had recovered from the railroad, the negligence of which caused the loss, was liable only for the surplus remaining in his hands after satisfying his loss and reasonable expenses in prosecuting an action against the railroad. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 175 S. W. 816.*

Where, upon payment of theft policy, the owner's interest, in a stolen automobile and a bill of sale of the car is assigned to the insurance company, the latter may maintain suit as claimant upon sequestration of the automobile. *Dawedoff v. Hooper (Civ. App.) 190 S. W. 522.*

Where owner had not assigned claim against railroad for fire loss, but had received insurance, in action by owner and insurer, it was erroneous to charge that railway company was only liable to insurer. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co. (Sup.) 194 S. W. 1099.*

**118. Interest.**—Where an insurance company sent to a beneficiary under a policy a check for the amount due, which she retained without objection, except an unfounded objection that it was insufficient in amount, this constituted a sufficient tender, and prevented the recovery of interest. *Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Zapp (Civ. App.) 160 S. W. 139.*

Where the beneficiary under a policy of life insurance, after death of the insured, demanded the amount of the policy, and refused the amount offered by the insurer, and began suit for and recovered such amount, held, that he was entitled to interest thereon. *First Texas State Ins. Co. v. Jiminez (Civ. App.) 163 S. W. 656.*

Where an insured building is destroyed, the amount of the policy is due when the loss occurred, and it will bear interest from that date. *Fire Ass'n of Philadelphia v. Strayhorn (Civ. App.) 165 S. W. 901.*

Under an accident insurance policy not specifying when an accrued indemnity should be payable, the liability accrues when the accident occurs, and payment should be made when proof of this liability is made to the insurer, and interest should be allowed from the date such proof is furnished. *American Nat. Ins. Co. v. Fulghum (Civ. App.) 177 S. W. 1008.*

Under employer's liability policy, insured recovering by reason of its payment of judgment obtained by insured's employé held entitled to interest on its judgment from date of employé's judgment against it, rather than from the date of its payment thereof. *Ætna Life Ins. Co. v. El Paso Electric Ry. Co. (Civ. App.) 184 S. W. 628.*

**119. Conditions precedent to action on policy.**—Compliance with the requirement that notice be given as soon as may be reasonably possible is a condition precedent to recovery under the policy. *Hefner v. Fidelity & Casualty Co. of New York (Civ. App.) 160 S. W. 330.*

**121. Defenses in general.**—Where an insured automobile was totally destroyed by successive fires, negligence of the insured in not safeguarding the automobile after the first fire held not to defeat recovery. *St. Paul Fire & Marine Ins. Co. v. Huff (Civ. App.) 172 S. W. 755.*

In an action on an accident policy which excepted injuries received while the insured was riding on a motorcycle, it is a good defense that the injuries were so received. *International Travelers' Ass'n v. Peterson (Civ. App.) 183 S. W. 1196.*

**124. Reinsurance.**—A reinsurer under a strict reinsurance contract is not liable for a loss directly to the insured, who cannot maintain his action against the reinsurer. *Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co. (Civ. App.) 180 S. W. 1165.*

A contract of reinsurance is one by which an insurer agrees to protect the first insurer from the risk he has already assumed, and creates no privity between reinsurer and insured, although the reinsurer can, by the contract, assume direct liability to the insured. *Id.*

A contract between two insurance companies held a contract of reinsurance, creating no privity between reinsurer and insured. *Id.*



## TITLE 72

## INTEREST

Art.	Art.
4973. Definition of interest.	4981. Judgments to bear six per cent when not otherwise stipulated.
4977. Six per cent the legal rate.	4982. Double the amount of usurious interest recovered, when.
4978. Six per cent on open accounts, when.	4983. Usury, how pleaded.
4979. Ten per cent the conventional rate.	
4980. Contracts for a greater rate than ten per cent void.	

**Article 4973. [3097] Definition of "interest."**

1. "Interest."—An agreement to pay plaintiff 200 per cent. on an investment as profits held not an agreement for the payment of usury, the payment not being for that of interest. *Burton v. Stayner* (Civ. App.) 182 S. W. 394.

The facts, pleaded therefor, showing the transaction usurious, it is immaterial that the pleading designated it as "exchange or interest"; the sum deducted for use of money constituting interest. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

2, 3. **Interest as damages—Indemnity for loss or injury.**—In an action in tort, interest is a part of the damages. *San Antonio & A. P. Ry. Co. v. Schaeffer* (Civ. App.) 179 S. W. 540.

In a suit for damages to personal property, interest is not recoverable *eo nomine*, but as damages. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593.

In a damage action for acquiring property by fraudulent representations, interest is allowable as an element of damages. *Williams v. Harris* (Civ. App.) 193 S. W. 403.

4. — **Breach of contract.**—In an action on a contract, with a cross-action alleging breach, and claiming in reconvention for damages and for interest thereon, defendant held entitled to interest on the damages from the date of the breach. *Times Pub. Co. v. Rood* (Civ. App.) 163 S. W. 1037.

Plaintiff, whether his action is regarded as one for breach of express contract of gratuitous bailment, or as one of debt for money had and received, and not returned, cannot recover other damages than interest for detention of money. *Ft. Worth State Bank v. Little* (Civ. App.) 168 S. W. 55.

In action between two parties, each claiming a balance due from the other, where appellant is found to owe appellee a substantial sum, appellant cannot object to failure of court to allow interest on his account against appellee, where appellee has not been allowed interest. *Walter v. Rowland* (Civ. App.) 189 S. W. 981.

Where there is no obligation to pay interest as well as principal, and interest is recoverable only as damages for nonpayment of principal when due, the receipt of the principal as such in full is a bar to any claim for interest which is a mere incident of the debt. *United Bros. of Friendship of Texas v. Kennedy* (Civ. App.) 193 S. W. 253.

9. — **Conversion.**—The measure of damages for conversion is the market value of the property at the time and place of conversion, with interest at the time of trial. *San Antonio & A. P. Ry. Co. v. Smith* (Civ. App.) 171 S. W. 282.

Where plaintiff was entitled to recover the value of animals as damages for wrongful conversion, he was also entitled to recover interest as a part of the damages, from the date of the conversion. *Hancock v. Haile* (Civ. App.) 171 S. W. 1053.

10. — **Claim against carrier.**—Where the petition in an action against a carrier for damage to goods expressly seeks interest it is recoverable from the date of the damage to the time of the trial. *Missouri, K. & T. Ry. Co. of Texas v. Gray* (Civ. App.) 160 S. W. 434.

A shipper recovering for damages to stock is entitled to recover interest from the date of the damage as a part of his compensatory damages. *Texas & P. Ry. Co. v. Erwin* (Civ. App.) 180 S. W. 662.

11. — **Rate and computation.**—Where a stockholder, was damaged by the negligence of the directors, he can only recover 6 per cent. simple interest on his damages. *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071.

12. — **Destruction of property.**—In an action against a railroad for the destruction of a house by fire, interest was recoverable only as a part of the damages. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Sup.) 180 S. W. 225, granting writ of error (Civ. App.) 179 S. W. 75.

14. **Detention of money.**—A sole heir having obtained exclusive possession of testatrix's estate by suppressing her will and later having left a will in which he bequeathed to a legatee an amount more than sufficient to satisfy a legacy in testatrix's will, the heir's estate was not liable to such legatee for interest at the highest rate. *Pitts v. Van Orden* (Civ. App.) 158 S. W. 1043.

Where the husband had secured a decree of divorce in another state, and on his death had made his mother independent executrix of the estate, and the former wife sued for her allowance, claiming the decree void, and it was adjudged to be void, she should

not be allowed interest as a personal judgment against the executrix. *Jones v. Bartlett* (Civ. App.) 189 S. W. 1107.

16. **Interest on recovery of money paid.**—Defendant held not liable to codefendants for interest on purchase money paid him. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

25. **Interest on note.**—Where the amount of a note is tendered, no interest falling due thereafter is recoverable. *Neff v. Heimer* (Civ. App.) 163 S. W. 140.

A judgment of foreclosure for the balance due on a vendor's lien note which provided for interest, after deducting credits to which the purchaser was entitled should allow interest on such balance. *Humphreys v. Douglass* (Civ. App.) 177 S. W. 569.

Where defendant guaranteed a third party's debt due plaintiff, he was liable only for the then existing debt with legal interest and not for the interest and attorney's fees stipulated in notes subsequently made by the debtor to plaintiff for the debt in question. *Martin v. Blair & Hughes Co.* (Civ. App.) 187 S. W. 505.

27. **Interest on amount due for services.**—In an action to recover the reasonable value of services rendered by an attorney where the services had been completed and demand made for payment which was refused, plaintiff was entitled to interest for the detention of the money due. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

31½. **Interest on money due as contribution.**—A claim against the owner of one-third of a lot for contribution of that part of the expense of filling the lot was not a claim for damages not allowing the assessment of interest as a part of the damages. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

Plaintiff, subrogated to the rights of the holder of vendor's lien notes to enforce payment of a part of the joint indebtedness assumed by defendant because of a discharge of such notes, held not entitled to recover interest at the rate named in the notes or the attorney's fees specified therein. *Holloman v. Oxford* (Civ. App.) 168 S. W. 437.

34. **Recovery of interest paid.**—Interest paid on the excess of purchase-money notes, due to a mistake in acreage, was recoverable. *Lindsay v. Vogelsang* (Civ. App.) 179 S. W. 58.

#### Art. 4977. [3101] Six per cent the legal rate.

"Ascertaining the sum payable."—Where plaintiff agreed with defendant to represent him in a suit for a certain sum, the receipt for a part of which contained a memorandum of the contract, which receipt was accepted by defendant, held, that the contract determined the sum payable within this article, so that interest was recoverable under the contract, and was not a part of the amount in controversy affecting the jurisdiction of a justice's court. *Ewalt v. Holmes* (Civ. App.) 165 S. W. 39.

In an action for disability indemnity on a policy of accident insurance, plaintiff is entitled to recover interest *eo nomine* on the amount sued for, and not as damages, since the contract is one "ascertaining the sum payable." *Great Eastern Casualty Co. v. Anderson* (Civ. App.) 183 S. W. 802.

The district court has jurisdiction of a suit for recovery of \$500 agreed to be paid as broker's commission on an exchange of realty, the interest on such sum being in the nature of damages for wrongful detention of the money, and not interest on an open account or a written contract ascertaining the sum payable, as provided for in arts. 4977 and 4978. *Robinson v. Lingner* (Civ. App.) 183 S. W. 850.

When applicable.—Where an obligation providing for the return of money did not stipulate any rate of interest, the obligee can recover only the legal rate of 6 per cent. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Under this article, interest is recoverable upon the amount contracted to be paid in an insurance policy. *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 177 S. W. 1008.

Under charter of city of Mineral Wells adopted August 19, 1913, in accordance with Acts 33d Leg. p. 147, § 8 (Vernon's Sayles' Civ. St. 1914, art. 1096h), city's assignable certificates for special assessments, fixing interest not to exceed 8 per cent. might be enforced, notwithstanding general statute relating to interest. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

#### Art. 4978. [3102] Six per cent on open accounts, when.

Application.—The district court has jurisdiction of a suit for recovery of \$500 agreed to be paid as broker's commission on an exchange of realty, the interest on such sum being in the nature of damages for wrongful detention of the money, and not interest on an open account or a written contract ascertaining the sum payable, as provided for in arts. 4977 and 4978. *Robinson v. Lingner* (Civ. App.) 183 S. W. 850.

#### Art. 4979. [3103] Ten per cent the conventional rate.

In general.—To recover 10 per cent. interest on any item of an account and 10 per cent. attorneys' fees, it was necessary to prove an agreement in writing to pay such sums. *Wall & Carr v. J. M. Radford Grocery Co.* (Civ. App.) 176 S. W. 785.

#### Art. 4980. [3104] Contracts for greater per cent void.

1. In general.—An agreement to pay plaintiff 200 per cent. on an investment as profits held not an agreement for the payment of usury, the payment not being for that of interest. *Burton v. Stayner* (Civ. App.) 182 S. W. 394.

Where the original transaction was usurious, that vice will follow a debt based on such usury in whatever form it may assume. *Id.*

4. **Loans in general.**—Loans of \$10 at the rate of \$3 a month were usurious, entitling the borrower to recover double the amount of interest paid. *Cotton v. Barnes* (Civ. App.) 167 S. W. 756.

5. **Bills, notes and other instruments for the payment of money.**—It is usury for one to discount a check for the drawer, retaining more than legal interest. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

6. — **Renewal note.**—In an action on a note wherein defendants set up usury, evidence held sufficient to support a finding that the usury occurred in previous transactions which had been settled by the execution of the note in question. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

When a usurious obligation is settled and abandoned to a new security taken for a debt lawfully due, such new security rests upon a consideration purged of usury, and is valid. *Id.*

11. **Contract or debt originally valid.**—An antecedent indebtedness is not affected by subsequent usurious renewals or extensions, where the transactions are distinct. *Cain v. Bonner* (Sup.) 194 S. W. 1098.

19. **Rights and remedies of parties—Application of payments.**—Each payment made upon a contract affected with usury is a payment upon the principal applied by law, notwithstanding it was paid and received as payment of interest. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

Payments made upon a contract affected with usury are applied by law as payments upon the principal, even though paid and received as interest. *Cotton v. Beatty* (Civ. App.) 162 S. W. 1007.

Where mechanic's lien contract originally valid was extended by agreement for usurious interest, the suit brought after expiration of limitations as to the original contract but within the period as to the renewals was upon the renewal contract, and the usurious interest collected should be applied to reduction of the principal. *Cain v. Bonner* (Sup.) 194 S. W. 1098.

27. **Waiver and estoppel.**—A release without consideration held not to estop plaintiff from suing for a recovery of the amount illegally collected from him by defendant as interest. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

The right to sue for usurious interest paid may be the subject of compromise and adjustment, where made in good faith, and where the right to recover the usury is waived by the payer for a sufficient consideration. *Id.*

Where plaintiff who had borrowed money of defendant at a usurious rate of interest had signed a so-called release procured by defendant as an estoppel against a suit to recover, it was not necessary for plaintiff to show that the release was signed by him as the result of fraud or mistake. *Id.*

An agreement between the debtor and usurer, reciting an accounting, and that the agreement was executed in full satisfaction of all claims of each against the other, would not estop the debtor from recovering usury in the absence of a showing that the claim therefor was included in the settlement. *Cotton v. Sanderson* (Civ. App.) 150 S. W. 658.

Where defendant made plaintiff a second usurious loan in consideration of plaintiff's releasing his right to sue for usury in the first loan, that consideration is sufficient and the agreement is a defense to the usury in the first transaction. *Cotton v. Beatty* (Civ. App.) 162 S. W. 1007.

The right to sue for usurious interest paid may be the subject of compromise. *Id.*

### Art. 4981. [3105] Judgments, rate of interest on.

Cited, *David v. First Nat. Bank of Claude* (Civ. App.) 172 S. W. 579.

**Rate on judgment.**—Under this article, where a note stipulated for interest at 8 per cent., judgment thereon was properly rendered for the amount due at the date of the judgment, with interest from that date at 8 per cent. *Lloyd v. American Nat. Bank* (Civ. App.) 158 S. W. 785.

### Art. 4982. May recover double usurious interest paid.

**Nature and grounds of remedy.**—A maker of a note held to have paid usurious interest authorizing a judgment for double the amount, under this article. *Lee v. White* (Civ. App.) 171 S. W. 1056.

Where all payments made on a note were applied on the principal, there can be no recovery under the statute providing for a recovery by the party who "pays" usurious interest. *Allen v. First Guaranty State Bank of Pittsburg* (Civ. App.) 175 S. W. 485.

Usury may be paid in property. *Stewart v. Briggs* (Civ. App.) 190 S. W. 221.

Where amount of interest note was usurious, held that, where cotton was received in payment and value of cotton did not exceed amount of lawful interest that could be charged, no usury was paid within this article. *Id.*

**Actions for penalties.**—Petition in an action to recover the statutory penalty for usury, alleging the borrowing of certain sums from defendant's agent secured by an assignment of wages and the payment of a usurious interest thereon, held good as against a general demurrer. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

Under this article, held that it was not necessary to allege a demand upon the defendant. *Id.*

Allegations of petition and of supplemental petition in an action to recover the statutory penalty for charging and collecting usury on money loaned held sufficient to let in proof of the true character of the release pleaded by defendant. *Id.*

In a suit to recover the statutory penalty for usury charged and collected on money

loaned, the amount owed by plaintiff to defendant was allowable to defendant as an offset against the amount of plaintiff's recovery. *Id.*

Omission of verification on a plea of usury seeking to recover a penalty required by this article and art. 4983 is not a jurisdictional defect and may be cured by amendment. *Cotton v. Rea* (Sup.) 163 S. W. 2.

A petition to recover usurious interest, alleging that defendant, agreeing to make a loan of \$8,000, exacted and received \$1,200, alleged payment of \$1,200. *Gunter v. Merchant* (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260.

An agreement of the maker of a note with B., after B. acquired the note, held admissible on the question of whether B. acquired it for himself or for the maker, relative to the maker's right to recover of the payee the penalty for usury paid. *Braly v. Connally* (Civ. App.) 180 S. W. 916.

The joint and several obligors with defendant on contracts claimed to be usurious were necessary parties to an action to recover usurious interest paid. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

**Persons entitled to enforce penalties.**—B. not having paid notes as agent of the maker, but, as shown by their agreement, acquired them for himself, the maker could not, under this article, recover of the payees the penalty for usury paid. *Braly v. Connally* (Civ. App.) 180 S. W. 916.

The maker of a note for the purchase price of land cannot recover the penalty for usury from a bank to which the note was transferred in payment of a previous note of the payee which included usury. *Thom v. First Nat. Bank of New Boston* (Civ. App.) 191 S. W. 148.

### Art. 4983. [3107] Usury, how pleaded.

**Necessity for verification.**—Omission of verification on a plea of usury seeking to recover a penalty required by this article and art. 4983 is not a jurisdictional defect, and may be cured by amendment. *Cotton v. Rea* (Sup.) 163 S. W. 2.

## TITLE 73

## IRRIGATION AND OTHER WATER RIGHTS

Chap.

1. Regulating the mode of irrigation and the use of water.

Chap.

2. Water improvement districts.

## CHAPTER ONE

## REGULATING THE MODE OF IRRIGATION AND THE USE OF WATER

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**Article 4991. [3115] Certain waters declared state property.**—The unowned and unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, collections of still water, and of the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or water shed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes

hereinafter provided. [Acts 1895, p. 25; Acts 1913, p. 358, § 1; Act March 19, 1917, ch. 88, § 1.]

**Explanatory.**—The act repeals ch. 171, Regular Session, 33rd Leg., and all other laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Cow Bayou Canal Co. v. Orange County* (Civ. App.) 158 S. W. 173; *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715; *Washington County v. Pendleton* (Civ. App.) 178 S. W. 979.

**Right to water at reasonable rate.**—See *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677; note under art. 5002c.

**To what waters applicable.**—Under this chapter, owners of land through which rain waters having their source in other lands flow, have no riparian rights in them, but they are subject to appropriation. *Hoefs v. Short* (Civ. App.) 178 S. W. 11.

Where water in a creek flows through a well-defined channel, with banks and bed fed by rains falling within its watershed outside of defendants' land and through which water flows only after a rainfall, held not to be watercourse to which riparian rights attach, but that title remains in state and the water is subject to appropriation under this article. *Hoefs v. Short* (Civ. App.) 190 S. W. 802.

**Art. 4992. [3116] Purposes for which storm, flood or rain waters may be diverted.**—The storm, flood or rain waters described in the preceding Section may be held or stored by dams, in lakes or reservoirs, or diverted by means of canals, ditches, intakes, pumping plants, or other works, constructed by any person, corporation, association of persons or irrigation district created under the statutes, for the purpose of irrigation, mining, milling, manufacturing, the development of power, the construction and operation of waterworks for cities and towns, or for stock raising. [Acts 1895, p. 25; Acts 1913, p. 358, § 2; Act March 19, 1917, ch. 88, § 2.]

**Art. 4993. [3117] The ordinary flow and underflow of flowing streams may be diverted, etc.**—The ordinary flow and underflow of the flowing water and tides of every natural river, or stream, within the State of Texas may be taken or diverted from its natural channel by any of the persons named in the preceding section for any of the purposes stated therein; provided, that such ordinary flow and underflow shall not be diverted to the prejudice of the vested rights of any riparian owner without his consent except after condemnation thereof in the manner hereinafter provided. The waters of any arm or inlet of the Gulf of Mexico, or of any salt water bay, may be changed from salt to sweet or fresh water, and held or stored by dams, dikes or other structures and taken or diverted by any of the persons named in this Section for any of the purposes stated herein. [Acts 1895, p. 25; Acts 1913, p. 358, § 3; Act March 19, 1917, ch. 88, § 3.]

**Art. 4994. [3118] Purposes of appropriation.**—The appropriation of water must be for irrigation, mining, milling, manufacturing, the development of power, the construction and operation of waterworks for cities and towns, or for stock raising. Provided, that so far as practicable and within the limits of the public welfare, the water engineering board hereinafter created shall subordinate the appropriation of water for power to the appropriation of water for irrigation. [Acts 1895, p. 25; Acts 1913, p. 358, § 4; Act March 19, 1917, ch. 88, § 4.]

<sup>1</sup>See *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677; note under art. 5002c.

**Art. 4995. [3119] Priority of appropriation; who deemed an appropriator; this act not to work a forfeiture of rights acquired under declaration of appropriation duly acted upon; forfeiture.**—As between appropriators, the first in time is the first in right. [Acts 1895, p. 25; Acts 1913, p. 358, § 5; Act March 19, 1917, ch. 88, § 5.]

For the purpose of this Act, an appropriator is any person, association of persons, corporation or irrigation district, who has heretofore

made beneficial use of any water, in a lawful manner, under the provisions of any Act of the Legislature of the State of Texas, prior to the passage of Chapter 171 of the General Laws of the Thirty-third Legislature of Texas, and who has filed with the State board of water engineers a record of his appropriation, as required by said Act of the Thirty-third Legislature, or who has heretofore or may hereafter make beneficial use of any water within the limitations of a permit lawfully issued by the board of water engineers, and no appropriation of any water shall be considered as having been perfected unless such water has been beneficially used for one or more of the purposes named in this Act, and for the purpose or purposes stated in the original declaration of intention to appropriate such water, or stated in the permit issued by the board of water engineers. [Act March 19, 1917, ch. 88, § 6.]

Neither the foregoing Section [preceding paragraph of this article] nor any other provision of this Act shall be construed as intended to impair or to work or authorize the forfeiture of, or shall impair or work or authorize the forfeiture of, any rights heretofore or hereafter acquired by any declaration of appropriation or by permit when the appropriator has begun, or begins, the work and development contemplated by his declaration of appropriation, within the time provided in the law under which the same was or is made and has prosecuted, and continues to prosecute, the same with all reasonable diligence toward completion; but if any appropriator under this Act, or other law of this State, has failed or fails to begin the work and development contemplated by his declaration of appropriation within the time provided in the law under which the same was or is made, or has failed or fails, to prosecute the same with all reasonable diligence toward completion, his right to so much water as has not been applied, or is not applied, to beneficial use, as defined in Section nine [Art. 4995aa] of this Act shall be considered as, and shall be, forfeited, and such water shall be subject to new appropriation under this Act; provided that no such rights shall be declared forfeited until the person or persons who are the owners of the land and whose rights are claimed to have been forfeited, shall first be given due notice and hearing as required in Section 33 [Art. 4999] of this Act, and provided further, that if a permit for the use of such water has been issued, or is issued, under this Act, or under the Act approved April the 9th, 1913, such water shall not be subject to new appropriation until the permit is cancelled by the board in whole, or in part, in accordance with the provisions of Section 33 [Art. 4999] of this Act. [Act March 19, 1917, ch. 88, § 7.]

**Explanatory.**—Act approved April 9, 1913, referred to above, is chapter 171 repealed hereby.

**Art. 4995a. State divided into water divisions.**—The State shall be and is hereby divided into three water divisions, as follows:

All that portion of the State of Texas lying North of the thirtieth parallel, north latitude, and west of the one hundredth meridian west longitude, shall constitute water division No. 1.

All that portion of the State of Texas lying east of the ninety-seventh meridian west longitude, and south of the thirtieth parallel north latitude, together with all that portion lying north of the thirtieth parallel north latitude and east of the one hundredth meridian west longitude, shall constitute water division No. 2.

All that portion of the State of Texas not embraced in water division No. 1 or water division No. 2, as hereinbefore defined, shall constitute water division No. 3. [Acts 1913, p. 358, § 6; Act March 19, 1917, ch. 88, § 8.]



**Art. 4995aa. What constitutes beneficial use.**—For the purposes of this Act, beneficial use shall be held to mean the use of such a quantity of water, when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose, as is economically necessary for that purpose. [Act March 19, 1917, ch. 88, § 9.]

**Art. 4995b. Board of water engineers continued; constitution of board; appointment and qualification of members; bond; removal; vacancies.**—The board of water engineers, created and constituted by the Act of the Thirty-third Legislature, Chapter 171, General Laws, approved April 9, 1913, is hereby continued, and the members constituting such board shall continue in office for the respective terms for which they were appointed, and until their successors are appointed and qualified, unless sooner removed in the manner provided by law. Said board shall be composed of three members, one of whom shall be appointed from each of the respective water divisions described in Section 8 [Art. 4995a]. The members of such board shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall each hold office for a term of six years, and until his successor is appointed and qualified. No person shall be appointed a member of the board who has not such technical knowledge and such practical experience and skill as shall fit him for the duties of the office. Each member of such board shall enter into bond, to be approved by the Governor, in the penal sum of ten thousand dollars, with not less than two personal sureties, or with one surety or guaranty company authorized to do business in this State, conditioned for the faithful discharge of the duties of his office, and for the delivery to his successor or other officer appointed by the Governor to receive same, all moneys, books and other property belonging to the State then in his hands, or under his control, or with which he may be legally chargeable as a member of said board. The Governor shall have power to remove, at any time, for cause, any member of the State board of water engineers, after such member shall have been given a full, free and public hearing by the Governor. The Governor shall fill all vacancies by appointment, with the advice and consent of the Senate. [Acts 1913, p. 358, § 7; Act March 19, 1917, ch. 88, § 10.]

**Explanatory.**—All of the provisions of chapter 171, referred to and repealed hereby, concerning said board, are carried into the above section of the new act.

**Art. 4995c. Salary.**—Each member of such board shall receive a salary of thirty-six hundred dollars per annum, payable in monthly installments, upon the presentation of salary vouchers, approved by the board. [Acts 1913, p. 358, § 8; Act March 19, 1917, ch. 88, § 11.]

**Art. 4995d. Sessions; quorum; secretary; rules; seal; office, supplies, etc.**—The members appointed shall meet at Austin and organize and elect one of their number chairman of said board. A majority of said board shall constitute a quorum to transact business. Said board shall appoint a secretary who shall be thoroughly conversant with irrigation law, at a salary of not more than two thousand dollars per annum, and who shall execute a bond in the sum of twenty-five hundred dollars, to be approved by the board, payable to the board of water engineers, and the board may appoint such experts and employés as may be necessary to perform any duty that may be required of them by this Act, and fix their compensation. The Secretary shall keep full and accurate minutes of all transactions and proceedings of said board and perform such duties as may be required by the board. The board shall have power to make all needful rules for its government and proceedings; and shall have a seal,

the form of which it shall prescribe. The board shall be furnished with an office at Austin, with necessary furniture, stationery, supplies, etc., at the expense of the State, to be paid for on the order of the board. [Acts 1913, p. 358, § 9; Act March 19, 1917, ch. 88, § 12.]

**Art. 4995e. Expenses.**—The members, secretary, experts and employés of the board shall be entitled to receive from the State their necessary traveling expenses while traveling on the business of the board, upon an itemized statement, sworn to by the party who incurred the expense and approved by the board. [Acts 1913, p. 358, § 10; Act March 19, 1917, ch. 88, § 13.]

**Art. 4995f. May hold sessions at any place.**—The board may hold sessions at any place in this State, when deemed necessary to facilitate the discharge of its duties. [Acts 1913, p. 358, § 11; Act March 19, 1917, ch. 88, § 14.]

**Arts. 4996–4996b.**

Repealed. See art. 5011½w, post.

Cited, *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

**Statement and map.**—Under Act April 19, 1913 (Acts 33d Leg. c. 171, § 12 [Vernon's Sayles' Ann. Civ. St. 1914, art. 4996]), a verified statement and accompanying map held to show an appropriation of storm waters as against an owner of land below. *Hoefs v. Short* (Civ. App.) 178 S. W. 11.

**Art. 4996bb. Extension of time for compliance with statute.**—That every person, association of persons, corporation or irrigation district who has not already complied with the requirements of Section 12, Chapter 171, of the General Acts of the Thirty-third Legislature [Art. 4996, Vernon's Sayles' Civ. St. 1914], shall have one year from and after the passage and approval of this Act within which to comply with the provisions of Section 12. [Act March 31, 1915, ch. 140, § 1.]

Became a law March 31, 1915.

**Art. 4996c. Persons desiring to appropriate water shall make application to board of water engineers; requisites of application; map; no application required in certain cases.**—Every person, association of persons, corporation, water improvement or irrigation district, who shall, after this Act shall take effect, desire to acquire the right to appropriate, for the purposes stated in this Act, unappropriated water of the State, shall, before commencing the construction, enlargement or extension of any dam, lake, reservoir or other storage work, or of any ditch, canal, headgate, intake, pumping plant or other distributing work, or performing any work in connection with the storage, taking or diversion of water, make an application in writing to the board for a permit to make such appropriation storage, or diversion.

Such application shall be in writing and sworn to; shall set forth the name and post office address of the applicant; the source of water supply; the nature and purposes of the proposed use; the location and description of the proposed dam, lake, reservoir, headgate, intake, pumping plant, ditch, canal or other work; the time within which it is proposed to begin construction, and the time required for the application of the water to the proposed use; and if such proposed use is for irrigation, a description of the lands proposed to be irrigated, and, as near as may be, the total acreage thereof.

Such application shall be accompanied by a map or plat drawn on tracing linen, on a scale not less than one inch equals two thousand feet, showing substantially the location and extend of the proposed works; the location of the headgate, intake, pumping plant or point of diversion

by course and distance from permanent natural objects or land marks; the location of the main ditch of canal and of the laterals or branches thereof; the course of the river, stream or other source of water supply; the position and area of all lakes, reservoirs or basins intended to be used or created, and the water line thereof, the intersection with all other ditches, canals, laterals, lakes or reservoirs the proposed work will touch or intersect, or with which connection will be made; and shall represent in ink of different color from that used to represent the proposed works, the location of all ditches, canals, laterals, reservoirs, lakes, dams, or other work of like character then existing on the ground, with a designation of the name of the owner thereof. Such map or plat shall contain the name of the proposed work or enterprise; the name or names of the applicants, and a certificate of the surveyor, giving the date of his survey, his name and post office address and also the date of the application which it accompanies.

Nothing in this Act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension or addition to any canal, ditch or other work that does not contemplate, or will not result in an increased appropriation, or the use of a larger volume of water, but before making any such alteration, enlargement, extension or addition, the person, association of persons, corporation or irrigation district desiring to make same, shall file with the board of water engineers a detailed statement and plan, for the information of the board of the work proposed to be done. [Acts 1913, p. 358, § 15; Act March 19, 1917, ch. 88, § 15.]

**Sufficiency of application.**—An irrigation company was not a statutory appropriator of waters from a lake, though it pumped water from a river into a canal leading into a lake, and then pumped from the lake; its irrigation affidavit stating the water was to be appropriated from the river. *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

**Art. 4996cc. Presentation by person desiring to investigate feasibility of reservoir project.**—Any person or association of persons, corporation, water improvement or irrigation district who desires to investigate the feasibility of any project having for its object the creation of a reservoir for the impounding of flood waters in quantities greater than five thousand acre-feet, and, which if constructed will probably result in the use of five thousand acre-feet per annum, or more, and who has an organized engineering force adequate to expeditiously proceed with such investigation, shall, upon the presentation of such facts, duly verified, to the board of water engineers, describing the locality of such proposed reservoir, have priority date from the time of the filing of such presentation, should a permit be granted thereafter, for the purposes described in such presentation; provided, however, that nothing in this Section or in this Act shall affect or restrict the right of any person or persons, owning lands in this State to construct on his own property any dam or reservoir which would impound or contain less than five hundred acre-feet of water. [Act March 19, 1917, ch. 88, § 16.]

**Art. 4996ccc. Same; fee to be deposited.**—Upon the filing of such presentation, a fee of two hundred and fifty dollars shall be paid to the board for the use of the State, as provided for other fees collected under this Act; no part of which shall be returned, except as hereinafter provided. The fee shall be held by the board for a period of twelve months from the date of its receipt, unless disposed of as hereinafter provided. [Id., § 17.]

**Art. 4996cccc. Same; credit with amount of fee paid on making application for permit.**—Any person or association of persons, corporation,

water improvement, or irrigation district who has complied with the provisions of Sections 16 and 17 [Arts. 4996cc, 4996ccc], and who shall, within twelve months from the date of such presentation, file an application for a permit to store and use any of the flood waters of this State, in volumes of five thousand acre-feet, or more, for the objects and purposes, and at the locality set out in the presentation described in Sections 16 and 17 [Art. 4996ccc], shall, when paying the fees described in Section 41 [Art. 5001f], be credited with the two hundred and fifty dollars paid in accordance with the provisions of Section 17 [Art. 4996ccc]. [Id., § 18.]

**Art. 4996cccc. Same; board may return fee on election not to apply for permit.**—If within twelve months after the filing of the presentation of facts described in Section 16 [Art. 4996cc], such relator shall elect not to apply for a permit, and shall file the results of his or its investigation in intelligible form, with the board, the board may, at its option, return all or any part of said two hundred and fifty dollars, if in its judgment such information will be of equivalent value to the State. [Id., § 19.]

**Art. 4996d. Additional data may be required; fees.**—If the proposed taking or diversion of water for irrigation is of greater volume than nine cubic feet per second of time, the board may require the following in addition:

A continuous longitudinal profile; cross sections of the proposed channel; and detail plans and specifications of any structural work of whatever character entering into the proposed project, on such scales and with such definition as the board may deem necessary or expedient.

The board may also require the filing of a copy of the engineer's field notes of any survey of such lake or reservoir, and all plans and specifications, where the project calls for a dam over six feet in height, either for the purpose of diversion or storage; and no work on such project shall proceed until approval of such plans is obtained.

The board may, in case the applicant is an incorporated company, require the filing of a certified copy of the applicant's articles of incorporation, together with a statement of the names and addresses of its directors and officers; and the amount of its authorized and of its paid-up capital stock.

If the applicant be other than an incorporated company, the board may require the filing of a sworn statement, showing the names and addresses of the person or persons interested in same and the extent of such interest and of the financial condition of each such person.

Every such application shall be accompanied by the fees hereinafter provided, and shall not be filed or considered until such fees are paid. [Acts 1913, p. 358, § 16; Act March 19, 1917, ch. 88, § 20.]

**Art. 4996dd. Drainage; plans.**—Whenever, in the opinion of the board the successful efficient operation of any existing or proposed irrigation system will, or may, be adversely affected by lack of adequate drainage facilities incident to the work proposed to be done by the applicant or applicants for a permit to appropriate public waters, the said applicant or applicants shall submit drainage plans adequate, in the opinion of the board, to guard against any present or future injury which the proposed works may entail. [Act March 19, 1917, ch. 88, § 21.]

**Art. 4996e. Preliminary examination.**—Upon the filing of such application, accompanied by the data and fees hereinbefore provided, it shall be the duty of the board to make a preliminary examination there-

of; and if it appear that there is no unappropriated water in the source of supply, or that, for other reasons, the proposed appropriation should not be allowed, the board may thereupon reject such application; in which case, it the applicant shall elect not to proceed further, the board may return to such applicant any part of the fees accompanying such application.

The board shall determine whether the application, maps, plats, contours, plans, profiles and statements accompanying same, are in compliance with the provisions of this Act, and with the regulations of the board, and may require the amendment thereof. [Acts 1913, p. 358, § 17; Act March 19, 1917, ch. 88, § 22.]

**Art. 4996f. Applications to be recorded.**—All applications filed with the board shall be recorded in a well bound book kept for that purpose in the office of said board, and shall be indexed alphabetically in the name of the applicant, of the stream or source from which such appropriation is sought to be made, and the county in which appropriation is sought to be made. [Acts 1913, p. 358, § 18; Act March 19, 1917, ch. 88, § 23.]

**Art. 4996g. Action upon application.**—It shall be the duty of the board to reject all applications and refuse to issue the permit asked for, if there is no unappropriated water in the source of supply; or if the proposed use conflicts with existing water rights, or is detrimental to the public welfare. It shall be the duty of the board to approve all applications and issue the permit asked for if such application is made in proper form in compliance with the provisions of this Act and the regulations of said board; and is accompanied by the fees required in this Act; and if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this Act; and does not impair existing water rights, or vested riparian rights, and is not detrimental to the public welfare. [Acts 1913, p. 358, § 19; Act March 19, 1917, ch. 88, § 24.]

**Art. 4996h. Notice of hearing of application, etc.**—Before the board shall approve any such application and issue any such permit, notice of such application shall be given substantially in the following manner:

Such notice shall be in writing; shall state the name of the applicant and his residence; the date of the filing of the application in the office of the board; the purpose and extent of the proposed appropriation of water; the source of supply; the place at which the water is to be stored; or to be taken or diverted from the source of supply; together with such additional information as the board may deem necessary. If the proposed use is for irrigation, such notice shall contain a general description of the location and the area of the land to be irrigated. Such notice shall also state the time and place when and where such application will be heard by the board. [Acts 1913, p. 358, § 20; Act March 19, 1917, ch. 88, § 25.]

**Art. 4996i. Publication of notices, etc.**—Such notice shall be published once in each week for four consecutive weeks prior to the date stated in such notice for the hearing of such application in some newspaper having a general circulation in that section of the State in which the source of water is located. In addition to such publication, a copy of such notice shall be transmitted by the secretary of the board, by registered mail addressed to each claimant or appropriator of water from such source of water supply, the record of whose claim or appropriation has been filed in the office of the board. Such notice shall be mailed not

less than twenty days before the date set for the hearing. [Acts 1913, p. 358, § 21; Act March 19, 1917, ch. 88, § 26.]

**Art. 4996j. Hearing upon application.**—At the time and place stated in the notice, the board shall sit to hear such application. Any person; association of persons, corporation, or irrigation district may appear, in person or by attorney, and enter appearance in writing in said matter, and present objection to the issuance of permit. The board may receive evidence, orally or by affidavit, in support of and in opposition to the issuance of such permit; and may also hear arguments. It shall have power to adjourn such hearing from time to time and from place to place, and after full hearing to render decision in writing approving or rejecting such application. Such application may be approved or rejected in whole or in part. Provided, however, that nothing herein contained shall prevent the board from rejecting any application in whole, without the issuance of the notice herein required. [Acts 1913, p. 358, § 22; Act March 19, 1917, ch. 88, § 27.]

**Art. 4996k. Cost of publication.**—The cost of publication of the notice herein required and the postage for mailing thereof shall in each case be paid by the applicant. [Acts 1913, p. 358, § 23; Act March 19, 1917, ch. 88, § 28.]

**Arts. 4996l–4996s.**

Repealed. See art. 5011½w, post.

**Art. 4996t. Attorney general to represent board.**—In all litigation to which the board may be a party, the Attorney General shall represent the board. [Acts 1913, p. 358, § 32; Act March 19, 1917, ch. 88, § 29.]

**Arts. 4996u, 4996v.**

Repealed. See art. 5011½w, post.

**Art. 4996w. Transmission of certified copy of judgment to board of water engineers.**—When any court of record in this State shall render any judgment, order or decree, affecting in any manner the title to any water right, claim, appropriation or irrigation works, or any matter over which the board of water engineers is given supervision, under the provisions of this Act, it shall be the duty of the clerk of such court to forthwith transmit to the office of the board a certified copy of such judgment, order or decree. [Acts 1913, p. 358, § 35; Act March 19, 1917, ch. 88, § 30.]

**Art. 4996ww. Inspection of works under construction.**—The board or any one employed by the board, for that purpose, shall have, at all times, authority to inspect any impounding, diversion or distribution works during construction, to determine whether or not they are being constructed in a safe and approved manner, and in accordance with the order of the board theretofore issued. [Act March 19, 1917, ch. 88, § 31.]

**Art. 4996x.**

Repealed. See art. 5011½w, post.

**Art. 4996y. Form of permit, etc.**—Every permit issued by the board, under the provisions of this Act, shall be in writing, attested by the seal of said board, and shall contain substantially the following: The name of the applicant to whom issued; the date of the issuance thereof; the date of the filing of the original application therefor in the office of the board; the use or purpose for which the appropriation of water is to be

made; the amount or volume of water authorized to be appropriated; a general description of the source of supply from which the appropriation is proposed to be made; and if such appropriation is for irrigation, a description and statement of the approximate area of the lands to be irrigated; together with such other data and information as the board may prescribe. Upon the issuance of such permit, same shall be transmitted by the secretary of the board by registered mail to the county clerk of the county in which the appropriation is to be made; and upon receipt of a recording fee of one dollar, to be paid by the applicant, such clerk shall file and record the same in a well bound book provided and kept for that purpose only, and to index the same alphabetically under the name of the applicant and of the stream or source of water supply, and thereupon to deliver such permit upon demand, to the applicant. Such permit, when thus filed in the office of the county clerk, shall be constructive notice of the filing of the application with the board; of the issuance of the permit; and of all the rights arising thereunder. [Acts 1913, p. 358, § 37; Act March 19, 1917, ch. 88, § 32.]

**Art. 4999. Work to begin in ninety days; revocation of permit on failure, etc.**—Within ninety days after the date of issuance of the permit provided for in this Act, the applicant seeking to appropriate water thereunder shall begin actual construction of the proposed ditch, canal, dam, lake, reservoir or other work, and shall prosecute the work thereon diligently and continuously to completion; provided, that the board may, by an order entered of record, extend the time for beginning the actual construction of such work for a period not to exceed twelve months from the date of issuance of such permit; and further provided, that if any applicant shall fail to comply with the requirements of this section, he, they or it shall thereby forfeit all rights under such permit. If any applicant to whom a permit is issued or one owning prior appropriation shall after beginning the actual construction of work, as provided in this section, fail to thereafter prosecute the same diligently and continuously to completion, the board may, after thirty days notice to the applicant or owner of such appropriation, and giving him an opportunity to be heard, by an order entered of record, revoke and cancel such permit or appropriation in whole or in part; provided any party affected by such order shall have the right of appeal to the district court as in this Act provided. A certified copy of such order shall be forthwith transmitted by the secretary of the board, by registered mail, to the clerk of the county in which such permit is recorded and which order shall be recorded by said county clerk. [Acts 1895, p. 25; Acts 1913, p. 358, § 38; Act March 19, 1917, ch. 88, § 33.]

**Art. 5001a.**

Repealed by sec. 139 of this act, post, art. 5011½w, but re-enacted in sec. 34 of this act, and set forth post as art. 837a, Penal Code.

**Art. 5001b. State may recover penalty.**—In addition to the punishment prescribed in the last preceding section [Penal Code, Art. 837a, post], any person, association of persons, corporation, water improvement or irrigation district, or any agent, officer, employé or representative of any such persons, association of persons, corporation, water improvement or irrigation district, who shall wilfully take, divert or appropriate water of the State, or the use of such water, without first complying with the provisions of this Act, shall be liable to a penalty of one hundred dollars per day for each and every day that such taking, diversion, appropriation, or use may be made, and the State may recover such

penalties by suit brought for that purpose in any court of competent jurisdiction. [Acts 1913, p. 358, § 40; Act March 19, 1917, ch. 88, § 35.]

**Art. 5001c. Date of priority.**—When any permit is issued under the provisions of this Act, the priority of the appropriation of water, or the claimant's right to the use of such water, shall date from the date of the filing of the original application in the office of the board. [Acts 1913, p. 358, § 41; Act March 19, 1917, ch. 88, § 36.]

**Art. 5001d. Board to measure streams, make reports, etc.**—It shall be the duty of the board to make or cause to be made measurements and calculations of the flow of streams from which water may be appropriated, as provided in this Act, commencing such work in those streams most used for irrigation or other beneficial uses; to collect data and make surveys; to determine the most suitable location for constructing works to utilize the waters of the State; to ascertain the location and area of the lands best suited for irrigation; to examine and survey reservoir sites; and wherever practicable, to make estimates of the cost of proposed irrigation works, and the improvements of reservoir sites. It shall be the duty of the board to make itself conversant with the water courses of the State and of the needs of the State concerning irrigation matters, and the storage and conservation of the waters of the State for other purposes. The board shall make biennial reports in writing to the Governor, in which shall be included the data and information collected by said board, and in which shall be included such suggestions as to the amendment of existing laws and the enactment of new laws as the information and experience of the board may suggest. The board shall keep in its office full and proper records of its work observations and calculations, all of which shall be the property of the State. [Acts 1913, p. 358, § 42; Act March 19, 1917, ch. 88, § 37.]

**Art. 5001dd. Ascertainment of quantities of water required.**—It shall be the duty of the board to ascertain the duty of water, and to determine the proper quantities required for irrigation and other lawful uses in the several sections of the State in order to secure the highest beneficial use of such water, such work to be first conducted in those sections where in the judgment of the board, the greatest necessity exists. [Act March 19, 1917, ch. 88, § 38.]

**Art. 5001ddd. Condemnation of existing works.**—Full authority is lodged with the board, on its own initiative, to condemn existing works, the existence or operation of which may, in the judgment of the board, become a public menace or dangerous to life and property; provided, that in all cases of proposed condemnation, the party or parties at interest shall be notified of such contemplated action, and may appear at a time stated and be heard. Provided, further, that in such cases the party or parties whose works may be condemned, shall have the right of appeal from the decision of the board, as provided herein, in all other cases of appeal. [Id., § 39.]

**Art. 5001e. Board to make rules, etc.**—The board may adopt, promulgate and enforce such rules, regulations and modes of procedure as it may deem proper for the discharge of the duties incumbent upon it under the provisions of this Act. [Acts 1913, p. 358, § 43; Act March 19, 1917, ch. 88, § 40.]

**Art. 5001f. Fees.**—The board shall charge and collect, for the benefit of the State, the following fees:



For filing each and every application for any purpose, a fee of seven and one-half dollars, and in addition thereto:

For filing each and every application for storage of water, except surface waters, a fee of five dollars, provided, that if the application shall contemplate and propose the storage of water in excess of five acre-feet, an additional fee of twenty-five cents shall be charged for each additional acre-foot in excess of five, up to and including one hundred acre-feet; for each additional one hundred acre-feet, or fraction thereof, in excess of one hundred, an additional fee of ten dollars, up to and including one thousand acre-feet; and for each additional thousand acre-feet, above one thousand, an additional fee of twenty-five dollars; provided, that no fee, based on storage, shall be charged for any proposed or contemplated storage of less than five acre-feet.

For filing each application contemplating and proposing the taking or division of water for the purpose of irrigation, ten cents for each and every acre proposed to be irrigated.

For filing each application proposing and contemplating the use of water for the purpose of developing hydraulic power, a fee of two cents for each foot of head for each cubic foot of water per second it is proposed to use.

For filing each application contemplating and proposing the taking, diversion, or use of flowing water for any other purpose than storage, irrigation of land, or the development of hydraulic power, as hereinbefore provided, five cents for each acre-foot of water consumed per annum.

Provided, that in estimating the aforesaid additional fees on a proposed appropriation contemplating the use of water for two or more of the aforesaid purposes, the fees charged shall be cumulative, and a charge made for each use, based on the quantity proposed for each separate use.

For the filing of each and every exhibit, map, affidavit, or other paper authorized to be filed in the office of the board of water engineers, a filing fee of twenty-five cents.

For recording each and every paper authorized or required to be recorded in the records of the office of the board, a fee of one dollar, and in addition thereto, a fee of fifteen cents per folio of one hundred words, in excess of two hundred.

For making and certifying each and every copy of an instrument or paper authorized to be certified under the seal of the board a fee of one dollar, and in addition thereto, a fee of fifteen cents per folio of one hundred words, including the certificate.

For making and certifying copies of any map or blue print thereof, a fee of one dollar, and in addition thereto a fee of seventy five cents for each hour or fraction thereof necessarily employed by the draughtsman in making such copy.

For filing each application for an extension of time within which to begin actual construction or to complete work, a fee equal to one-half of the original application fees in such case; provided, that if it be simultaneously sought to extend both the time for the beginning and completion of any work theretofore authorized, but one fee shall be charged; and in addition thereto, the usual fees for filing and recording such applications. The fees and charges collected in accordance with the provisions of this Act shall be immediately deposited in the State treasury to the credit of the general revenue and full and detailed verified monthly and annual reports of all such receipts, as well as of the expenditures of the said board shall be filed with the comptroller of public accounts. [Acts 1913, p. 358, § 44; Act March 19, 1917, ch. 88, § 41.]

**Art. 5001g.**

Repealed.—See art. 5011½*w*, post.

**Art. 5001h. Standard unit.**—A cubic foot of water per second of time shall be the standard unit for the measurement of flowing water, for the purpose of distributing water for beneficial uses. The standard unit for volume of static water shall be the acre-foot. [Acts 1913, p. 358, § 46; Act March 19, 1917, ch. 88, § 42.]

**Art. 5001hh. Quantity of water constituting unit.**—A cubic foot per second of time is the quantity of water that will pass through an area of one square foot in one second, when flowing at an average velocity of one foot per second. An acre foot is the quantity of water required to cover one acre foot deep. [Acts 1913, p. 358, § 46; Act March 19, 1917, ch. 88, § 43.]

**Art. 5001i. Water right.**—A water right is the right to use the water of the State when such use has been acquired by the application of water under the statutes of this State and for the purposes stated in this Act. Such use shall be the basis, the measure and the limit to the right to use water of the State at all times, not exceeding in any case the limit of volume to which the user is entitled and the volume which is necessarily required and can be beneficially used for irrigation or other authorized uses. [Acts 1913, p. 358, § 47; Act March 19, 1917, ch. 88, § 44.]

**Art. 5001j. Right limited to beneficial use.**—Rights to the use of water acquired under the provisions of this Act shall be limited and restricted to so much thereof as may be necessarily required when beneficially used for the purposes stated in this Act, irrespective of the capacity of the ditch or other works, and all the water not so applied shall not be considered as appropriated. [Acts 1913, p. 358, § 48; Act March 19, 1917, ch. 88, § 45.]

**Art. 5001k. Right forfeited by abandonment.**—Any appropriation or use of water heretofore made under any Statute of this State or hereafter made under the provisions of this Act which shall be wilfully abandoned during any three successive years, shall be forfeited and the water formerly so used or appropriated shall be again subject to appropriation for the purposes stated in this Act. [Acts 1913, p. 358, § 49; Act March 19, 1917, ch. 88, § 46.]

**Art. 5001*l*. Right of owner of dam to appropriate water; application; rights as to persons using water.**—Any person, association of persons, corporation, water improvement or irrigation district, who may have heretofore constructed or who may hereafter construct any dam or dams across any river, or other stream, for the purpose of storing water for any of the purposes set forth in Section 2 [Art. 4992] of this Act shall have the right to appropriate the ordinary flow or underflow, or the storm, flood or rain waters of such stream, in amounts and quantities equal to the holding capacity of such dam or dams, by making application as provided for in Section 15 [Art. 4996*c*] of this Act, and such application shall have priority over all other applications; and, provided, that any such person, association of persons, corporations or irrigation district thus impounding water in any river, channel, lake or reservoir and appropriating the same shall have the right to collect from any riparian owner who shall divert such impounded water from said reservoir by pumping or otherwise a reasonable sum for the water so diverted, such sum to be determined by the board of water engineers, based upon the benefits accruing to such riparian owner by reason of the construction

of such dam, lake or reservoir and the impounding of such waters therein, provided, the owner of such dam, lake or reservoir, and the owner of riparian rights using such water cannot agree upon the price to be paid therefor. [Acts 1913, p. 358, § 49a; Act March 19, 1917, ch. 88, § 47.]

**Damages for failure to furnish water.**—Tenant claiming damages from failure to furnish irrigation water, held bound to allege and prove the contract with defendant, having no claim, under the irrigation statute. Louisiana, Rio Grande Canal Co. v. Elliott (Civ. App.) 193 S. W. 255.

**Art. 50017l. Corporations may sell or lease water or water rights; lien; obligation under contracts; priority of appropriators not affected.**—All such corporations, whether chartered under the provisions of Chapter 2, Title 73, Revised Civil Statutes of Texas, 1911, or under the general corporation laws of the State of Texas, shall have full power and authority to make contracts for the sale of permanent water rights, to any person, corporation, association of persons, or irrigation district and to have the same secured by a lien on the lands or otherwise, and to lease, rent or otherwise dispose of the water controlled by such corporation, for such price as may be agreed upon, and in addition to the lien on the crops hereinafter provided for, such lease or rental contract may be secured by lien on land or otherwise; provided, that such water may be sold, leased, rented or otherwise disposed of to any such person, corporation, association of persons or irrigation district, or to the water tenants thereof, who have heretofore appropriated and complied with the provisions of Chapter 2, Title 73, Revised Civil Statutes of Texas, 1911, regardless of whether or not the water so furnished to lands adjacent or contiguous to the canals of such corporation, association of persons or irrigation district so furnishing water; provided further that any person, corporation, association of persons or irrigation district, shall be under no obligation during the period that water is so taken and utilized, to operate it or their pumping plant, headgate or intake, and failure to so operate its pumping plant, headgate or intake during such period, shall not be deemed an abandonment or waiver of his, their or its rights in such pumping plant, headgate, intake and source of supply.

Provided that nothing herein contained shall affect or alter the existing relative rights of priority of the various appropriators whose supply is derived from the same source. [Act March 19, 1917, ch. 88, § 48.]

**Art. 5001m. Conservation of storm water authorized.**—Any person, association of persons, corporation, water improvement or irrigation district having in possession and control storm, flood or rain waters conserved or stored, under the provisions of this Act, may enter into contract to supply same to any person, association of persons, corporation, water improvement or irrigation district having the right to acquire such use; provided that the price and terms of such contract shall be just and reasonable and without discrimination and subject to the same revision and control as hereinafter provided for other water rates and charges; provided, that if any person shall use such stored or conserved water without first entering into contract with the party having stored or conserved the same, such user shall pay for the use thereof such charge or rental as the board shall find to be just and reasonable, and subject to revision by the court, as herein provided for other water rates and charges. [Acts 1913, p. 358, § 50; Act March 19, 1917, ch. 88, § 49.]

**Art. 5001n. Use of streams for conveying stored water.**—For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use, as provided in the preceding section, it shall be lawful for any person, association of persons, corporation,

water improvement or irrigation district to use the banks and beds of any flowing natural stream within this State, under and in accordance with such rules and regulations as may be prescribed by the board of water engineers, and such board shall prescribe rules and regulations for such purpose. No person, association of persons, corporations, water improvement or irrigation district who has not acquired the right to the use of such conserved or stored waters, as provided in the last preceding Section, shall take, use or divert same. [Acts 1913, p. 358, § 51; Act March 19, 1917, ch. 88, § 50.]

**Art. 5001o.**

Repealed by sec. 139 of this act, post, art. 5011½w, but re-enacted as sec. 51 of this act, and set forth post as art. 837c of the Penal Code.

**Art. 5001p. Injunction authorized.**—It shall be the duty of the district court, or the judge thereof, of any judicial district in or through which the conserved or stored waters described in the last three preceding Sections [Arts. 5001m, 5001n, ante; Art. 837c, Pen. Code, post] may pass, at the suit of any party having an interest therein, upon it being made to appear that any person, association of person, corporation, water improvement or irrigation district, or any agent, officer, employé, or representative thereof, is interfering with, or threatening or about to interfere with the passage, or is taking, diverting, appropriating, or threatening, or about to take, divert, or appropriate, any conserved or stored waters, in violation of the provisions of the last three preceding Sections; to issue such writ or writs of injunction, mandamus, or other process as may be proper or necessary to prevent such wrongful acts. [Acts 1913, p. 358, § 53; Act March 19, 1917, ch. 88, § 52.]

**Art. 5002. [3125] Formation of corporations authorized.**—Corporations may be formed and chartered, under the provisions of this Act, and of the general corporation laws of the State of Texas, for the purpose of constructing, maintaining and operating canals, ditches, flumes, feeders, laterals, dams, reservoirs, lakes and wells, and of conserving, storing, conducting and transferring water to all persons entitled to the use of the same for irrigation, mining, milling, manufacturing, the development of power to cities and towns for waterworks, and for stock-raising. [Acts 1895, p. 27; Acts 1913, p. 358, § 54; Act March 19, 1917, ch. 88, § 53.]

See Toyah Valley Irr. Co. v. Winston (Civ. App.) 174 S. W. 677; note under art. 5002c. Cited, McKenzie v. Imperial Irr. Co. (Civ. App.) 166 S. W. 495.

**Art. 5002a. [3125] Same; sale or lease of water and water rights; compliance with statute.**—All such corporations shall have full power and authority to make contracts for the sale of permanent water rights, and to have the same secured by liens on the land, or otherwise, and to lease, rent or otherwise dispose of the water controlled by such corporation, for such time as may be agreed upon, and in addition to the lien on the crops hereinafter provided for, the lease or rental contract may be secured by a lien on the land, or otherwise.

Provided, any contract for the sale of water rights shall be voidable unless the seller thereof has complied with the provisions of the statute relating to certified filings, or shall have obtained a permit from the board of water engineers for the purposes and uses proposed to be made by the buyer of such water rights it is proposed to deliver. [Acts 1913, p. 358, § 55; Act March 9, 1917, ch. 88, § 54.]

**Note.**—A concluding provision of this section creates an offense, and is set forth post as art. 837cc, Penal Code.

**Power to contract.**—A contract by which the officers and directors of an irrigation company attempted to divest themselves of the possession and control of the company's

property and to transfer it to individuals is ultra vires. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

It is not an ultra vires act for a corporation, organized for the purpose of irrigating certain lands which it held, to contract to supply to a lessee thereof sufficient water, which, with the natural rainfall, would produce a rice crop on the land, without any reservation to cover impossibility of performance through act of God. *Northern Irr. Co. v. Watkins* (Civ. App.) 183 S. W. 431.

A tenant is authorized to lease or rent water for the purpose of irrigating such lands and to bind himself for the payment of rental therefor. *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

**Right to water at reasonable rate.**—See *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677; note under art. 5002c.

**Art. 5002b. [3125] Persons entitled to use water.**—All persons who own or hold a possessory right or title to land adjoining or contiguous to any dam, reservoir, canal, ditch, flume or lateral, constructed and maintained under the provisions of this Act, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam, reservoir or lake with water for irrigation of such land, and for mining, milling, manufacturing, development of power, and stock-raising, in accordance with the terms of his or their contract. [Acts 1913, p. 358, § 56; Act March 19, 1917, ch. 88, § 55.]

**Right to water at reasonable rate.**—See *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677; note under art. 5002c.

**Duty to supply water.**—Property which receives a right or privilege from the government and is used in dealing with the public is a legitimate subject for reasonable governmental regulations. *Lastinger v. Toyah Valley Irr. Co.* (Civ. App.) 167 S. W. 788.

Both at common law and under this article it is the duty of an irrigation company regardless of contract, to furnish to those in possession of land water necessary for the irrigation of crops, and the company is liable for damages caused by its failure. *Id.*

**Contracts to supply water.**—Where one clause of an irrigation contract provided that the manner of distributing water upon land leased by the company was to rest entirely with the company, and another bound the company to furnish all necessary water to irrigate the land, held that the company could not refuse to furnish any water at all, on the ground that the crop was worthless. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

Where plaintiff conveyed a right of way for irrigation ditches over 427.7 acres of land described as being on a specified survey, defendant held bound to furnish water to irrigate the entire tract though 80 acres thereof were actually in another survey. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28.

A contract by parties to repair canal in consideration of water rights held not to give to the individual parties thereto the right to the possession and control of the property of an irrigation company as against its officers. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

The right of individuals under a contract by which they agreed to pay the debts and maintenance charges of an irrigation company held to cease on the failure of the individuals to perform their agreement. *Id.*

Where defendant agreed to furnish sufficient water for irrigating plaintiff's lands, the contract, requiring the plaintiff to demand water, in writing, when he expected to use it, and there was an unusual drought and all parties knew that the water could not be furnished if demanded, it was no defense to plaintiff's suit for damages that he failed to demand it. *Northern Irr. Co. v. Watkins* (Civ. App.) 183 S. W. 431.

Provision of a lease contract that the lessor shall pay the irrigation company for four irrigations does not require it to furnish the water. *Hillside Land & Irrigation Co. v. Ruiz* (Civ. App.) 184 S. W. 282.

**Liability for breach.**—Where defendant irrigation company contracted to furnish plaintiff water sufficient to irrigate land leased by plaintiff from defendant, plaintiff's rights upon breach of contract by failure to furnish water are measured by the contract. *Northern Irr. Co. v. Dodd* (Civ. App.) 162 S. W. 946.

That defendant irrigation company for about ten years before the season of 1910 had procured water from the Colorado river, and that at no other time during such ten years before the season of 1910 had such water supply failed, did not show that its failure in the season of 1910 by drought was due to the "act of God." *Id.*

The exception to the general rule that an act of God will not excuse nonperformance of a contract, which excuses performance where it depends upon the continued existence of a particular thing or person which ceases to exist, would not apply to excuse nonperformance of a contract to furnish water for irrigation prevented by a drought stopping the usual water supply; the contract providing for damages for failure to furnish water. *Id.*

Where an irrigation company contracts with the owner of land to furnish water, it is presumed to have contracted in contemplation of this article, and hence the owner's tenant may recover damages for injuries suffered by the company's refusal to carry out its contract. *Lastinger v. Toyah Valley Irr. Co.* (Civ. App.) 167 S. W. 788.

Where defendant irrigation company purchased the plant of another and assumed its contract obligations, plaintiff, having a contract with such other company, could maintain an action direct against the purchasing company on its assumed obligation. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

Where defendant was under a continuing contract to furnish water, the fact that defendant, prior to plaintiff's planting a crop notified him that it would no longer furnish water, did not require plaintiff to desist from planting a crop of that year, nor preclude him from recovering his expenditures in planting and cultivating his crop up to the time of defendant's final refusal to furnish water. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28.

Where defendant contracted to pay a certain sum for irrigation water rights, he could not escape liability for failure to pay by selling his land, or a part thereof, so that, in an action to recover the sum due, his contract with the buyer of his land was inadmissible. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

Where defendant agreed to furnish plaintiff sufficient water to grow his rice crop on land rented from defendant, without reservation in the contract excusing defendant for failure to furnish sufficient water in case of drought, the contract providing for damages if the water supply was insufficient, the defendant was liable, in spite of the fact that an unusual drought caused a deficiency in the water supply. *Northern Irr. Co. v. Watkins* (Civ. App.) 183 S. W. 431.

The measure of damages for failure to furnish irrigation water is the difference in market value of crops raised, and what would have been raised with sufficient water, less cost of harvesting and marketing the additional crops. *Louisiana, Rio Grande Canal Co. v. Elliott* (Civ. App.) 193 S. W. 255.

**Limitation of liability.**—Where an action by a tenant of E. irrigation company against defendant irrigation company for damages for failure to furnish water was not based solely on defendant's assumption of the obligation of the E. company to furnish the water, but also upon a direct promise by defendant, a limitation of the damages in the lease from the E. company did not inure to the benefit of defendant. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

Contract to furnish water for irrigation, exempting company from liability during reasonable time for repair and construction, held not an attempt to contract against its own negligence, but a valid condition, so that testimony of the cause of a delay was admissible in an action for the contract price of water furnished. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

**Art. 5002c. [3125] No discrimination against users.**—If the person, association of persons, or corporation owning or controlling such water, and the person who owns or holds a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral, lake or reservoir, constructed or maintained under the provisions of this Act, fail to agree upon a price for a permanent water right, or for the use or rental of the necessary water to irrigate the land of such person, or for mining, milling, manufacturing, the development of power, or stock raising; such person, association of persons, or corporation shall, nevertheless, if he, they or it, have or control any water not contracted to others, furnish the necessary water to such person to irrigate his lands or for mining, milling, manufacturing, the development of power or stock raising, at such prices as shall be reasonable and just, and without discrimination. [Acts 1913, p. 358, § 57; Act March 19, 1917, ch. 88, § 56.]

**Right to water at reasonable rate.**—Under Rev. St. 1911, arts. 4991, 4994, 5002, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 5002a, 5002b, 5002c, held that, in suits by parties entitled to use water, court would require that they be furnished water at reasonable price. *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677.

**Art. 5002d. [3125] Water to be prorated.**—In case of shortage of water from drouth, accident or other cause, all water to be distributed shall be divided among all customers pro rata, according to the amount he or they may be entitled to, to the end that all shall suffer alike, and preference be given to none; provided, that nothing in this Section contained shall be held to preclude any such person, association of persons, or corporation owning or controlling such water from supplying the same to any person having a prior vested right thereto under the laws of this State. [Acts 1913, p. 358, § 58; Act March 19, 1917, ch. 88, § 57.]

**Art. 5002e. [3125] Permanent water right and easement.**—The permanent water right shall be an easement to the land and pass with the title thereto; the owner thereof shall be entitled to the use of the water upon the terms provided in his or their contract with such person,

association of persons or corporation, or, in case no contract is entered into, then at just and reasonable prices, and without discrimination. Any instrument of writing conveying a permanent water right shall be admitted to record in the same manner as other instruments relating to the conveyance of land. [Acts 1913, p. 358, § 59; Act March 19, 1917, ch. 88, § 58.]

**Art. 5002f. Regulation of rates; discrimination; complaint; deposit.**—If any person entitled to receive or use water from any canal, ditch, flume, lateral, dam, reservoir or lake, or from any conserved or stored supply, shall present to the board his petition in writing, showing that the person, association of persons, corporation, water improvement or irrigation district owning or controlling such water has a supply of water not contracted to others and available for his use, and fails or refuses to supply such water to him, or that the price or rental demanded therefor is not reasonable and just, or is discriminatory; or that the complainant is entitled to receive or use such water, and is willing and able to pay a just and reasonable price therefor; and shall accompany such petition with a deposit of twenty-five dollars; it shall be the duty of the board to make a preliminary investigation of such complaint and determine whether there is probable ground therefor. If said board shall determine that no probable ground exists for such complaint, same shall be dismissed, and the deposit may, at the discretion of the board, be returned to the complainant or paid into the State treasury. [Acts 1913, p. 358, § 60; Act March 19, 1917, ch. 88, § 59.]

**Art. 5002g. Order on complaint; deposit and bond for costs; certified copy of complaint to be sent to defendants.**—If the board shall determine that probable ground exists for such complaint, it shall enter an order setting said matter for hearing at a time and place to be named therein. The board may, in its discretion, require the complainant to make an additional deposit, or to enter into bond in an amount fixed by the board, conditioned for the payment of all costs of such proceeding, and which bond shall be approved by the board. Thereupon it shall be the duty of the secretary of the board to transmit a certified copy of the petition of complainant and of the order setting same for hearing, by registered mail, addressed to the party or parties against whom such complaint is made, and which notice shall be deposited in the mails at least twenty days before the date set for such hearing. [Acts 1913, p. 358, § 61; Act March 19, 1917, ch. 88, § 60.]

**Art. 5002h. Hearing; evidence; adjournments; decision.**—At the time and place stated in such order, the board shall sit to hear such complaint. It may hear evidence orally or by affidavit in support of or against such complaint, and may hear arguments, and shall have power to adjourn such hearing from time to time and from place to place, and upon completion thereof shall render decision in writing. [Acts 1913, p. 358, § 62; Act March 19, 1917, ch. 88, § 61.]

**Art. 5002i. Appeal; supersedeas.**—Appeal from such decision of the board may be taken within the time and in the manner as herein provided for other appeals from the decision of such board. The decision may be suspended by the filing of a supersedeas bond, in the same manner as now provided in other civil cases; provided, that the board shall fix the amount of the bond necessary to stay the execution of any such order. [Acts 1913, p. 358, § 63; Act March 19, 1917, ch. 88, § 62.]

**Art. 5002j. Issuance of subpoenas authorized, etc.**—In any examination, investigation or proceeding authorized before the board of water engineers, such board shall have power to issue subpoenas for the attendance of witnesses, under such rules as the board may prescribe. Each witness who shall appear before the board by order of the board, at a place outside of the county of his residence, shall receive for his attendance, one dollar per day and three cents per mile traveled by nearest practicable route, in going to and returning from the place of meeting of said board which shall be ordered paid by the comptroller of public accounts upon the presentation of proper vouchers, sworn to by such witness and approved by the chairman of the board; provided, that no witness shall be entitled to any witness fees or mileage who is directly interested in such proceeding. [Acts 1913, p. 358, § 64; Act March 19, 1917, ch. 88, § 63.]

**Art. 5002k. Who may administer oaths, etc.**—In any examination or hearing held before the board of water engineers, the board shall have authority to adjourn such hearing from time to time and from place to place. Each member of such board and the secretary thereof shall be authorized to administer oaths. [Acts 1913, p. 358, § 65; Act March 19, 1917, ch. 88, § 64.]

**Art. 5002l. Certified copies.**—Upon application of any person, the board shall furnish certified copies of any order or decision of record of such board, or of any paper, map or other document filed in the office of such board, and such certified copies, under the hand of the secretary and seal of the board, shall be admissible in evidence in any court, in the same manner and with like effect that the original would be entitled to. [Acts 1913, p. 358, § 66; Act March 19, 1917, ch. 88, § 65.]

**Art. 5002m. Rules may be prescribed, etc.**—Every person, association of persons, corporation or irrigation district, conserving or supplying water for any of the purposes authorized by this Act, shall make and publish reasonable rules and regulations relating to the method and manner of supply, use and distribution of water, and prescribing the time and manner of making application for the use of water and of payment therefor. [Acts 1913, p. 358, § 67; Act March 19, 1917, ch. 88, § 66.]

**Art. 5002n. Conveyances, how made.**—Every conveyance of a ditch, canal or reservoir, or other irrigation work, or any interest therein, shall hereafter be executed and acknowledged in the same manner as the conveyance of real estate, and recorded in the deed records of the county or counties in which such ditch, canal or reservoir is situated, and any such conveyance which shall not be made in conformity with the provisions of this Act, shall be null and void, as against subsequent purchasers thereof in good faith and for valuable consideration. [Acts 1913, p. 358, § 68; Act March 19, 1917, ch. 88, § 67.]

**Note.**—Secs. 68, 69, and 70 are criminal provisions, and are set forth post as arts. 837d-837f, Penal Code.

**Art. 5002o. Partnership ditches.**—In all cases where irrigation ditches are owned or used by two or more persons, or by mutual or co-operative companies or corporations, and one or more of such persons, or shareholders shall fail or neglect to do or to pay for his proportionate share of the work necessary for the proper maintenance and operation of such ditch, the owners or shareholders, desiring the performance of such work as is reasonably necessary to maintain and operate the ditch, may, after having given ten days' written notice to such joint owner, or owners, or shareholders who have failed to pay for or refused to perform



their proportionate share of work necessary for the operation and maintenance of said ditch, proceed themselves to do such work, or cause the same to be done, and may recover therefor from such person so failing to perform or pay for his share of such work, in any court having jurisdiction over the amount, the reasonable expense or value of such work or labor so performed. [Acts 1913, p. 358, § 72; Act March 19, 1917, ch. 88, § 71.]

**Art. 5002p. Surplus water to be returned.**—All surplus water taken or diverted from any running stream and not used by the appropriator or disposed of to consumers for the purposes stated in this Act, shall be conducted back to the stream from which taken or diverted, wherever such water may be returned by gravity flow, whenever reasonably practicable. [Acts 1913, p. 358, § 73; Act March 19, 1917, ch. 88, § 72.]

**Art. 5003. [704] Preliminary surveys; members of board and employes may enter upon land to make investigations.**—Every person, association of persons, corporation, water improvement or irrigation district shall have power to cause an examination and survey for its proposed work to be made as may be necessary to the selection of the most advantageous reservoir sites and rights of way for any of the purposes authorized by this Act, and for such purposes shall have the right to enter upon the lands or waters of any person.

Any member or employee of the board shall have authority to enter upon the lands and any or all waterways, either natural or artificial, for the purpose of making any investigation that would, in the judgment of the board, assist in the discharge of its duties. [Acts 1895, p. 27; Acts 1913, p. 358, § 74; Act March 19, 1917, ch. 88, § 73.]

**Art. 5004. [3126] Right of way over public lands.**—Every person, association of persons, corporation, water improvement or irrigation district formed for any of the purposes authorized by this Act, are hereby granted the right of way, not to exceed one hundred feet in width, and the necessary area for any dam and reservoir site over all public free school, University and asylum lands of this State, with the use of the rock, gravel and timber on such reservoir site and right of way for construction purposes, after paying such compensation as the board of engineers may determine, and may acquite such reservoir site and rights of way over private lands by contract. [Acts 1895, p. 21; Acts 1913, p. 358, § 75; Act March 19, 1917, ch. 88, § 74.]

**Former statute.**—The right of an irrigation corporation to condemn land, under Rev. St. 1911, art. 5004, for a right of way is not dependent on the filing of a water appropriation under articles 4996, 4998, and in proceedings to condemn it is not error to exclude a certified copy of a water appropriation made by the corporation. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

Under Const. 1869, art. 9, § 8, Act March 10, 1875 (Acts 2d Sess. 14th Leg. c. 63), conferring right of way for irrigation ditches across county school lands, held valid. *Washington County v. Pendleton* (Civ. App.) 178 S. W. 979.

Under Const. 1869, art. 9, § 8, act approved April 23, 1874 (Acts 14th Leg. c. 97), and act approved March 10, 1875 (Acts 2d Sess. 14th Leg. c. 63), an irrigation company and its successors held to have acquired the right to construct and maintain a ditch over county school lands. *Id.*

**Art. 5004a. Eminent domain; application to board; institution of proceedings by board.**—Any person, association of persons, corporation, irrigation or water improvement district, or any city or town, may also obtain the right of way over private lands and also the lands for pumping plants, intakes, headgates and storage reservoirs, by condemnation, by causing the damages for any private property appropriated by any such person, association of persons, corporation, water improvement or irrigation district, or city or town, to be assessed and paid for as pro-

vided in cases of railroads; provided, however, that when the power granted by this section is sought to be exercised by any person or association of persons, he or they shall first make application to the Board of Water Engineers for such condemnation and said Board shall make due investigation and if it deems advisable shall give notice to the party owning the land sought to be condemned, and after hearing, may institute such condemnation proceedings in the name of the State of Texas for the use and benefit of said person or persons and all others similarly situated, the costs of said suit and condemnation to be paid by the person or persons at whose instance the same is instituted in proportion to the benefits received by each as fixed by said Board and to be paid before use is made of such condemned rights or property; and thereafter all persons seeking to take the benefits of such condemnation proceedings shall make application therefor to the Board of Water Engineers and if such application is granted shall pay such fees and charges as may be fixed by said Board. [Acts 1913, p. 358, § 76; Act March 19, 1917, ch. 88, § 75.]

**Former statute.**—The right of an irrigation corporation to condemn land, under Rev. St. 1911, art. 5004, for a right of way is not dependent on the filing of a water appropriation under articles 4996, 4998, and in proceedings to condemn it is not error to exclude a certified copy of a water appropriation made by the corporation. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Interest acquired.**—Where the document under which an irrigation company took possession of land recited that the width of its projected canal was 40 feet and the depth 3 feet, with the right under an act of the Legislature to claim, purchase, and condemn 100 feet in width, it acquired no more than an easement in the land. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

**Measure of damages.**—The measure of damages to land from seepage through embankment is difference in market value, but in determining market value permanency or temporary nature of damage should be considered. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

Injury to land from water seeping through defendants' embankment cannot be deemed permanent where it lasts for a time only, even though it be several years. *Id.*

**Art. 5006. [3128] Public roads and bridges.**—All persons, associations of persons, corporations, and water improvement or irrigation districts shall have the right to run along or across all roads and highways necessary in the construction of their work, and shall at all such crossings construct and maintain necessary bridges, culverts, or siphons, and shall not impair the uses of such road or highway; provided, that if any public road or highway or public bridge shall be upon the ground necessary for the dam site, reservoir, or lake, it shall be the duty of the commissioners' court to change said road and to remove such bridge that the same may not interfere with the construction of the proposed dam, reservoir, or lake; provided, further, that the expense of making such change shall be paid by the person, association of persons, corporation, water improvement or irrigation district desiring to construct such dam, lake or reservoir. [Acts 1895, p. 21; Acts 1913, p. 358, § 77; Act March 19, 1917, ch. 88, § 76.]

**Art. 5008. [704] May cross streams, etc.**—Such person, association of persons, corporation or irrigation district shall have power to construct its ditch or canal across, along or upon any stream of water. [Acts 1895, p. 25; Acts 1913, p. 358, § 78; Act March 19, 1917, ch. 88, § 77.]

#### **Arts. 5009, 5009a.**

Repealed. See art. 5011½w, post. Re-enacted in Act March 19, 1917, ch. 88, as sections 87 and 88, set forth post as arts. 5011ff and 5011fff.

**"Owner."**—The term "owner," as generally used, signifies one who has legal rightful title, but as used in Acts 24th Leg. c. 21, § 18 (*Sayies' Ann. Civ. St. 1897, art. 3130; Rev. St. 1911, art. 5009*), declaring a paramount lien for water furnished lands for irrigation,

the term includes both owner of title and tenants in possession. *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

**Art. 5011. Surveys under reclamation act.**—When, in the examination of any irrigation or reclamation project, under the provisions of the Act of Congress, known as the Reclamation Act, approved June 17, 1902, it shall be found advisable or necessary to irrigate or reclaim lands within the limits of this State, the Secretary of the Department of the Interior is authorized to make all necessary examinations and surveys for, and to locate and construct irrigation or reclamation works within this State, and to perform any and all acts necessary to carry into effect the provisions, limitations, charges, terms and conditions of said Reclamation Act. [Acts 1905, p. 151; Acts 1913, p. 358, § 79; Act March 19, 1917, ch. 88, § 78.]

**Art. 5011a. Reclamation projects.**—The provisions of this Act shall in all things apply to the construction, maintenance and operation of any irrigation works in this State, constructed under what is known as the Federal Reclamation Act, approved June 17, 1902, and the amendments thereto, in so far as the provisions of this Act are not inconsistent with said Act of Congress, or the amendments thereto, or the regulations prescribed by the Secretary of the Department of the Interior in conformity to such Reclamation Act and the amendments thereto. [Acts 1913, p. 358, § 80; Act March 19, 1917, ch. 88, § 79.]

**Art. 5011b. Diversion of water from watershed prohibited when.**—It shall be unlawful for any person, association of persons, corporation, water improvement or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed, in this State into any other natural stream, water course or watershed, to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted. [Acts 1913, p. 358, § 81; Act March 19, 1917, ch. 88, § 80.]

**Art. 5011c. Application to board of water engineers; hearing; appeals.**—Before any person, association of persons, corporation, water improvement or irrigation district shall take any water from any natural stream, water course, or watershed in this State into any other watershed, such person, association of persons, corporation, water improvement or irrigation district shall make application to the Board of Water Engineers for a permit so to take or divert such waters, and no such permit shall be issued by the board until after full hearing before said board as to the rights to be affected thereby, and such hearing shall be held and notice thereof given at such time and such place, in such mode and maner as the board may prescribe; and from any decision of the board an appeal may be taken to the district court of the county in which such diversion is proposed to be made, in the mode and manner prescribed in this Act for other appeals from the decision of the board. [Acts 1913, p. 358, § 82; Act March 19, 1917, ch. 88, § 81.]

**Art. 5011cc. Prescriptive right to appropriation.**—Whenever any appropriator of water from any stream or other source of water supply located in whole or in part within this State, shall have obtained from the Board of Water Engineers a permit for the use of water, and shall have made use of the water under the terms of such permit; or whenever any such appropriator of water shall have filed an appropriation, in accordance with the laws of this State in force at the time of such filing, and shall have filed with the Board of Water Engineers a certified record of such appropriation, as required by Chapter 171 of the Acts of the regular

session of the Thirty-third Legislature, and shall have made use of the water, under the terms of such filing or permit for a period of three years after this Act shall take effect, he shall be deemed to have acquired a title to such appropriation by limitation, as against any and all other claimants of water from the same stream, or other source of water supply, and as against any and all riparian owners upon said stream or other source of water supply. [Act March 19, 1917, ch. 88, § 83.]

**Art. 5011d. Reservoirs and canals, etc., to be fenced.**—Unless the person, association of persons, corporation, water improvement or irrigation district owning or controlling any ditch, canal, reservoir, dam or lake, shall keep the same securely fenced, no cause of action shall accrue in their favor against owners of live stock for any trespass thereon. [Acts 1913, p. 358, § 84; Act March 19, 1917, ch. 88, § 84.]

**Art. 5011e. Alienation of land required, etc.**—Any corporation organized under the provisions of the General Laws of this State, or the provisions of this Act, for any of the purposes stated in this Act, shall have the power to acquire lands by voluntary donation or purchase in payment of stock or bonds or water rights; and to hold, improve, subdivide and dispose of all such land and other property; and to borrow money for the construction, maintenance and operation of its canals, ditches, flumes, feeders, reservoirs, dams, lakes, wells and other property and franchises, to the extent of the value thereof, to secure the payment of any debts contracted for same; provided, no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increases in stock or indebtedness shall be void; provided further, all lands acquired by such corporation, except such as are used for the construction, maintenance or operation of such canals, ditches, laterals, feeders, reservoirs, dams, lakes, wells and other necessary works, shall be alienated within fifteen years from the date of acquiring said land or be subject to judicial forfeiture. [Acts 1913, p. 358, § 85; Act March 19, 1917, ch. 88, § 85.]

**Art. 5011f. Directors may be elected.**—Any corporation organized under the provisions of the General Laws of this State, or the provisions of this Act, for any of the purposes stated in this Act, may elect directors or trustees to hold office for a period of three years, and may provide for the election of one-third in number thereof each year. [Acts 1913, p. 358, § 86; Act March 19, 1917, ch. 88, § 86.]

**Art. 5011ff. Preference lien upon crops raised on land irrigated.**—Every person, association of persons, corporation, water improvement or irrigation district, who has heretofore constructed, or may hereafter construct any ditch, canal, dam, lake or reservoir, for the purposes of irrigation, and who shall lease, rent, furnish, or supply water to any person, association of persons, water improvement or corporation, for the purpose of irrigation, shall, irrespective of contract, have a preference lien superior to every other lien upon the crop or crops raised upon the land thus irrigated. [Acts 1895, p. 21; Acts 1913, p. 358, § 87; Act March 19, 1917, ch. 88, § 87.]

**Priority of lien.**—Ordinarily a statutory lien will not be given priority over existing recorded liens, but Legislature has undoubted power to give statutory lien priority over all other liens where its object is to secure charges necessary to preservation of property. *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

The lien provided by this article, for water furnished land for irrigation purposes, is enforceable against crops of tenant for water furnished tenant under contract, and is superior to lien of landlord for unpaid rent and to crop lien under mortgage. *Id.*

**Art. 5011fff. Enforcement of lien.**—For the enforcement of the lien provided for in the preceding Section, every such person, association of

persons, corporation, water improvement or irrigation district shall be entitled to all the rights and remedies prescribed by Chapter 1, Title 80, of the Revised Civil Statutes of this State for the enforcement of the lien as between landlord and tenant. [Acts 1913, p. 358, § 88; Act March 19, 1917, ch. 88, § 88.]

**Note.**—Sec. 89 makes it a misdemeanor to permit Johnson grass and Russian thistle to go to seed about a reservoir, etc., and is set forth post as art. 837j, Pen. Code.

**Art. 5011g. Artesian wells.**—An artesian well is defined, for the purposes of this Act, to be an artificial well in which, if properly cased, the waters will rise by natural pressure above the first impervious stratum below the surface of the ground. [Acts 1913, p. 358, § 91; Act March 19, 1917, ch. 88, § 90.]

**Art. 5011h. Certain artesian wells declared nuisances.**—Any artesian well which is not tightly cased, capped and furnished with such mechanical appliances as will readily and effectively arrest and prevent the flow from such well, either over the surface of the ground about the well, or wasting from the well through the strata through which it passes, is hereby declared a public nuisance and subject to be abated as such, upon the order of the board. [Acts 1913, p. 358, § 92; Act March 19, 1917, ch. 88, § 91.]

**Art. 5011i. Waste in relation to artesian wells defined.**—Waste is defined, for the purposes of this Act, in relation to artesian wells, to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek, or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land of any other person than that of the owner of such well, or upon the public lands, or to run or percolate through the strata above that in which the water is found; unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well; provided, that nothing in this Section shall be construed to prevent the use of such water, if suitable, for proper irrigation of trees standing along or upon any street, road or highway, or for ornamental ponds or fountains, or the propagation of fish, or for the purposes authorized by this Act. [Acts 1913, p. 358, § 93; Act March 19, 1917, ch. 88, § 92.]

**Art. 5011j.**

Repealed. See art. 5011½w, post. Re-enacted by Act Mar. 19, 1917, ch. 88, § 94, set forth post as art. 837n, Pen. Code.

**Art. 5011k.**

Repealed and re-enacted as section 104 of this act, set forth post as art. 5011½ee.

**Arts. 5011l, 5011m.**

Repealed and re-enacted as sections 136 and 137 of this act, set forth post as arts. 5011½uu and 5011½v.

**Art. 5011n.**

Repealed. See post art. 5011½w.

**Art. 5011o.**

Repealed and re-enacted as section 138 of this act, set forth post as art. 5011½vv.

**Art. 5011t. Diversion of surface waters; remedies; provisos.**—That it shall hereafter be unlawful for any person, firm or private corporation to divert the natural flow of the surface waters in this State or to permit a diversion thereof caused by him to continue after the passage of this Act, or to impound such waters, or to permit the impounding thereof

caused by him to continue after the passage of this Act, in such a manner as to damage the property of another, by the overflow of said water so diverted or impounded, and that in all such cases the injured party shall have remedies in both law and equity, including damages occasioned thereby, provided that the passage of this Act shall in no way affect the construction and maintenance of levees and other improvements for the purpose of controlling floods, overflows and freshets in rivers, creeks and streams, nor the construction of canals for the purpose of conveying waters for irrigation; and provided further that nothing in this Act shall be so construed as to authorize or give authority to persons or corporations owning or constructing canals for irrigation or other purposes, to construct or maintain any canal, lateral canal or ditch in such manner as to obstruct any river, creek, bayou, gully, slough, ditch or other well defined natural drainage. [Act May 29, 1915, 1st C. S., ch. 7, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Right to repel surface water.**—Under the common-law rule which by virtue of art. 5492, prevailed in Texas prior to the passage of this act, the proprietor of land improving the same may lawfully repel surface water and turn the flow back on other lands without liability. *Walenta v. Wolter* (Civ. App.) 186 S. W. 873.

**Construction of railroad.**—See notes under art. 6495.

A railroad company cannot, in view of this article, divert a water course which drained plaintiff's land in such a manner as to impound surplus waters on plaintiff's property. *McAmis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 331.

**Art. 5011½. Artesian wells may be dug if securely cased.**—Whenever any person desires to drill a well upon his own land for domestic purposes or use for stock raising purposes or use, that comes within the definition of artesian well, as defined in this Act, he shall have the right to do so without subjecting himself to the provisions of this Act; provided, that said well shall be properly and securely cased, and whenever water is reached containing mineral or other substances injurious to vegetation or agriculture it shall be the duty of owner of said well to securely cap same or to control its flow so as not to injure the land of any other person, or to fill it up so as to prevent the water of said well to rise above the first impervious stratum below the surface of the ground. [Act March 19, 1917, ch. 88, § 93.]

**Art. 5011½a. Waste of water; nuisance; abatement; closing water gates against person guilty.**—Any person, association of persons or the agent of any corporations owning or acquiring any possessory right to lands contiguous to any canal or irrigation system and who acquires the right to the use of water from such canal or irrigation system, by contract as in this Act provided, who wilfully and knowingly permits the excessive or wasteful use of water by any of the agents, servants or employes of said parties, or who wilfully and knowingly permits water to be wasted and not applied to a beneficial purpose, shall be deemed guilty of a misdemeanor, and shall be punished as provided in Section 101 [Art. 837nnn, Penal Code, post], and such use or waste of water shall be declared a public nuisance and abated as such by the Board of Water Engineers; said Board of Water Engineers being empowered to direct the canal company or irrigation system to close the water gates of said persons and to keep them closed until such time as such unlawful use of water shall be corrected and the determination of this question shall be controlled entirely by the Board of Water Engineers, or its agents, servants and employes. [Id., § 95.]

**Art. 5011½b. Waste of water a public nuisance.**—Any person, association of persons, corporation, water improvement or irrigation district who owns or operates any works which make use of water for any

of the purposes named in this Act, and who permits unreasonable loss of water in the operation of such works, through the faulty design or negligent operation of such works, shall be deemed guilty of waste, and such works, or any part thereof may be declared a public nuisance and abated as such by the Board of Water Engineers. [Id., § 96.]

**Note.**—Section 97 makes it a misdemeanor to use water in a manner declared a public nuisance. See art. 837nn, post, Pen. Code.

**Art. 5011½c. Jurisdiction and venue of suits.**—In any and all civil suits instituted by or under the direction of the board of water engineers, suit may be prosecuted and instituted in any court of competent jurisdiction in the county or in any of the counties where the land lies. [Id., § 98.]

**Art. 5011½cc. Who may sue for injuries due to waste of water.**—Action may be brought before any district court of this State, having jurisdiction over the irrigation district in question by any person, association of persons, corporation, water improvement or irrigation district, who may be injured by waste, as herein defined, for the determination of questions arising under Sections 96 and 97 [Art. 5011½b, ante; Art. 837nn, Pen. Code, post] of this Act. [Id., § 99.]

**Art. 5011½d. Operator of irrigation system to keep records, annual statement to board of water engineers.**—Any person, association of persons, corporation, irrigation or water improvement district who owns and operates any system of works used for the irrigation of land, or for any of the purposes named in the law, shall keep such detailed record of daily operations as may be necessary to determine the quantity of water taken or diverted each calendar year. If the use is for irrigation, there shall also be kept a record of the number of acres irrigated, as near as may be, without making actual surveys for the purpose and the character of crop or crops grown, and the yield per acre.

On or before the first day of March of each year, every person, association of persons, corporation, water improvement or irrigation district who, during any part of the preceding calendar year, owned or operated any of the works described in this Section, shall furnish, under oath, to the Board of Water Engineers, upon blanks to be furnished by the board, the information required to be kept for such preceding year, or part thereof, together with such other available information as the board may require, covering the uses made of water for any of the purposes named in the law. [Id., § 100.]

**Note.**—Sec. 101 makes it a misdemeanor to permit waste of water, and is set forth post as art. 837nnn, Pen. Code.

**Art. 5011½dd. Statement to board as to test of artesian well.**—Any person, association of persons, corporation, or water improvement or irrigation district, owning or operating any artesian well, as defined for the purposes of this Act, at the time of its taking effect, shall, within one year thereafter, transmit to the Board of Water Engineers a sworn statement showing the result of such test, together with a declaration of the use or uses to which the newly developed supply will be devoted, and the contemplated extent of such use. [Id., § 102.]

**Art. 5011½e. Annual report as to public artesian wells.**—On or before the first day of March of each year, every person, association of persons, corporation, water improvement or irrigation district who, during any part of the preceding calendar year, owned or operated any artesian well for any purpose other than that of domestic use, shall furnish, under oath, to the Board of Water Engineers, upon blanks to be furnished

by the board, a detailed statement showing the quantity of water which has been derived from such well, and the character of use to which same has been applied, together with the change in level of the water table of said well, and if used in irrigation, the acreage and yield of each crop, together with such additional data as the board may require. [Id., § 103.]

**Art. 5011 $\frac{1}{2}$ ee. Regulations relating to artesian wells not to apply to oil wells.**—Nothing in the preceding Sections, relating to artesian wells, shall be construed to apply to any oil well, and the status of such oil wells shall be unaffected by this Act; provided that abandoned oil wells shall be safeguarded as required in Section 91 [Art. 5011h] of this Act. [Acts 1913, p. 358, § 96; Act March 19, 1917, ch. 88, § 104.]

**Art. 5011 $\frac{1}{2}$ f. Board to determine relative rights of claimants to waters; taking testimony; transfer of cases from courts to board.**—Upon a petition to the Board of Water Engineers, signed by one or more water users, upon any stream or other source of water supply, requesting the determination of the relative rights of the various claimants to the waters of such streams or other source of supply, it shall be the duty of the Board of Water Engineers, if upon investigation they find the facts and conditions are such as to justify, to make a determination of such rights, fixing a time for beginning the taking of testimony, and the making of such examinations as will enable them to determine the rights of the various claimants. In case suit is brought in any court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Water Engineers for determination, as in this Act provided. [Act March 19, 1917, ch. 88, § 105.]

**Art. 5011 $\frac{1}{2}$ ff. Notice; adjournment of taking of testimony; sessions; members of board who may preside.**—The Board shall prepare a notice setting forth the date when the investigation will begin of the flow of the stream and of the ditches and pumps taking water therefrom, and a place and time certain when one or more members of the Board of Water Engineers will begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the portion of the State in which said water supply is situated, the last publication of said notice to be not less than thirty days prior to the beginning of taking testimony and for the measurement of the stream. The member or members of the board taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested. Provided that the hearing for the taking of testimony shall be held in each county through which such stream may flow, or in which a portion of such water supply is situated. Such hearing may be held by any one or more members of the Board of Water Engineers, and when taken before any one or more members, shall have the same force and effect as if the whole board were sitting at such hearing. [Id., § 106.]

**Art. 5011 $\frac{1}{2}$ g. Special notice to claimants of sessions of board.**—It shall be the duty of the Board of Water Engineers to cause a notice to be sent by registered mail to each person, firm or corporation shown by the Records of the Board to the Board to be a user or claimant to the use of water upon such stream or other source of water supply, which said notice shall set forth the date when a member or members of the board will sit within the county of such claimant's residence, or the county in which may be situated the land to which such water right may be



appurtenant, and also setting forth the date when the examination of the stream or other source of water supply, and the ditches and pumps diverting water therefrom, will begin; and also the date when testimony will be taken as to the rights to the water of said stream, or other source of water supply. Said notice shall be mailed at least thirty days prior to the date set therein for making examination of such stream, or other source of water supply, and the taking of testimony. [Id., § 107.]

**Art. 5011½gg. Claimant shall make statement in writing of extent of claim.**—Accompanying each such notice there shall, in addition, be enclosed with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream or other source of water supply to which he lays claim, the said statement to include the following: The name and post office address of the claimant; the nature of the right or use on which the claim is based; the time of initiation of such right, or the commencement of such use, and, if distributing works are required, the date of beginning of construction; the date when completed; the date of beginning and completion of enlargements; the dimensions of the ditch as originally constructed and as enlarged; the date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, and the amount in subsequent use with the dates of reclamation and the amount and general location of the land such ditch or pump is intended to irrigate; the character of the soil, and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right claimed. [Id., § 108.]

**Art. 5011½gh. Verification of statement.**—Each claimant or owner shall be required to certify to his statement under oath, and any member of the Board of Water Engineers, or the secretary of the board, is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement, above provided for. [Id., § 109.]

**Art. 5011½hh. Taking of testimony; disqualification of members of board.**—Upon the date named in the notice above provided for, for the taking of testimony, a member or members of the Board of Water Engineers shall begin the taking of such testimony, and shall continue the same until completed. Provided, that the meetings may be adjourned from time to time and place to place, to suit the convenience of the parties. In case any member of the Board of Water Engineers is directly or indirectly interested in the water of any stream, or other source of water supply, upon which an investigation and hearing shall be undertaken, or is prevented by illness, or otherwise from taking part in such hearing, the taking of testimony, so far as relates to said stream, or other source of water supply, shall be carried on by another member or members of the board, and such member so interested shall be deemed to be disqualified, and shall not participate in the taking of testimony or the determination of such cause. [Id., § 110.]

**Art. 5011½gi. Notice of completion of testimony; inspection by claimants.**—Upon the completion of the taking of testimony, it shall be the duty of the board, or the member or members thereof taking such testimony, to give notice, by registered mail, to the various claimants, that at a time and place named in the notice, not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and others, and said member or members of the board

conducting such hearing, shall keep such evidence open to inspection at said places for such a length of times as, in the opinion of the board, shall be necessary to permit anyone interested to examine the same. [Id., § 111.]

**Art. 5011½ii. Employment of stenographers, experts, etc.**—Whenever in the judgment of the Board of Water Engineers it is deemed necessary or expedient to employ stenographers, hydrographers and other experts, in order to properly perform its duties as required by Section 111 to 123 [Arts. 5011½i-5011½o], inclusive, the board shall have the authority to make such employment, at just and reasonable rates of compensation for such services and for their necessary traveling expenses, to be paid out of a fund created for that purpose, and the Legislature shall create such fund by appropriating a sufficient sum therefor out of money not otherwise appropriated for the use of the Board of Water Engineers. [Id., § 112.]

**Art. 5011½j. Expenditures charged as costs.**—Any money expended in accordance with the provisions of the preceding section shall be charged as costs in the proceedings creating the necessity for its expenditure, and upon collection thereof by the proper authority shall be thereupon deposited with the State Treasurer, who shall place the same to the credit of the fund required by the preceding section. [Id., § 113.]

**Art. 5011½jj. Contest of claims; notice.**—Should any person, corporation, water improvement or irrigation district, or association of persons owning irrigation works deriving water from, or claiming any interest in the stream or other source of water supply involving the determination, desire to contest any of the rights of the persons who have submitted evidence, as aforesaid, such persons, corporations or associations shall, within thirty days after the expiration of the period as fixed in the notice for public inspection, notify the Board of Water Engineers, or the member or members conducting such hearing, in writing, stating with reasonable certainty the grounds for his proposed contest, which statement shall be verified by the affidavit of the contestant or his agent of attorney, and the said board, or the member or members thereof conducting such hearing, shall notify the said contestant and the person, corporation, water improvement, and irrigation district or association whose rights are contested, to appear before such board, or the member or members thereof conducting such hearing, at such convenient time and place as shall be designated in such notice. [Id., § 114.]

**Art. 5011½k. Hearing; compelling attendance of witnesses; depositions; fees and costs.**—The time fixed for the hearing in the foregoing section provided for shall be not less than thirty nor more than sixty days from the date the notice is issued to the person, corporation, water improvement, or irrigation district, or association of persons whose rights are contested, which notices may be served and returns thereof may be made in the same manner as citations are served in civil actions in the district court. The Board of Water Engineers, or the member or members so conducting such hearing, shall have the right and power to issue subpoenas and compel the attendance of witnesses to testify upon such hearing, which shall be served in the same manner as subpoenas issued out of the district courts, and shall have the power to compel such witnesses so subpoenaed to testify, and to give evidence in said matter, and shall have the power to order the taking of depositions, and to issue, through their secretary, commissions to take depositions, in such manner as the Board of Water Engineers, by written rule, may provide, and said

witnesses shall receive the same fees as in civil cases, the costs to be taxed as the Board of Water Engineers may direct. [Id., § 115.]

**Art. 5011½kk. Transmission of evidence to office of board.**—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the Board of Water Engineers, or any member or members thereof, together with the evidence taken in all contests, if any, shall be transmitted to the office of the Board of Water Engineers, either by some member of the Board, or the secretary of the Board, in person, or by registered mail, and such evidence shall thereupon be filed as a public document in the office of the Board of Water Engineers. [Id., § 116.]

**Art. 5011½l. Examination of stream or water supply; measurements; map.**—It shall be the duty of the Board of Water Engineers, either through one of its own members, or a qualified agent or employé, to proceed, at the time specified in the notice to the parties on such stream or other source of water supply, to make an examination of such stream or other source of water supply, and the works diverting water therefrom, said examination to include the measurements of the discharge of such stream, and of the carrying capacity of the various ditches and canals, an examination of the irrigated lands, and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals, and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested, which said observation and measurement shall be reduced to writing and made a matter of record in the office of the board, and it shall be the duty of the board to make or cause to be made map or plat, on a scale of not less than one inch to a mile, showing with substantial accuracy the course of said stream, the location of each ditch and canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed. [Id., § 117.]

**Art. 5011½ll. Findings of fact and determination; rights determined; certified copy sent to counties through which stream flows.**—As soon as practicable after the compilation of said data and the filing of said evidence in the office of the Board of Water Engineers, the board shall make and cause to be entered of record in its office, findings of fact and an order of determination, determining and establishing the several rights to the waters of said stream. And where the evidence taken at such a hearing as herein provided shall disclose existing water rights not represented at such a hearing, said rights shall be included in such findings of fact of said board and shall be likewise determined and established. A certified copy of such order of determination and findings shall be filed in every county in which such stream or any portion of a tributary is situated, or by which it flows, with the county clerk of said county. [Id., § 118.]

**Art. 5011½m. Certificates of determination; registration.**—Upon the final determination of the rights to the waters of any stream or other source of water supply, it shall be the duty of the secretary of the Board of Water Engineers to issue to each person, association or corporation represented in such determination, upon payment of the fee required by law, a certificate to be signed by the chairman of the Board of Water Engineers, and attested under seal by the secretary of said board, setting forth the name and post office address of the owner of the right, the date

of the priority, extent and purpose of such right, and if such water be for irrigation purposes, a description of the legal subdivisions of the land to which the water is appurtenant. Such certificate shall be transmitted by the secretary in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk, upon receipt of the statutory recording fee, to record the same in a book prepared and kept for that purpose, and the clerk shall, upon receipt of the filing fee and the recording of said certificate, immediately transmit the certificate to the owner. [Id., § 119.]

**Art. 5011 $\frac{1}{2}$ mm. Appeal to district court; parties.**—Any party or any number of parties, acting jointly, who may feel themselves aggrieved by the determination of the Board of Water Engineers, may take an appeal from the decision of the board to the district court. All persons joining in the appeal shall be joined as appellants, and all others, parties to the proceedings, shall be joined as appellees. [Id., § 120.]

**Art. 5011 $\frac{1}{2}$ n. Notice of appeal; bond; consolidation of appeals.**—The party or parties appealing shall, within sixty days of the determination by the Board of Water Engineers, which is appealed from, and the entry thereof in the records of the board, file in the district court to which the appeal is taken, a notice in writing stating that such party or parties appeal to such district court from the determination and order of the Board of Water Engineers, and upon the filing of such notice, the appeal shall be deemed to have been perfected. Provided, however, that the party or parties appealing shall, within sixty days mentioned, enter into a bond, to be approved by the district clerk, to be made payable to all the parties in said suit or proceeding, other than the parties appealing, which bond shall be in such an amount as the district clerk shall fix, conditioned that the parties taking such appeal will prosecute their appeal to effect, and pay all costs which may be adjudged against them, or either or any of them. In the event that more than one appeal shall be perfected, the district court shall have the right to order such appeals consolidated in such manner and upon such terms as the district court shall direct. [Id., § 121.]

**Art. 5011 $\frac{1}{2}$ nn. Notice to board of perfection of appeal; service on appellees.**—The clerk of the district court, immediately upon the filing of said notice of appeal, and the approval of the bond mentioned in the preceding section, shall transmit to the secretary of the Board of Water Engineers a notice over the seal of the court, to the effect that said appeal has been perfected, which notice shall be entered of record by the secretary in the records of the board. The appellant or appellants shall cause a certified copy of said notice to be served on each of the appellees, the same to be served in the same manner provided for other process issuing out of the district court. [Id., § 122.]

**Art. 5011 $\frac{1}{2}$ o. Appellant shall file in district court certified transcript of record and determination of board.**—The appellant or appellants shall, within ninety days after the appeal is perfected, as provided for, file in the office of the clerk of the district court of the proper county, a certified transcript of the order of determination made by the Board of Water Engineers, which order is appealed from, together with a certified copy of all of the records of the Board of Water Engineers relating to such determination, and the originals or certified copies of all documentary evidence offered before the board, or prepared by the board, including the measurements of streams, tributaries and ditches, together with a petition setting out the cause of complaint of the party or parties appealing. [Id., § 123.]

**Art. 5011 $\frac{1}{2}$ oo. Trial de novo in district court.**—When any appeal to the district court shall have been perfected, as provided in the afore-said sections, a trial de novo shall be held in the district court, and the practice in the taking of testimony and the pleadings therein shall follow as nearly as may be the procedure provided by law in appeals in probate cases from the county to the district court, except as herein otherwise provided. [Id., § 124.]

**Art. 5011 $\frac{1}{2}$ p. Testimony taken before boards, maps, etc., admissible in evidence.**—All surveys, maps, plats and plans, together with stream measurements and scientific and other data collected or prepared by the board, or under its authority, and evidence taken before such board or member thereof, shall be admissible in evidence, under certificate of the secretary of the board, in all hearings before the board, and in any of the courts of this state. [Id., § 125.]

**Art. 5011 $\frac{1}{2}$ pp. Decree of district court; costs; appeal.**—After final hearing, the court shall enter a decree affirming or modifying the order of the Board of Water Engineers, and may assess such costs and apportion the same, as it deems just. Appeals may be taken from the judgment of the district court to the court of civil appeals and supreme court, in the same manner as in other cases. [Id., § 126.]

**Art. 5011 $\frac{1}{2}$ q. Order of board effective pending appeal.**—Pending final determination of the cause on appeal, the order of the Board of Water Engineers shall be in full force and effect, and the operation thereof shall not be suspended by the appeal. [Id., § 127.]

**Art. 5011 $\frac{1}{2}$ qq. Determination of board as affirmed or modified conclusive.**—The determination of the Board of Water Engineers, as confirmed or modified on appeal, as provided in this Act, shall be conclusive as to all prior rights, and upon the rights of all existing claimants, upon the stream or other body of water embraced in such determination. [Id., § 128.]

**Art. 5011 $\frac{1}{2}$ r. Persons not presenting claims to board shall be barred after three years; rights of riparian owners not affected.**—Whenever the Board of Water Engineers shall, as provided by law, and after publication of notice, as hereinbefore provided, proceed to determine the right of the various claimants to the use of water upon any stream or other source of water supply, it shall be the duty of all claimants interested in such streams or other source of water supply, to appear and submit its or their respective claims or appropriations, at the time and in the manner required by law, and by said published notice, and any claimant who shall fail to appear in such proceedings and submit proof of his claim or appropriation, and who are required by this Act to appear, shall, after three years from the date of the entering of the order of said hearing be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other source of water supply, embraced in such jurisdiction and shall be held to have forfeited all rights to appropriate or use the said waters theretofore claimed by him, provided that nothing herein contained shall be held to in any way destroy, infringe or impair the right of any riparian owner to the use of the water from such stream for domestic purposes and use or for the use of stock, and it shall not be necessary for the claimant of this right to appear or assert his right to such use, but the same shall be respected. [Id., § 129.]

**Art. 5011 $\frac{1}{2}$ rr. Each county shall constitute a water district; resolution of commissioners' court for water commissioner; salary and expenses.**—Each county in this State, now existing or hereafter organized,

shall constitute a water district, provided, that no water commissioner shall be appointed for any such district until the Commissioners' Court of such county shall, by resolution duly entered in the minutes of such court, call upon the Board of Water Engineers to appoint a Water Commissioner. At the same time that said County Commissioners shall call upon the Board of Water Engineers for the appointment of a Water Commissioner for their district, such Commissioners' Court shall, by resolution, fix the salary or compensation to be paid such commissioner, and the salary and necessary traveling expenses of such Water Commissioner shall be paid by said county, in the mode and manner that may be provided by the Commissioners' Court. As soon as the Commissioners' Court shall have acted upon any such resolution, a certified copy of the order of said court shall be forthwith transmitted to the secretary of the Board of Water Engineers by the clerk of the county court. [Id., § 130.]

**Art. 5011½s. Board shall appoint water commissioner for each district; tenure, removal, and vacancies; oath and bond.**—There shall be appointed by the Board of Water Engineers, by a majority vote of such board, one water commissioner for each water district, after the commissioners' court shall have acted, as in the last preceding section set forth, which commissioner shall hold his office for the term of two years, unless sooner removed by the Board of Water Engineers; provided, that any such water commissioner may, at any time, be removed by the Board of Water Engineers, by a majority vote thereof, and in case of such removal, the board shall specify in its order the reason for such removal. All vacancies in the office of water commissioner, created by removal, resignation or otherwise, shall be filled by the Board of Water Engineers. Before entering upon the discharge of the duties of his office, the water commissioner shall take the oath of office prescribed by the constitution, and shall enter into bond with at least two personal sureties or with one surety or guaranty company authorized to do business in this state, payable to the Board of Water Engineers, to be approved by such board, in the penal sum of Five Thousand (\$5,000.00) Dollars, conditioned for the faithful performance of his duties. [Id., § 131.]

**Art. 5011½ss. Duties of water commissioner.**—It shall be the duty of such water commissioner to divide the water of the streams, canals, ditches, or other sources of water supply of his district, among the several users and appropriators thereof, according to the prior right of each, respectively, as determined by the order of the Board of Water Engineers. He shall shut and fasten or cause to be shut and fastened, the headgates of all ditches, or of intakes of all pumps, and shall regulate or cause to be regulated the controlling works of reservoirs in times of scarcity, in accordance with the orders of the Board of Water Engineers, as may be necessary by reason of priority of right existing upon such stream or other sources of water supply in his district. Such water commissioner shall have authority to regulate the distribution of water among the various users under any partnership or other canal, ditch or reservoir, in accordance with the respective rights of the appropriators, as determined by the Board of Water Engineers. Whenever, in the pursuance of his duties, the water commissioner regulates the headgate of a ditch or the controlling works of a reservoir, or the intake of any pumping plant, it shall be his duty to attach to said headgate, pump or controlling works, a written notice, dated and signed by him, setting forth the fact that said headgate, pump or controlling works has been properly regulated and is wholly under his control, and such notice shall be legal

notice to all parties interested in the division and distribution of the waters of such stream, canal, ditch, pump or reservoir. [Id., § 132.]

**Art. 5011½t. Same; division, etc., of water; appeal to board.**—Said water commissioner shall, as near as may be, divide, regulate and control the use of the water of all streams and other sources of water supply within his district under the orders of the Board of Water Engineers, by such closing or partial closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the appropriator is legally entitled, and any person who may be injured by the action of any water commissioner or his failure to act pursuant to this Act, shall have the right to appeal to the Board of Water Engineers, and from the decision of the said Board of Water Engineers an appeal may be taken to the district court. Provided, however, that the decision of the water commissioner, or other authority appealed from, shall remain in full force and effect, pending such appeal, and until reversed or altered by the authority to which such appeal shall be taken. [Id., § 133.]

**5011½tt. Assistants for water commissioner; compensation; discharge.**—The Board of Water Engineers shall have the power to authorize the water commissioner to employ an assistant or assistants to aid him in the discharge of the duties of his office, but such assistant shall have no authority except such as may be delegated to him by the water commissioner, and the water commissioner shall be in all things responsible for the actions of his assistant or assistants. Such assistants shall receive such compensation as may be allowed by the County Commissioners' Court, and the time and method of paying the same shall be settled by the Commissioners' Court in an order or resolution authorizing their appointment. Such assistant or assistants may be discharged by the water commissioner at any time, for any reason satisfactory to himself. [Id., § 134.]

**Art. 5011½u. Act shall apply to what streams, etc.**—The provisions of this Act shall apply to all streams or other sources of water supply lying upon or forming a part of the boundaries of this State. [Id., § 135.]

**Art. 5011½uu. Recognition of riparian rights.**—Nothing in this Act contained shall be construed as a recognition of any riparian right in the owner of any lands the title to which shall have passed out of the State of Texas subsequent to the first day of July, A. D. 1895. [Acts 1913, p. 358, § 97; Act March 19, 1917, ch. 88, § 136.]

**Art. 5011½v. Not to affect vested rights.**—Nothing in this Act contained shall be held or construed to alter, affect, impair, increase, destroy, validate or invalidate any existing or vested right of property existing at the date when this Act shall go into effect. [Acts 1913, p. 358, § 98; Act March 19, 1917, ch. 88, § 137.]

**Art. 5011½vv. Partial invalidity.**—If any Section or provision of this Act shall be held unconstitutional, it shall not be held to invalidate any other provision of this Act. [Acts 1913, p. 358, § 99; Act March 19, 1917, ch. 88, § 138.]

**Art. 5011½w. Repeal.**—Chapter 171 of the General Laws of the regular session of the Thirty-third Legislature, and all other laws and parts of laws in conflict with the provisions of this Act, are hereby repealed. [Act March 19, 1917, ch. 88, § 139.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Rights of Riparian owners.**—As a riparian owner can make no use of the stream that will injure another riparian owner, he may not construct an embankment or ob-

struction which in times of ordinary flood will overflow and injure the lands of the opposite proprietor. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Where a deed provided that the vendee waived all claims which might accrue for damage by reason of seepage or overflow from the vendor's irrigation canals, vendor would not be liable for damages caused from such source in the absence of gross or willful negligence by him causing damage to the land. *Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.* (Civ. App.) 158 S. W. 1191.

A depression of the ground in a flat marshy country filled with rank vegetation from a quarter of a mile to a mile in width, with no defined banks and no channel, and through which water only oozes, is not a watercourse. *Wilborn v. Terry* (Civ. App.) 161 S. W. 33.

Riparian rights are property which will be protected by the courts, and a riparian proprietor entitled to the flow of a stream of pure and wholesome water may enjoin pollution of the stream. *Houston Transp. Co. v. San Jacinto Rice Co.* (Civ. App.) 163 S. W. 1023.

A person owning part of the bed of a natural lake worthless without the water on it has a right to have the water maintained at its natural level, so that the owner of another part of the bed may not divert the water to irrigate nonriparian lands, when this injuriously affects the rights of the first owner. *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

A riparian owner has the right to take all the water he needs, if such use does not injure other owners, in which latter case he may have his just proportion. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

The natural uses of water by a riparian owner take precedence over such unusual uses as irrigation, mills, mining, etc. *Id.*

Where the natural flow of surface water was not changed by a change of grade of lots, the owner of adjacent property could not recover damages from surface water. *Todd v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 173 S. W. 617.

The word "draw," as commonly understood, does not mean a stream of running water with well-defined banks, as distinguished from the flow of surface water. *Cartwright v. Warren* (Civ. App.) 177 S. W. 197.

Riparian rights may be alienated separately and apart from the land to which they are appurtenant. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

The riparian rights of a landowner whose property abutted upon a navigable gulf are those of access, the right to acquire the fee in accretions and alluvion, as well as in land exposed by reliction, together with the privilege of building a wharf. *Id.*

Where riparian owners placed fillings and buildings in the bed of a navigable river they created a purpresture, and were liable to judgment restraining them from continuing the trespass and authorizing removal of the obstructions, whether or not overflows dangerous to the public were caused. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

Where a riparian proprietor filled in and built upon the bed of a stream, so as to create danger of overflow through inadequate outlet for high water, such nuisance was open to abatement by the city whether the river was navigable or not and although overflows might occur in the absence of such obstruction. *Id.*

Where defendant city tore down plaintiff riparian owners' structures in the bed of a stream constituting a dangerous obstruction in time of flood, but did not take the material or destroy it, an emergency existing justifying the summary action, plaintiffs could not recover damages for the removal of the obstructions. *Id.*

A creek flowing through a well-defined channel, with banks and bed fed by rains falling within its watershed outside of defendants' land, and through which water flows only after a rainfall, was not diffused surface water flowing across defendants' land which could be regarded as their absolute property. *Hoefs v. Short* (Civ. App.) 190 S. W. 802.

**Navigable waters.**—Hunting, camping, and fishing are reasonable uses of waters and shore line of navigable streams. *Dincans v. Keeran* (Civ. App.) 192 S. W. 603.

Campers and owners of lands adjoining navigable stream have equal rights to use such navigable waters and the shore line between high and low tide marks. *Id.*

Under the civil law the "shore line" boundary of lands adjoining navigable waters is the line marked by the highest tide. *Id.*

Owners of land adjoining navigable stream could acquire exclusive rights to the shore line thereof only by express legislative act. *Id.*

The term "highest tide," referring to boundaries of lands adjoining navigable waters, does not mean the highest crest of storm-driven sea water. *Id.*

Defendants, who had been removing sand bars from the bed of a navigable stream, held to have acquired no prescriptive rights, because their previous removals had not even threatened the sand bar which protected the stream at the point where plaintiffs' lands were located from the flow of salt water from the gulf into which the stream emptied. *Houston Transp. Co. v. San Jacinto Rice Co.* (Civ. App.) 163 S. W. 1023.

While the owner of the shore of a navigable stream has no ownership in the water, he has the right to divert its waters for domestic purposes and irrigation, so long as it does not interfere with the rights of the public. *Id.*

Where a sand bar protected a fresh-water stream from the influx of salt water, private persons, desiring to remove the sand bar, will be enjoined, where it will greatly injure the property of riparian owners who used the water for irrigation and domestic purposes; this being so even though the stream is a navigable one. *Id.*

**Rights under grants and conveyances.**—Owners of land held to hold it burdened with the rights retained by a water company in conveying to his grantor for its and other water users' benefit. *Houk v. Robinson* (Civ. App.) 160 S. W. 120.

Under a conveyance of land by a water company, held, that one of the subsequent owners of such land had a right to go upon the land of another for the purpose of main-



taining and repairing a lead ditch which the company's engineer had determined it was necessary and proper to use for the service of several owners. *Id.*

A clause in a deed of purchase by the Lakeside Irrigation Company of the irrigation plant of the Eagle Lake Irrigation Company, binding the grantee to furnish water for lands leased by the grantor, created an incorporeal hereditament, appurtenant to the land and running with it. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

A reservation in a deed of riparian property held void because inconsistent with the grant. *Richter v. Granite Mfg. Co.* (Sup.) 174 S. W. 284, L. R. A. 1916A, 504, answer to certified question conformed to (Civ. App.) 178 S. W. 1022.

Reservation of water rights contained in a deed of riparian property held void as being too vague and indefinite to be enforceable. *Richter v. Granite Mfg. Co.* (Civ. App.) 178 S. W. 1022, conforming to answer to certified question (Sup.) 174 S. W. 284, L. R. A. 1916A, 504.

**Actions to establish or protect rights.**—In an action for damages for damming a lake so that surface waters were collected and thrown back on plaintiff's land, evidence held insufficient to show that the dam cast water upon plaintiff's land, at most only showing that it prevented the surface water from flowing off as rapidly as before. *Wilborn v. Terry* (Civ. App.) 161 S. W. 33.

Right of action against riparian owners for using more than their just proportion of the water does not accrue, so as to be ground for a prescriptive title, until an injury is caused or threatened to the complaining owner. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

Evidence held insufficient to show that there was during the prescriptive period any injury to the complaining owners which would constitute a cause of action. *Id.*

In injunction against irrigation company, held that judgment fixing the price would not be construed as a holding that the price found would be a reasonable charge for another year. *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677.

Decree enjoining use of surface waters flowing in a well-defined channel beyond a certain amount held not to require defendants to maintain works to deliver water or to impose an easement upon land. *Hoefs v. Short* (Civ. App.) 190 S. W. 802.

In action for damages to farm by dam causing overflow of part of it, the damages recoverable are the difference between the market value of the entire tract immediately before and immediately after the dam construction. *City of Ft. Worth v. Burgess* (Civ. App.) 191 S. W. 863.

In action for overflowing of lands, evidence held sufficient to show market value of land immediately before and immediately after construction of dam. *Id.*

In determining the damages to land from construction of a dam causing its overflow, the plaintiff can have the jury consider the prior market value of his land for any purpose to which it was adapted and for which he desired to use it. *Id.*

Evidence showing that a ranch foreman of plaintiff's predecessor invited defendants to assist in rebuilding irrigation dam, held insufficient to establish an irrevocable license to maintain the dam. *Popham v. Eggleston* (Civ. App.) 193 S. W. 181.

In suit to restrain defendant's interference with arrangement for pumping water on land conveyed to defendant by plaintiff, who reserved right to use water, decree awarding plaintiff free use of water in practically language of stipulation in his deed to defendant did not award plaintiff any greater right than stipulation would warrant. *Day v. Williams* (Civ. App.) 193 S. W. 239.

Evidence held to show that plaintiff relied on the furnishing of irrigation water by defendant, and that defendant recognized his right to receive the water. *Louisiana, Rio Grande Canal Co. v. Elliott* (Civ. App.) 193 S. W. 255.

Landowner could recover the difference in the market value immediately before overflow of surface water and immediately thereafter, or for rentals lost, but could not recover both items. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 194 S. W. 662.

**Lease of water rights.**—Water rights can be leased with the land, and the lessee may sue on the contract. *Louisiana, Rio Grande Canal Co. v. Elliott* (Civ. App.) 193 S. W. 255.

**Right to repel surface water.**—Where a lower landowner prevents surface waters from flowing over his land, thus obstructing natural drainage, though not interfering with the watercourse, he is not liable for injuries caused to the lands of other proprietors upon which the surface waters are thrown back. *Wilborn v. Terry* (Civ. App.) 161 S. W. 33.

A landowner has the legal right to divert the flow of surface water after rainfall from his land to adjacent land by constructing embankments for that purpose. *Wellborn v. Wellborn* (Civ. App.) 185 S. W. 1041.

**Liability for injury to property.**—The fact that a corporation is exercising the powers of a public service irrigation corporation is immaterial upon its liability for damage to land or crops by negligent seepage or flooding of water from its streams. *Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.* (Civ. App.) 158 S. W. 1191.

A landowner who erected a dam, thus collecting surface waters in a lake upon his own property and retaining them so that they were thrown back on the land of higher proprietors, is liable for the injury. *Wilborn v. Terry* (Civ. App.) 161 S. W. 33.

## CHAPTER TWO

## WATER IMPROVEMENT DISTRICTS

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**Article 5107—1. Commissioners' Court may establish districts; boundaries; powers; petition and proceedings thereon.**—The county commissioners' court of any county in this State at any regular or called sessions thereof may hereafter establish one or more water improvement districts in their respective counties in the manner hereinafter provided. Said districts may or may not include within their boundaries, villages, towns and municipal corporations, or any part thereof, but no land shall be at the same time included within the boundaries of more than one water improvement district created under this Act. Such district, when so established may make irrigation improvements therein or may purchase improvements already existing, or may purchase improvements and make additional improvements, and issue bonds in payment therefor, as hereinafter provided. Such districts being authorized to provide for the irrigation of the land included therein. Districts may be formed for co-operation with the United States under the Federal reclamation laws for the purpose of construction of irrigation works including drainage works necessary to maintain the irrigability of the land or for the purchase, extension, operation or maintenance of constructed works, or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands.

Upon the presentation to the county commissioners' court of any county in this State, either at a regular or any called session of said court, of a petition signed by a majority in number of the holders of title or evidence of title to lands situated within the proposed district and representing a majority, in value as indicated by the State and county assessment rolls of all of said lands, praying for the establishment of a water improvement district, and setting forth the necessity, public utility and feasibility and setting forth the proposed boundaries thereof, and designating a name for such district, which name shall include the name of the county. The said commissioners' court shall, at the session when said petition is presented, set the same down for hearing at some regular or special session of said court called for the purpose not less than twenty nor more than forty days from the presentation of said petition, and shall order the clerk of said court to give notice of the date and place of said hearing by posting a copy of said petition and the order of the court thereon in five public places within said proposed district, and one at the court house door of said county. Said clerk shall receive as compensation for such service one (\$1.00) dollar for each notice so posted and five cents per mile for each mile necessarily and actually traveled in posting such notices. Such notices shall be posted for at least twenty days prior to the date of such public hearing. The clerk shall make due return of a true copy of such notice, showing the time when and the places where such notices were posted, and shall file the same in his office and among the papers affecting such district. [Acts 1905, p. 235; Acts 1913, p. 380, § 1; Act March 19, 1917, ch. 87, § 1.]

**Note.**—Sec. 118 repeals all laws in conflict. Became a law March 19, 1917.

**Former statute—Constitutionality.**—Chapter 172, Acts 33d Leg. (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5107—1 to 5107—105), held not violative of Const. art. 1, § 17, forbidding the taking of property for public use without compensation, unless by consent, and section 19, forbidding the taking of property for public use without due process of law; section 24 of the act expressly providing the process for acquiring the lands. Barstow v. Ward County Irr. Dist. No. 1 (Civ. App.) 177 S. W. 563.

Such chapter held not violative of Const. art. 1, §§ 17 and 19, as allowing an excessive valuation of the lands within the district for bonding purposes; the act limiting bond issues to one-fourth of the actual value of the lands. *Id.*

Where land has been incorporated within an irrigation district according to statute, taxation of riparian rights belonging to owners of land within such district is not a taking of property. *Id.*

That the provision making the declaration of the district court as to the validity of bonds issued, final, may be unconstitutional, does not vitiate the remainder of the act. —*Id.*

**Art. 5107—2. Contest of petition; hearing.**—Upon the day set by said county commissioners' court for the hearing of said petition, any person whose lands are included in and would be affected by the creation of said district may appear before said court and contest the creation of such district, or contend for the creation thereof, and may offer testimony to show that such district is or is not necessary and would or would not be of public utility, and that the creation of such district would or would not be feasible or practicable. Said county commissioners' shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such district and all matters pertaining to the same, except as is hereinafter provided, and may adjourn the hearing on any matter connected therewith from day to day and all judgments rendered by said court in relation thereto shall be final, except as herein otherwise provided. [Acts 1913, p. 380, § 2; Act March 19, 1917, ch. 87, § 2.]

**Art. 5107—3. Findings of commissioners' court.**—If, at the hearing of such petition, it shall appear to the satisfaction of the court that the organization of such district and the construction or purchase, or the construction and purchase of the proposed irrigation system, or that cooperation with the United States as in Section 1 [Art. 5107—1] provided, is feasible and practicable, and that it is needed and would be a public benefit and a benefit to the lands included in the district, then the court shall so find, and cause its findings to be entered of record; but if the court should find that the irrigation of the lands in such district is not feasible and practicable and that it would not be a public benefit or is not needed or would not be a public utility, then the court may enter such findings of record and dismiss the petition at the cost of petitioners. [Acts 1913, p. 380, § 3; Act March 19, 1917, ch. 87, § 3.]

**Art. 5107—4. Appeal to district court; certification of result.**—If at the hearing provided for in Section 3 [Art. 5107—108] of this Act the court shall enter an order granting or dismissing the petition for the organization of said district at the cost of petitioners, then and in that event the petitioners, or any one or more of them, or any one owning land in such district, may appeal from said order to the district court, and in the event of such appeal, said cause shall be tried under the rules prescribed for practice in the district court and shall be de novo, and the clerk of the commissioners' court shall transfer to the clerk of the district court, within thirty days from the date of such judgment all records filed with the county commissioners' court, and it shall be unnecessary to file any other additional pleadings in said court. The final judgment on appeal shall be certified to the commissioners' court for their further action. [Acts 1913, p. 380, § 4; Act March 19, 1917, ch. 87, § 4.]

**Art. 5107—5. Order for election.**—After the hearing of the petition, as provided for in Sections 2 and 3 [Arts. 5107—2, 5107—3] of this Act, if the commissioners' court shall find in favor of the petitioners for the establishment of a district according to the boundaries as set out in said petition, the county commissioners' court shall order an election to be held within said proposed district, at which election there shall be submitted the following propositions: "For the Water Improvement District," "Against the Water Improvement District," and the election of five directors as is hereafter provided. [Acts 1913, p. 380, § 5; Act March 19, 1917, ch. 87, § 5.]

**Art. 5107—6. Notice of election.**—After the ordering of the election as provided in the preceding section, notices of such election shall be

given, stating the time and place or places of holding the election, and showing the boundaries of said proposed district, and such notices shall also show the presiding officer or officers appointed for the holding of said election. Such notices shall be posted in four places in such proposed district, and one shall be posted at the court house door of the county in which such proposed district is situated, such posting to be for twenty days previous to the date of the election and shall contain the proposition to be voted upon and names of offices to be filled at such election. [Acts 1913, p. 380, § 6; Act March 19, 1917, ch. 87, § 6.]

**Art. 5107—7. Conduct of election; ballots.**—The manner of conducting such election shall be governed by the election laws of the State of Texas, except as is herein otherwise provided, and at such election none but resident property taxpayers, who are qualified voters of said proposed district, shall be entitled to vote on any question submitted to the voters thereof at such election. The county commissioners' court shall name a polling place for such election in each voting precinct or part of a voting precinct embraced in said district, and shall also select and appoint two judges, one of whom shall be the presiding judge, and two clerks at each polling place named, and shall provide one and a half times as many ballots for said election as there are qualified resident tax-paying voters within such district, as shown by the tax rolls of said county. Said ballot shall have printed thereon the following: "For the Water Improvement District," "Against the Water Improvement District," and said ballot shall also contain a space in which to write the name or names of the officer or officers to be selected at such election, and each voter at such election may write or have printed upon said ballot the name of the parties voted for as directors and there shall be no other matter placed upon said ballot. [Acts 1913, p. 380, § 7; Act March 19, 1917, ch. 87, § 7.]

**Art. 5107—8. List of property taxpayers to be furnished for judges of election; oath of voters.**—It shall be the duty of the tax collector of the county before a water improvement district is formed, and of the tax collector of said district after its organization, to make out a certified list of the property tax payers of said district, and to furnish same to the presiding judge of the election, and before any person is entitled to vote at any election under this Act, his name must appear in said certified list of property tax payers, unless such person acquired property in said district after the 1st day of January of the preceding year, and in such event before he shall be permitted to vote he must take the following oath, to be administered by the presiding judge of the polling place where he offers to vote, and for such purpose the presiding judge is hereby authorized to administer the same: "I do solemnly swear (or affirm) that I am a qualified voter of \_\_\_\_\_ county, and that I am a resident property tax payer of the district or proposed district, that I was not subject to pay property tax in said district for the preceding year and have not voted before at this election." [Acts 1913, p. 380, § 8; Act March 19, 1917, ch. 87, § 8.]

**Art. 5107—9. Returns and canvass of election; directors.**—Immediately after the election, the presiding judge at each polling place shall make returns of the result in the same manner as provided for in general elections for State and county officers, and the commissioners' court shall, at a regular session or a special session called for that purpose, canvass such vote, and if it be found that the votes of two-thirds of the resident property taxpayers voting thereon shall have been cast in favor of the district, then the court shall declare the result of said election in

favor of the establishment of said district, and shall enter the same in the minutes of said courts, and shall also canvass the vote for directors and issue or cause to be issued to the five directors receiving the highest number of votes certificates of their election as provided under the general election law; provided, however, that should it be found that two or more persons had received the same number of votes for the fifth position or the fifth director, then the said commissioners' court shall select one of said persons to fill said position. [Acts 1913, p. 380, § 9; Act March 19, 1917, ch. 87, § 9.]

**Art. 5107—10. Order for establishment of district; name and number of district; change of name; number created.**—If the commissioners' court shall declare the result of said election to be in favor of the establishment of the district, then said court shall cause to be made and entered in the minutes of said court an order setting forth facts substantially as follows: "In the matter of the petition of ..... and ..... others praying for the establishment of a water improvement district as in said petition described and designated as ..... County Water Improvement District No. .... Be it known, that an election was called for that purpose in said district and held on the ..... day of ..... A. D. 19...., and two-thirds of the resident property taxpayers voting thereat voted in favor of the creation of said district. Now, therefore, it is ordered by the court that said district be and the same is hereby established under the name of ..... County Water Improvement District No. ...., with the following metes and bounds; (which field notes shall be copied in the record.)"

All such districts hereafter created shall bear the name of the county in which it may be located as a part of its name, and shall be numbered consecutively as created and established under the order of the commissioners' court; provided, however, that all districts heretofore established and otherwise named shall not be required to change its name, but may do so by filing with the commissioners' court a declaration in writing declaring such intention, such declaration to be recorded as is hereinafter provided for the record of the order of the commissioners' court establishing such districts, but the number assumed thereby shall not conflict with the numbers of the other districts hereafter created. The number of districts created hereafter shall not conflict with the number of irrigation districts heretofore created, but shall be consecutively continued. [Acts 1913, p. 380, § 10; Act March 19, 1917, ch. 87, § 10.]

**Art. 5107—11. Recording certified copy of orders.**—After the making and entering by the commissioners' court of the order establishing such districts as herein provided, or an order changing the name of a district, the said court shall cause to be made a certified copy of such order, which shall be filed with the county clerk of the county in which such district is situated, and shall cause same to be duly recorded in the deed records of said county and properly indexed in the same manner provided for the recording and indexing of deeds, and such recordation shall have the same effect, in so far as notice is concerned, as is provided for the record of deeds, and all costs in connection with the making and recording of such copies shall be paid by the district. [Acts 1913, p. 380, § 11; Act March 19, 1917, ch. 87, § 11.]

**Art. 5107—12. Directors to give bond; approval; oath of office; filing.**—Within ten days after the making and entry of the order of the commissioners' court declaring the result of the election and the establishment of the district as hereinbefore provided, or as soon thereafter as is practicable, the directors elected at such election shall each make

and enter into a good and sufficient bond in the sum of five thousand (\$5,000 00) dollars each, payable to such district conditioned upon the faithful performance of their duties, to be approved by the commissioners' court. Provided, however, that after the organization of such district, all bonds required to be given by any director, officer or employé of such district shall be approved by the directors of such district, and said directors shall take the oath of office prescribed by statute for the commissioners' court, except that the name of the district shall be substituted for the name of the county in said oath of office; and the bond and oath herein provided for shall be filed with the county clerk of the county within which said district is situated and be by him recorded in the official bond record for said county, and after its record, said bond shall be delivered by the county clerk to the depository selected by such district under the provisions of this Act, and shall be by it safely kept and preserved as a part of the records of said district. [Acts 1913, p. 380, § 12; Act March 19, 1917, ch. 87, § 12.]

**Art. 5107—13. Organization of directors; quorum.**—The directors of such district shall organize by electing one of their number as president and one as secretary; and any three of whom shall constitute a quorum, and a concurrence of three shall be sufficient in all matters pertaining to the business of their district except the letting of contracts and the drawing of warrants on the depository, which shall require the concurrence of at least four of said directors. [Acts 1913, p. 380, § 13; Act March 19, 1917, ch. 87, § 13.]

**Art. 5107—14. Qualifications of directors.**—No persons shall be elected a director of any district created under this Act unless he is a resident of the State of Texas and owns land subject to taxation within said district, and who, at the time of such election, shall be more than twenty-one years of age. [Acts 1913, p. 380, § 14; Act March 19, 1917, ch. 87, § 14.]

**Art. 5107—15. Assessor and collector; bond; qualifications; compensation; additional bond for collections under federal reclamation act; duties; additional compensation.**—The office of assessor and collector herein provided for shall be filled by the same person who hereafter shall be appointed by the directors, and before entering upon his duties as such assessor and collector, he shall qualify by making and entering into a good and sufficient bond to be approved by the directors, in the sum of five thousand (\$5,000.00) dollars, conditioned for the faithful performance of his duties as assessor and collector, and for the paying over to the district depository of all sums of money coming into his hands as such collector; provided, however, that the directors shall require additional security in the event in their judgment the same may become necessary; and such assessor and collector shall be a resident of the district, or of any town within the general boundaries of the district, and a qualified voter in the county, and shall receive such compensation for his services as may be provided by the board of directors, not to exceed fifteen hundred (\$1,500.00) dollars per annum; provided, that in case any district organized hereunder is appointed fiscal agent of the United States or by the United States is authorized to make collections of money for and on behalf of the United States in connection with any Federal reclamation project, such assessor and collector and each director shall execute a further additional official bond in such sum as the Secretary of the Interior may require, conditioned for the faithful discharge of the duties of his respective office and the faithful discharge by the district of its duties as fiscal or other agent of the United



States under any such appointment or authorization; such additional bonds to be approved, recorded and filed as herein provided for other official bonds, and any such additional bonds may be sued on by the United States or any person injured by the failure of such officer or the district to fully, promptly and completely perform their respective duties; provided, that the board of directors may require the assessor and collector to perform other duties than those herein imposed on him as assessor and collector of taxes, and when such other duties are so required of him, he shall be paid such additional compensation as shall be fixed by the board of directors, but in such event it shall never exceed the maximum salary herein provided for. [Acts 1913, p. 380, § 15; Acts 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 15.]

**Note.**—Act March 30, 1915, ch. 138, § 1, amends sections 15, 21, 58, 59, 69, 70, 75, 83, 85, and 97, chapter 172, of Acts 33rd Leg., regular session. Act March 30, 1915, ch. 138, is expressly repealed by Act March 19, 1917, ch. 87, § 107, set forth post as Art. 5107—107.

**Art. 5107—16. Survey of boundaries of district.**—It shall be the duty of the directors, immediately after they qualify as such, to cause an actual survey of the boundaries of such district to be made according to the boundaries designated in the petition for the establishment of such district, or to adopt in whole or in part such boundaries where already established, and to have said boundary marked by suitable monuments. [Acts 1913, p. 380, § 16; Act March 19, 1917, ch. 87, § 16.]

**Art. 5107—17. Exclusion of land from district; petition of owner.**—The owner or owners of the fee of any land constituting a portion of any district may, within thirty days after the election, qualification and organization of the first board of directors for such district, file with said board a petition praying that such lands may be excluded from and taken out of said district. The petition shall describe the lands which the petitioners desire to have excluded by metes and bounds, and such petition must be acknowledged in the same manner and form as is required in cases of conveyance of real estate. [Acts 1913, p. 380, § 17; Act March 19, 1917, ch. 87, § 17.]

**Art. 5107—18. Same; notice.**—Upon the filing of a petition for the exclusion of any lands from said district with the board of directors, they shall immediately set said petition down for hearing for a day certain, not to exceed twenty days, however, from the date of the filing thereof and shall cause notice of such hearing to be given by the posting of written or printed notices of the time and place of such hearing at three public places within said district. Such notice shall contain a copy of the petition for exclusion, and shall be posted for at least eight days prior to such hearing. [Acts 1913, p. 380, § 18; Act March 19, 1917, ch. 87, § 18.]

**Art. 5107—19. Same; order excluding non-irrigable land; effect.**—The board of directors, at the time and place mentioned in such notice, or at such time and place as such hearing may from time to time be adjourned, shall proceed to hear the petition and all objections thereto, and shall determine whether or not said lands, or any portion thereof, shall remain as a portion of such district; and if upon such hearing said directors shall determine that the land desired to be withdrawn from said district or any portion thereof is not susceptible to irrigation from the system proposed to be provided, then such non-irrigable lands shall be excluded therefrom, and such excluded lands and the owners thereof thereby waive all rights to be served with water from such irrigation system; provided, however, that in the event such petition is not filed within thirty days from the date of the qualification of the first board of direc-

tors, then no such petition shall thereafter be filed or considered by such board. [Acts 1913, p. 380, § 19; Act March 19, 1917, ch. 87, § 19.]

**Art. 5107—20. Addition of contiguous land to district; petition; survey; recording proceedings; consent of Secretary of the Interior.**—The owner or owners of the fee to lands contiguous to any district created under this Act may file with the board of directors of said district a petition in writing, praying that such land be included in such district. The petition shall describe the tract or body of land owned by the petitioners by metes and bounds, and upon the filing of such petition with the board of directors, said board of directors shall cause an accurate survey of the said tract of land to be made and the boundaries thereof marked upon the ground, and said tract of land may be admitted as a part of the district; provided it can be irrigated without prejudice to the rights of any of the lands originally contained therein to be first furnished with an adequate supply of water, and when said lands are so admitted, they shall immediately become subject to their proportionate share of any taxation or bonded indebtedness that may have been created against said district and subject to such reasonable charge against such lands for the purpose of defraying its part of the expenses of maintenance, operation or other necessary expenditures previously made as may be determined by the board of directors. If the lands described in said petition are admitted as a part of the district, the application for such admission shall be signed and acknowledged as provided for deeds, and shall be recorded in the deed records of the county in which such district is situated, together with the order of the directors endorsed thereon. No land shall be added to any irrigation district with which contract with the United States shall have been made without the written consent of the Secretary of the Interior. [Acts 1913, p. 380, § 20; Act March 19, 1917, ch. 87, § 20.]

**Art. 5107—21. Powers of board of directors; employés; general manager; contracts; contracts with United States; levy of tax; district as federal fiscal agent.**—The board of directors herein provided for shall have control over and management of all the affairs of such district, shall make all contracts pertaining thereto, and shall employ all necessary employés for the proper handling and operating of such district, and especially may employ a general manager, an assessor and collector, attorneys, a bookkeeper, an engineer, water master and such other assistants and such other laborers as may be required, and they may also buy all necessary work animals, motors, pumps, engines, boilers, machinery and supplies as may be required in the erection, operation and repair of the improvements of the district; a director may be employed as general manager, and at such compensation as may be fixed by the other four directors and when so employed he shall also perform the duties of a director, but he shall not receive the compensation in this Act provided to be paid to directors. The board of directors, on behalf of said district, may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom, or for the drainage of district lands or for the assumption of indebtedness to the United States for district lands, or for the temporary rental of water from the United States for district lands or a part thereof, under the provisions of the Federal reclamation Act, and all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any Act of Congress providing for or permitting such contract, and in case contract has been or hereafter may be made with the United States as herein

provided, bonds of the district may be deposited with the United States at ninety (90) per cent of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds to be provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contracts, and if bonds of the district are not so deposited it shall be the duty of the board of directors to include as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the terms of any such contract; and the board may accept on behalf of the district appointment of the district as fiscal agent of the United States in connection with any Federal reclamation project, whereupon the district shall be authorized to so act, and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the Federal statutes now or hereafter enacted in connection therewith and all things required by the rules and regulations now or that may hereafter be established by any department of the Federal Government in regard thereto. [Acts 1913, p. 380, § 21; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 21.]

See note under Art. 5107—15.

#### **Art. 5107—22.**

Repealed by Act March 19, 1917, ch. 87, § 107, post art. 5107—107, and re-enacted as sec. 22 of the repealing act, and set forth post as art. 379 of the Penal Code.

**Art. 5107—23. District may sue and be sued; judicial notice of district; contracts.**—All districts established under the provisions of this Act are hereby declared to be defined districts within the meaning of Section 52, Article 3, of the Constitution and may, by and through its directors, sue and be sued in any and all courts of this State in the name of such district, and all courts of this State shall take judicial notice of the establishment of such districts and said districts shall contract and be contracted with in the name of such districts. [Acts 1913, p. 380, § 23; Act March 19, 1917, ch. 87, § 23.]

**Art. 5107—24. Construction of works; acquisition of right of way by condemnation or otherwise; purchase of established works; conveyance to United States.**—Districts created under the provisions of this Act are hereby empowered to own and construct reservoirs, dams, wells, canals, etc., and to acquire the necessary right-of-way for and buy or construct all reservoirs, dams, wells, canals, laterals, sites for pumping plants and all other improvements required for the irrigation of the lands in such district by gift, grant, purchase or condemnation and they may acquire the title to any and all lands necessary or incident to the successful operation thereof in addition to any of the above in the manner herein provided, including the authority by purchase or condemnation to acquire rights-of-way for the enlargement, extension or improvement of any existing canals, or ditches for the purpose of using such canals and ditches jointly with the owners thereof. In no event, however, shall such district have the right to acquire by condemnation any irrigation system that may be now or may hereafter be built by any individual or corporation authorized to appropriate water and construct irrigation plants under the irrigation laws of this State, but any and all such plants and rights may be acquired by contract from the owners thereof in the same manner that any other property may be acquired, and all such districts shall have full authority and right to acquire water rights and privileges in any way that any individual or corporation may acquire the

same. Any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into thereunder. [Acts 1913, p. 380, § 24; Act March 19, 1917, ch. 87, § 24.]

**Art. 5107—25. Duties of assessor and collector; assessment of lands; listing of lands not rendered by owners.**—Immediately upon the qualification of the assessor and collector, as hereinbefore provided, he shall enter upon the discharge of his duties, and shall at once proceed to make an assessment of all the taxable property, both real, personal and mixed, in his said district; and such assessment shall be made annually thereafter. Said assessment shall be made upon blanks to be provided by the directors for such district. Said assessment shall consist of a full statement of all property owned by the party rendering same in said district and subject to taxation therein, and shall state the full value thereof. There shall be attached to each such assessment an affidavit made by the owner or his agent rendering said property for taxation to the effect that said assessment or rendition contains a true and complete statement of all property owned by the party for whom said rendition is made in said district and subject to State and county taxation therein; and in addition to all such assessments or renditions made by the owner or agents of such property, the tax assessor shall make out similar lists of all property not rendered for taxation in such districts that is subject to State and county taxation therein. Each and every person, partnership or corporation owning taxable property in such district shall render same for taxation to the assessor when called upon so to do, and if not called upon be the assessor, the owner shall on or before June 1 of each year nevertheless render for taxation all property owned by him in the district subject to taxation. And all laws and penal statutes of this State providing for securing the rendition of property for State and county taxes, and providing penalties for the failure to render such properties shall apply to all persons, partnerships or corporations owning or holding property in any such district. The tax assessor shall have authority to administer oaths to fully carry out the provisions of this section. [Acts 1913, p. 380, § 25; Act March 19, 1917, ch. 87, § 25.]

**Art. 5107—26. Appointment of commissioners to act as Board of Equalization; meetings of board; secretary; records.**—The directors for such district created under the provisions of this Act shall, at their first meeting, or as soon thereafter as practicable, and annually thereafter, appoint three commissioners, each being a qualified voter and resident property owner of said district, who shall be styled the “Board of Equalization,” and at the same meeting the same Board of Directors shall fix the time for the meeting of such Board of Equalization for the first year; and said Board of Equalization shall convene at the time fixed by the directors to receive all assessment lists or books of the assessor for said district for examination, correction, equalization, appraisalment and approval, and at all meetings of said Board the secretary of the Board of Directors shall act as secretary thereof and keep a permanent record of all the proceedings of said Board of Equalization. [Acts 1913, p. 380, § 26; Act March 19, 1917, ch. 87, § 26.]

**Art. 5107—27. Oath of members of Board of Equalization.**—Before entering upon the duties as such Board of Equalization, each of the members thereof shall take and subscribe the following oath: “I . . . . . do solemnly swear (or affirm) that I will, to the best of my ability, make

a full and complete examination, correction, equalization and appraisal of all property contained within said district, as shown by the assessment lists or books of the assessor for said district, and add thereto all property not included therein of which I have knowledge," and said oath shall be spread upon the minutes to be kept by the secretary of said board. [Acts 1913, p. 380, § 27; Act March 19, 1917, ch. 87, § 27.]

**Art. 5107—28. Equalization of assessments; omitted property.**—The Board of Equalization herein provided for shall cause the assessor to bring before them, at the time fixed for the convening of said Board, all the assessment lists or books of the assessor of said district for their examination, that they may see that each and every person has rendered his property at its full value; and said board shall have power to send for persons and papers to swear and qualify persons who testify, to ascertain the value of such property, and if they are satisfied it is too high, they shall lower it to its proper value; and if too low they shall raise the value of such property to a proper figure. Said board shall have power to correct any and all errors that may appear on the assessors lists or books, and shall have further authority to add any and all property to said lists of inventories that may have been omitted therefrom. [Acts 1913, p. 380, § 28; Act March 19, 1917, ch. 87, § 28.]

**Art. 5107—29. Mode of equalization; complaints.**—The Board of Equalization shall equalize, as near as possible the value of all property situated within said district, having reference to the location of said property and the improvements thereon situated. Any any person may file with the said Board at any time before the final action of said Board, a complaint as to the assessment of his or any other person's property, and said Board shall hear said complaint, and said complainant shall have the right to have witnesses examined to sustain said complaint as to the assessment of said property, or as to a failure to render any property owned by any person, partnership or corporation situated within said district subject to taxation which has not been properly assessed. [Acts 1913, p. 380, § 29; Act March 19, 1917, ch. 87, § 29.]

**Art. 5107—30. Appraisal of property not listed by owners.**—The assessor for such district, at the same time that he delivers to said Board his lists and books, shall also furnish to said Board a certified list of the names of all persons who either refuse to swear to, or to sign, the oath or affirmation as required by this law, together with the list of the property of such persons situated within said district who have failed or refused to list their property, as made, by him through other information, and said Board shall examine the list and appraise the property so listed by the assessor. [Acts 1913, p. 380, § 30; Act March 19, 1917, ch. 87, § 30.]

**Art. 5107—31. Notice to owners of action of Board of Equalization; appearance by owners.**—In all cases where the Board of Equalization shall find it their duty to raise the value of any property appearing on the lists or books of the assessor, or to add property omitted therefrom, they shall, after having fully examined such lists or books, and corrected all errors appearing therein, adjourn to a day not less than ten nor more than fifteen days from the date of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of said Board to give a written notice to the owner of such property, or to the person rendering same, of the time to which said Board may have adjourned, and that such owner or person may at that time appear and show cause why

the value of such property should not be raised, which notices may be served by depositing the same, properly addressed and postage paid, in any postoffice within the county. [Acts 1913, p. 380, § 31; Act March 19, 1917, ch. 87, § 31.]

**Art. 5107—32. Hearing of objections; approval of lists; reconvening of board to approve rolls.**—The Board of Equalization shall meet at the time specified in said order of adjournment and shall hear all persons the value of whose property has been raised; and if said Board is satisfied they have raised the value of such property too high, they shall lower the same to its proper value; and said Board of Equalization, after they have finally examined and equalized the value of all the property on the assessor's lists or books or that may have been placed thereon by said Board of Equalization, shall approve said lists or books and return them, together with the lists of unrendered property to the assessor that he may make up therefrom his general rules as required by this Act; and when said general rolls are so made up the Board shall immediately reconvene to examine said rolls and approve the same if found correct; and the action of the Board at the meeting last provided for in this article shall be final and shall not be subject to revision by said Board or by any other tribunal thereafter. [Acts 1913, p. 380, § 32; Act March 19, 1917, ch. 87, § 32.]

**Art. 5107—33. Compensation of members of Board of Equalization and its secretary.**—The members of the Board of Equalization, and the secretary while acting as secretary of said Board, shall receive such compensation for their services to be allowed by the directors for said district as they may deem just and reasonable, not to exceed, however, the sum of three dollars per day for the time actually engaged in the discharge of such duties. [Acts 1913, p. 380, § 33; Act March 19, 1917, ch. 87, § 33.]

**Art. 5107—34. Duplicate tax rolls.**—After the return to the assessor and collector of the assessment lists and books duly approved by the Board of Equalization, as hereinbefore provided for, the said assessor and collector shall make up the assessment of all taxable property situated in said district upon duplicate rolls and after the approval of said rolls by the Board of Equalization, he shall retain one of same in his office and shall deliver the other copy to the directors of said district, to be kept by them as a permanent record in their office, and all lists and books of said assessor shall be caused to be substantially bound and by him kept as a permanent record of his office, and be delivered, together with all other records of his office to his successor, upon his election and qualification, or, in case of a vacancy in such office to the directors for said district. [Acts 1913, p. 380, § 34; Act March 19, 1917, ch. 87, § 34.]

**Art. 5107—35. Collection of taxes; payment to depository; general duties of assessor and collector.**—The assessor and collector shall collect all taxes due to said district, and shall, at the expiration of each week, pay over to the depository selected by said district all moneys by him collected, and shall report to the directors for such district on the fourth Saturday in every month all moneys so collected by him and paid over to the depository as hereinbefore provided, and shall perform all such other duties, and in such manner and according to such rules and regulations as the Board of Directors may prescribe and for the convenience of the persons, firms or corporations owning such tax, shall keep and maintain an office with the Board of Directors for such district, where

all such taxes may be paid. [Acts 1913, p. 380, § 35; Act March 19, 1917, ch. 87, § 35.]

**Art. 5107—36. Assessor and collector chargeable with total assessment; credits; report; audit.**—The assessor and collector shall be charged by the directors for such district, upon a permanent finance ledger to be kept for said purpose by said district, with the total assessment as shown by the assessment rolls; and proper credit shall be given to the assessor and collector for all sums of money paid over to the depository, as shown by his monthly reports as hereinbefore provided for, and upon the final annual settlement, the said assessor and collector shall make up a full complete report of all taxes that have not been collected, which said report shall be audited by said Board of Directors, and proper credits given therefor, and such annual settlements shall be made on the first Monday in September of each year. [Acts 1913, p. 380, § 36; Act March 19, 1917, ch. 87, § 36.]

**Art. 5107—37.**

Repealed. See art. 5107—107, post.

**Art. 5107—38. Date of assessment; time for completion.**—The assessment provided for in this Act shall be made upon all property subject to taxation in said district on the first day of January of each year, and such assessment shall be completed and the lists and books ready to deliver on or before the first day of June of each year. [Acts 1913, p. 380, § 38; Act March 19, 1917, ch. 87, § 37.]

**Art. 5107—39. Annual meeting of Board of Equalization; time for completion and delivery of rolls.**—The Board of Equalization, after the first year, shall convene annually on the first Monday in June of each year to receive all of the assessment lists or books of the assessor of said district for examination, correction, equalization, appraisal and approval, and for the addition thereto of any property found to be unrendered in said district, and shall complete and deliver said lists and rolls to the assessor and collector by the third Monday in July of said year, and the said assessment rolls shall be completed by the assessor and approved by the Board of Equalization, and returned to said assessor and collector by the first Monday in October of each year after the first assessment as hereinbefore provided. [Acts 1913, p. 380, § 39; Act March 19, 1917, ch. 87, § 38.]

**Art. 5107—40. When taxes became due.**—All taxes provided for by this Act shall become due and payable on the first day of November of each year and shall be paid on or before the 31st day of January thereafter. [Acts 1913, p. 380, § 40; Act March 19, 1917, ch. 87, § 39.]

**Art. 5107—41. Lien for taxes delinquent; sale of land.**—All lands or other property which have been returned delinquent, or which may hereafter be returned delinquent shall be subject to the provisions of this Act and said taxes shall remain a lien upon said land although the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and cost shown to be due by such assessment for any preceding year. [Acts 1913, p. 380, § 41; Act March 19, 1917, ch. 87, § 40.]

**Art. 5107—42. Delinquent tax roll.**—It shall be the duty of the directors for such district to cause to be prepared by the tax collector, at the expense of such district, a list of all lands upon which the taxes remain unpaid on the 31st day of January of each year, and such list of

lands shall be known as a delinquent tax roll, and such delinquent tax roll shall be delivered to the secretary of such district to be by him safely kept as a part of the record of his office. Such delinquent record shall carry a sufficient description to properly identify the land shown to be delinquent therein. Such description may be made by reference to lot or block number. [Acts 1913, p. 380, § 42; Act March 19, 1917, ch. 87, § 41.]

**Art. 5107—43. Same; record and index.**—Upon receipt of such delinquent tax roll by the directors of said district, the said directors shall cause said record to be recorded in a book which shall be labeled, “The delinquent tax record of . . . . . county, water improvement district No. . . . .,” and shall be accompanied by an index showing the name of delinquents in alphabetical order. [Acts 1913, p. 380, § 43; Act March 19, 1917, ch. 87, § 42.]

**Art. 5107—44. Same; publication.**—Upon the completion of said delinquent tax record by any such district, it shall be the duty of the directors thereof to cause the same to be published in some newspaper published in the county in which said district is situated for three consecutive weeks, but if no newspaper is published in the county, such list may be published in a newspaper outside of the county to be designated by such directors by a contract duly entered into, and a publisher’s fee of not to exceed twenty-five (\$.25) cents for each tract of land so advertised; and said publication, and any other publication, in a newspaper provided for in this Act may be proven by the affidavit of the proprietor of the newspaper in which the publication was made, his foreman or principal clerk, annexed to a copy of the publication, specifying the time when and the paper in which the publication was made. [Acts 1913, p. 380, § 44; Act March 19, 1917, ch. 87, § 43.]

**Art. 5107—45. Suit for delinquent taxes; employment of attorney; petition; precedence over other cases.**—Twenty days after the publication of such notice, or as soon thereafter as practicable, the directors for such water improvement or irrigation district shall employ an attorney to bring suit in the name of the district in the district court of said county for the purpose of collecting all taxes, interest, penalty and costs due upon said land. Said petition shall describe all lands upon which taxes and penalties shall remain unpaid and the total amount of taxes and penalties due thereon with interest computed to the time fixed for the sale of said land at the rate of six (6%) per cent per annum, and shall pray for a judgment for said amount, and for the fixing, establishing and foreclosing of the lien existing against such land; that said lands be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief to which such district may be entitled under the law and facts. All suits to enforce the collection of taxes as provided in this Act shall take precedence and have priority over all other suits pending in the district court. [Acts 1913, p. 380, § 45; Act March 19, 1917, ch. 87, § 44.]

**Art. 5107—46. Same; parties and process; sale in parcels; disposition of proceeds.**—The proper persons shall be made parties defendants in all such suits, and shall be served with process and other proceedings due therein as provided by law for suits of like character in the district court of this State, and in case of foreclosure, order of sale shall issue thereunder as in other cases of foreclosure; but if the defendant or his attorney shall, at any time before the sale, file with the sheriff or other officer in whose hands any such order of sale shall be placed a written request that the property described therein shall be divided



and sold in less tracts than the whole, together with a description of such sub-division as the defendant may request, provided same are reasonable, and in such case, shall sell only as may sub-divisions as may be necessary to satisfy the judgment, interest, penalties and cost, and after the payment of the taxes, interest, penalties and costs adjudged against it, the remainder of the purchase price, if any, shall be paid by the sheriff or other officer executing said order of sale to the defendant or his attorneys of record. [Acts 1913, p. 380, § 46; Act March 19, 1917, ch. 87, § 45.]

**Art. 5107—47. Conveyance to purchaser.**—In all cases in which lands may be sold for default in the payment of taxes under the preceding section, it shall be lawful for the sheriff or other officers selling the same, or any of his successors in office, to make a deed or deeds to the purchaser, or to any other person to whom the purchaser may direct the deed to be made, and any such deed shall be held in any court of law or equity in this State to vest a good and perfect title in the purchaser thereof subject to be impeached only for actual fraud. [Acts 1913, p. 380, § 47; Act March 19, 1917, ch. 87, § 46.]

**Art. 5107—48. Fees of attorneys and officers.**—The attorneys representing such district in all suits against delinquent taxpayers that are provided for in this Act shall receive for such services such compensation to be paid out of delinquent taxes collected, as may be allowed by the directors for such district; provided, however, that in no event shall said fee exceed fifteen (15%) per cent of the amount of taxes so collected. The sheriffs, district clerks and other officers, executing any writ or performing any service in the foreclosure of delinquent taxes on any lands situated in such district shall receive the same fees for such services as is provided by statute as fees for like services performed in connection with the discharge of the duty of their respective offices. [Acts 1913, p. 380, § 48; Act March 19, 1917, ch. 87, § 47.]

**Art. 5107—49. Penalty for non-payment of taxes; interest; levy on personal property; delinquent list.**—If any person shall fail or refuse to pay the taxes imposed upon him or his property by this Act until after the 31st day of January next succeeding the return of the assessment roll for said district, a penalty of ten (10%) per cent on the entire amount of such tax shall accrue, which penalty, when collected, shall be paid over to such district. Such delinquent taxes shall bear interest from August 1st after due at the rate of six per cent per annum. And the collector of taxes shall, by virtue of his tax roll, seize and levy upon and sell so much personal property as shall be sufficient to make the amount of such taxes, together with the penalty above provided interest thereon at the rate of six (6%) per cent per annum and all costs accruing thereon. If no personal property be found for seizure and sale as above provided, the collector shall make up and file with the secretary of the district the delinquent tax list hereinbefore provided for, charging against same all taxes, penalties and interest assessed against same and the owner thereof. [Acts 1913, p. 380, § 49; Act March 19, 1917, ch. 87, § 48.]

**Art. 5107—50. Redemption of lands before sale.**—Any delinquent taxpayer whose lands have been returned delinquent, or any one having an interest therein, may redeem the same at any time before his lands are sold under the provisions of this Act by paying to the collector the taxes due thereon with interest at the rate of six (6%) per cent and all costs and the penalty of ten (10%) per cent as provided in this Act. [Acts 1913, p. 380, § 50; Act March 19, 1917, ch. 87, § 49.]

**Art. 5107—51. Survey; map and profile; adoption of previous surveys.**—After the establishment of any such district, and after the qualification of the board of directors, and after the return of the list of assessments of the taxable property situated in such district, the board of directors for such district may appoint an engineer, whose duty it shall be to make a complete survey of the lands contained in said district, and to make a map and profile of the several canals, laterals, reservoirs, dams and pumping sites in such district and connected therewith, which shall also show any part of said canals, laterals, reservoirs and dams or pumping sites extending beyond the limits of such district, which said map shall show the name and number of each survey and shall also show the area in number of acres contained in such district. Provided, however, that such engineer may adopt any and all surveys heretofore made by any person, firm or corporation who have applied for or appropriated any water for irrigation under the general laws of this State; and provided, further, that said engineer may adopt all surveys for canals, laterals, reservoirs, dams or pumping sites shown on said maps or plats, or may adopt other maps, plats and surveys of the correctness of which he may be satisfied. [Acts 1913, p. 380, § 51; Act March 19, 1917, ch. 87, § 50.]

**Art. 5107—52. Requisites of maps; profile map.**—The maps hereinbefore provided for shall show the relation that each canal and lateral bears to each tract of land through which it passes and the shapes into which it divides each tract, and how much and what part of each tract can be irrigated therefrom, and where the canal or lateral cuts off any less than twenty acres of land from any tract, the map shall show the number of acres so divided therefrom and the number of acres in the whole tract, showing the shape of such small tract and its relation to the canal or lateral. And such profile map shall also show in detail the number of cubic yards necessary to be moved or excavated in order to make such reservoir, canal or lateral, and shall show in detail the specification for all other works necessary to the construction of all improvements proposed to be made in such district, and give the estimated cost of each, and when said map, profile, specifications and estimates shall have been completed by the engineer as herein provided, he shall sign the same in his official capacity and file them with the secretary of said board. Provided, however, that where said district contains any pumping plants, canals, dams, ditches or reservoirs heretofore created, and which is contemplated to be purchased or acquired by said district, then such map or plat and estimates as hereinbefore provided for shall show such improvements and the price or probable price at which the same may be acquired, and where additional improvements of canals, ditches, laterals, reservoirs or pumping plants are to be constructed, such report shall contain the detailed information with reference to such additional improvements as is provided for in this Section. Provided, further, that none of the maps and data prescribed by this and the preceding sections except such as are required for use in the making of assessments and levies for district purposes shall be required where contract is entered into with the United States under Federal laws. [Acts 1913, p. 380, § 52; Act March 19, 1917, ch. 87, § 51.]

**Art. 5107—53. Order for election to determine question of issuance of bonds and making of contract with United States.**—After the establishment of any such district and the qualification of the directors thereof, and after the making and filing of such maps, profiles, specifications and estimate as provided for in the preceding section of this Act, and after the making and return of the assessment roll by the assessor and

collector for said district, as provided for in this Act, the board of directors may order an election to be held within such district at the earliest possible legal time, at which election there shall be submitted the proposition and none other: "For the issuance of bonds and levy of tax and payment therefor"; "Against the issuance of bonds and levy of tax and payment therefor." In the event that contract is proposed to be made with the United States under the Federal reclamation laws, the question which shall be submitted to the voters at such election shall be: "For contract with the United States and levy of taxes and payment therefor," and "Against contract with the United States and levy of taxes and payment therefor." [Acts 1913, p. 380, § 53; Act March 19, 1917, ch. 87, § 52.]

**Art. 5107—54. Notice of election; amount of bonds.**—Notice of such election, stating the amount of bonds, which shall not exceed the engineer's estimate and all necessary incidental expenses and the cost of additional work which may become necessary by any change or modification made by the directors for such district, stating the time and places of holding the election, shall be given by the secretary of the board of directors by posting notices thereof in four public places in such district, and one at the court house door of the county in which such proposed district is situated. Such notice shall be published in the manner prescribed in Section 44 [Art. 5107—45] of this Act and shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted upon as set forth in the preceding section of this Act, together with the engineer's estimate of the probable cost of construction of the proposed improvement, and estimate of incidental expenses or of the purchase of improvements already existing or of the purchase of such existing improvements and construction of additions thereto, as the case may be. If, however, contract with the United States is proposed for election, the notice shall state the maximum amount of money payable for construction purposes, exclusive of penalties and interest. [Acts 1913, p. 380, § 54; Act March 19, 1917, ch. 87, § 53.]

**Art. 5107—55. Conduct of election; qualification of voters; polling places; election officers; ballots.**—The manner of conducting all elections herein provided for shall be governed by the election laws of the State of Texas, except as herein otherwise provided. None but resident property taxpayers who are qualified voters of said district shall be entitled to vote at any election on any question submitted to the voters thereof by the directors for such district at such election. The directors for such district shall name a polling place for such election in each voting precinct or part of the voting precinct embraced in said district, and shall also select and appoint two judges, one of whom shall be the presiding judge, and two clerks, for each voting precinct designated in said order; and shall provide one and one-half times as many ballots for said election as there are qualified resident taxpaying voters within such district, as shown by the tax rolls of said county. Said ballot shall have written or printed thereon these words, and no others, "For the issuance of bonds and levy of tax in payment therefor;" and "Against the issuance of bonds and levy of tax in payment therefor." If it is proposed that contract be entered into with the United States the ballot shall contain the following words and no others: "For Contract with the United States and levy of taxes and payment therefor," and "Against Contract with the United States and levy of taxes and payment therefor." [Acts 1913, p. 380, § 55; Act March 19, 1917, ch. 87, § 54.]

**Art. 5107—56. Oath of voters.**—Every person who offers to vote in any election held under the provisions of this Act shall first take the following oath before the presiding judge of the polling place where he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of ..... county, water improvement District No. ...., and that I am a resident property taxpayer of said district, and that I have not voted before at this election." [Acts 1913, p. 380, § 56; Act March 19, 1917, ch. 87, § 55.]

**Art. 5107—57. Returns of election; canvass and declaration of result.**—Immediately after the election, the presiding judge at each polling place shall make return of the result in the same manner as provided for in general elections for State and county officers, such return to be made to the secretary of such district, who shall keep same in a safe place, and deliver them, together with the returns from the several polling places, to the directors of such district, who shall, at a regular session or a special session called for the purpose of canvassing said vote, at such session canvass vote, and if it be found that two-thirds majority of the resident taxpaying voters voting therein shall have been cast in favor of the issuance of bonds, or in favor of making contract with the United States, as the case may be, and the levy of tax, then said directors shall declare the result of said election to be in favor of the issuance of the bonds, or in favor of the making of contract with the United States, and the levy of tax and payment therefor, and shall cause the same to be entered in their minutes. [Acts 1913, p. 380, § 57; Act March 19, 1917, ch. 87, § 56.]

**Art. 5107—58. Order for issuance of bonds; amount of bonds; additional bonds; election.**—After the canvass of the vote and declaring the result, as provided for in the preceding Section, the directors for said district shall make and enter an order directing the issuance of bonds, or authorizing the execution of contract with the United States for such district, as the case may be, sufficient in amount to pay for such proposed improvements, together with all necessary actual and incidental expense connected therewith; provided, however, that said bonds or contract indebtedness with the United States shall not exceed in amount one-fourth of the actual assessed value of the real property in such district, as shown by the assessment thereof made for the purpose of determining the value thereof, or at the last annual assessment, as provided for in this Act, and not to exceed the amount specified in said order and notice of election. Provided, however, that if, after an election has been held for the issuance of bonds or for contract with the United States, and the tax authorized and levied, and bonds have been authorized to be issued, or have been issued as provided for in this Act, or contract with the United States authorized or executed, as the case may be, the directors for said district shall consider it necessary to make any modifications in said district, or in any of the improvements thereof, or shall determine to purchase or construct any further or additional improvements therein and issue additional bonds upon the report of the engineers, or shall determine to make supplemental contract with the United States, or upon its own motion shall find it necessary to make said additional improvements, or purchase additional property in order to carry out the purposes for which said district was organized, or to best serve the interest of such district, said findings shall be entered on record, and notice of an election for the issuance of said bonds, or for authorization of contract with the United States, shall be given and such election held within such times, and the returns of such election made as hereinbefore provided for in cases of

original election, and if two-thirds of the resident property taxpaying voters of the district voting thereon vote in favor of additional bond issue, or in favor of supplemental contract with the United States, and levy of tax and payment therefor, said directors shall declare such result, and enter the same in the minutes of said directors, and order such bonds to be issued, or shall negotiate and execute supplemental contract with the United States, as in the manner provided in this Act. And provided, further, that if a contract is made with the United States, as in Section 21 [Art. 5107—21] hereof provided, and bonds are not to be deposited with the United States in connection with such contract, bonds need not be issued, or if required to raise funds in addition to the amount of such contract, said bonds shall be issued only in the amount needed in addition thereto. [Acts 1913, p. 380, § 58; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 57.]

See note under Art. 5107—15.

**Art. 5107—59. Execution of bonds; denomination and provisions; lien for payments to United States.**—The bonds issued under the provisions of this Act shall be issued in the name of the district, signed by the president and attested by the secretary, with the seal of said district affixed thereto, and such bonds shall be issued in denominations of not less than one hundred (100) dollars nor more than one thousand (1000) dollars each, and such bonds shall bear interest at the rate of not to exceed six (6%) per cent per annum, payable annually or semiannually. Such bonds shall by their terms provide the time, place or places, manner and conditions of their payment, and the interest thereon, as may be determined and ordered by the directors for such district, and none of such bonds shall be made payable more than forty years after the date thereof. Provided, that the lien for the payments due the United States under any contract between the district and the United States accompanying which bonds have not been deposited with the United States, shall be a preferred lien to that of any issue of bonds or any series of any issue subsequent to the date of such contract. [Acts 1913, p. 380, § 59; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 58.]

See note under Art. 5107—15.

**Art. 5107—60. Validity of formation of district or of bonds not to be contested except by suit brought at instance of Attorney General.**—No suit shall be permitted to be brought in any court of this State contesting or enjoining the validity of the formation of any district created under the provisions of this Act, or any bonds issued hereunder, or contesting the validity of contract with the United States or of the authorization thereof by the district except in the name of the State of Texas, by the Attorney General, upon his own motion, or upon the motion of any party affected thereby upon good cause shown, except as herein provided. [Acts 1913, p. 380, § 60; Act March 19, 1917, ch. 87, § 59.]

**Art. 5107—61. Validation of bonds; form of suit; notice.**—Any such district in this State desiring to issue bonds in accordance with this Act shall, before such bonds are offered for sale, bring an action in the district court in any county of the judicial district in which said district may be situated or in the district court of Travis county, to determine the validity of any such bonds, or such district contracting with the United States in accordance with this Act shall, if requested by the Secretary of the Interior, bring an action in said court to determine the validity of said contract. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of a

notice thereof once each week for at least three consecutive weeks in some paper of general circulation published in the county where the action is pending, and in the county in which said district is situated. Notice shall also be served upon the Attorney General of the State of Texas of the term of court to which said suit is made returnable. Such notice to the Attorney General shall contain a copy of all of the proceedings had in the formation of such district, and in connection with the issuance of said bonds, or in connexion with the authorization of said contract with the United States and a copy of the contract, the Attorney General may waive service when furnished a full transcript of such proceedings. [Acts 1913, p. 380, § 61; Act March 19, 1917, ch. 87, § 60.]

**Art. 5107—62. Same; duties of Attorney General; trial; intervention; preferred cause.**—It shall be the duty of the Attorney General to make a careful examination of all such proceedings and require such further evidence and make such further investigation as may seem to him advisable. He shall then file an answer tendering the issue as to whether such bonds are legal and binding obligations upon such district, or, as the case may be, as to whether such contract with the United States is legal and binding upon the district. The issue thus made shall be tried and determined by the court and judgment entered upon such finding. Upon the trial of such cause the court may permit any person having an interest in the issues to be determined to intervene and participate in the trial of the issues made. All suits brought under the provisions of this Act shall have preference over all other actions in order that a speedy determination as to the matters involved may be reached. [Acts 1913, p. 380, § 62; Act March 19, 1917, ch. 87, § 61.]

**Art. 5107—63. Same; judgment; correction of bond proceedings; conclusiveness.**—Upon the trial of the issues made under the preceding section of this Act, if the judgment of the court shall be adverse to the district, then such judgment may be by said district accepted, and the error pointed out in such proceedings may be corrected in the manner designated or directed by said court, and when so corrected, the judgment of the district court shall be rendered showing that said corrections had been made, and that the bonds issued thereunder, or the said contract with the United States, are binding obligations upon said district. And thereafter the judgment, when so finally made and entered, shall be received as *res adjudicata* in all cases arising in connection with the collection of said bonds or any interest due thereon, or in connection with the collection of moneys required by contract with the United States, and as to all matters pertaining to the organization and validity of said district, or pertaining to the validity of the bonds or of the said contract with the United States. [Acts 1913, p. 380, § 63; Act March 19, 1917, ch. 87, § 62.]

**Art. 5107—64. Same; filing certified copy of judgment with Comptroller of Public Accounts; evidence.**—After the making and entry of the judgment of the district court, as hereinbefore provided, the clerk of said court shall make a certified copy of such decree, which shall be a part of the orders and decrees connected with such election, and said court decree shall be filed with the Comptroller of Public Accounts, and to be by him recorded in a book kept for that purpose, and said certified copy or a duly certified copy of said record made by the Comptroller shall be received in evidence in all litigation thereafter arising which may affect the validity of such bonds or of such contract with the United States, and shall be conclusive evidence of such validity. [Acts 1913, p. 380, § 64; Act March 19, 1917, ch. 87, § 63.]

**Art. 5107—65. Registration of bonds and of judgment of validation; certificate.**—Upon the presentation of said bonds, together with certified copy of the decree of the district court, as provided for in the preceding section, the Comptroller shall register said bonds, together with a certified copy of the judgment, as herein provided for, in a book to be provided for that purpose, and shall attach to each of said bonds a certificate of the fact that the decree of the district court as required by this Act has been filed with him in his office; such certificate to be signed by him officially, and the seal of his office attached thereto. [Acts 1913, p. 380, § 65; Act March 19, 1917, ch. 87, § 64.]

**Art. 5107—66. County clerk to keep record of bonds; public inspection; entry of payment of bonds; certified copies of orders of directors of water district as to levy of taxes; fees of county clerk.**—The county commissioners court in which said district is situated, in whole or in part, shall provide a well bound book in which a record shall be kept by the county clerk of all bonds issued, with their numbers, amount, rate of interest, date of issue, when due, where payable, and the annual rate per cent of tax levy made each year to pay the interest on said bonds, and to provide a sinking fund for their payment, and said book shall be at all times open to the inspection of all parties interested in said district, either as taxpayers or bondholders, and upon the payment of any bond an entry shall be made in said book, showing such payment, and the secretary of such district shall furnish to the county clerk certified copies of all orders made in connection with the issuance and levy and assessment of taxes for the payment of interest and creating a sinking fund for the final payment of such bonds. The county clerk shall receive for his services in recording all instruments of the district required to be recorded, the same fees as are provided by law for other like service. [Acts 1913, p. 380, § 66; Act March 19, 1917, ch. 87, § 65.]

**Art. 5107—67. Sale of bonds; exchange of bonds for property, work, etc.**—After the issuance of said bonds, and after the registration by the Comptroller of Public Accounts for the State of Texas, as provided by this Act, the board of directors for such district shall offer for sale and sell said bonds on the best terms and for the best possible price, but none of said bonds shall be sold for less than the face value thereof and the accrued interest thereon, and as said bonds are sold, all moneys received therefrom shall be immediately paid over by the board of directors to the depository for said district. Provided, however, that the board of directors may exchange bonds for property to be acquired by purchase under contract, or in payment of the contract price for work to be done for the use and benefit of said district. [Acts 1913, p. 380, § 67; Act March 19, 1917, ch. 87, § 66.]

**Art. 5107—68. Construction and maintenance fund.**—All expenses, debts and obligations necessarily incurred in the creation and establishment and maintenance of any district organized under the provisions of this Act shall be paid out of the construction and maintenance fund of such district, which fund shall consist of all moneys received by said district from the sale of the bonds of such district, or as hereinafter provided, or if contract is proposed to be made with the United States for the construction of the irrigation system, said expenses, debts and obligations may be paid out of the maintenance and operating fund. [Acts 1913, p. 380, § 68; Act March 19, 1917, ch. 87, § 67.]

**Art. 5107—69. Levy of tax to pay interest on bonds and to create a sinking fund; in case of contract with United States.**—Whenever such

bonds shall have been voted, the directors for such district shall levy a tax upon all property within such district sufficient in amount to pay the interest on such bonds, together with an additional amount to be placed in the sinking fund, sufficient to discharge and redeem said bonds at their maturity, and said directors for such district shall annually levy or cause to be assessed and collected taxes upon all property within said district sufficient in amount to pay for the expenses for assessing and collecting such taxes. Whenever contract shall be made with the United States, taxes shall similarly be levied sufficient in amount to meet all installments, as they become payable, and interest, if any, and the directors shall cause due levy annually to be made until all such contracts and obligations shall have been discharged. Such bonds may be issued in serial form, or payable in installments, as determined by said directors, and such tax levy shall be sufficient if it provides an amount sufficient to pay the interest on such bonds and to meet the proportional amount of the principal of the next maturing series of said bonds, and the expenses of assessing and collecting such taxes for such year. [Acts 1913, p. 380, § 69; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 68.]

See note under Art. 5107—15.

**Art. 5107—70. Interest and sinking fund.**—There is hereby created what shall be termed the “Interest and Sinking Fund,” for such district, and all taxes collected under the provisions of this Act shall be credited to such fund, and shall never be paid out, except for the purpose of satisfying and discharging the interest on said bonds, or for the cancellation and surrender of such bonds and to defray the expense of assessing and collecting such tax, and for the payment of principal and interest due or to become due to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States, as in Section 21 [Art. 5107—21] hereof provided, and such fund shall be paid out upon order of the directors for such district upon warrants drawn therefor, as hereinbefore provided, and at the time of such payment the depository for said district shall receive and cancel any interest coupon so paid or any bond so satisfied or discharged, and when such interest coupon or bond shall be turned over to the directors, the account of such depository shall be credited with the amount thereof, and such bond or interest coupon shall be cancelled and destroyed. [Act 1913, p. 380, § 70; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 69.]

See note under Art. 5107—15.

**Art. 5107—71. Maintenance and operating fund.**—There shall also be created a fund to be known as “Maintenance and Operating Fund,” and such fund shall consist of all moneys collected by assessment or otherwise for the maintenance and operation of the properties purchased or constructed or otherwise acquired by such district, or for temporary annual rental due to the United States, and out of this fund shall be paid the salaries of all officers other than the assessor and collector, and of all employees of every kind whatsoever, all expenses of operation of every kind, except the expense of assessing and collecting taxes, whether the same be for water distribution or for operation of machinery, canals, ditches laterals or otherwise, or for the payment of the unpaid balance due for construction or for extension of said canals, ditches or laterals and the purchase of machinery for replacements; such debts to be paid upon a warrant executed as otherwise provided herein. [Acts 1913, p. 380, § 71; Act March 19, 1917, ch. 87, § 70.]

**Art. 5107—72. Terms of office of district officers.**—The terms of office of all officers elected for such district shall be for two years, and un-



til their successors are elected and qualified; provided, however, that all officers elected at the first election held under the provisions of this Act shall hold office only until the next regular election to be held in said district for the election of such officers. [Acts 1913, p. 380, § 72; Act March 19, 1917, ch. 87, § 71.]

**Art. 5107—73. Biennial election of directors.**—There shall be held on the second Tuesday in January, 1918, and every two years thereafter, a general election, at which time there shall be elected five directors for such district, who shall be the elective officers for such district. [Acts 1913, p. 380, § 73; Act March 19, 1917, ch. 87, § 72.]

**Art. 5107—73a. General election laws to apply; directors to appoint election officers, etc.**—All elections held in such districts shall be held in accordance with the provisions of the general election laws of this State, except as herein otherwise provided; provided, however, that the board of directors shall appoint all necessary officers to hold such elections, and shall name the polling places in said district, and shall receive and canvass the election returns and do and perform all other duties necessary to the holding of said elections and canvassing the returns thereof and declaring the result thereof. [Act March 19, 1917, ch. 87, § 73.]

**Art. 5107—74. Directors to appoint employés; duration of employment; compensation.**—All other persons employed or representing said district shall be employed by the board of directors for such time and under such terms and conditions as said board of directors shall deem best for the interest of said district; provided, however, that no contract shall ever be made with any person or employé for a longer period of time, at any one time, than one year, and the salaries of all such employees, or the compensation to be received by them, shall be fixed by the board of directors at the time of the employment. [Acts 1913, p. 380, § 74; Act March 19, 1917, ch. 87, § 74.]

**Art. 5107—75.**

Repealed. See Art. 5107—107, post. See, also, note under Art. 5107—15, ante.

**Art. 5107—76. Vacancies in board of directors, how filled; special election in case of more than two vacancies; order for election; county commissions to approve bonds of directors where no quorum of directors.**—All vacancies in the office of director for such district shall be filled by the board of directors by appointment, and the director so appointed shall hold office until the next regular election, and until his successor has been elected and qualified. Provided, however, that where the number of directors shall have been reduced by death or resignation or from other cause to less than three, then such vacancies shall be filled by a special election to be ordered by the president of said board of directors, or by any two members of said board, said election to be ordered and held after the giving of notice for the election of said officers as provided for the holding of general elections; and further provided, that if said president or two of the directors shall fail or refuse to order such election, then said election may be ordered by the district judge of any judicial district in which said district may be situated upon a petition signed by any five parties interested in the election of said directors, whether said interested parties be taxpayers or bond holders; and when so ordered, notices shall be given of said election, and such election held in the manner provided for the holding of general elections, but under the orders of said court, and the directors elected at such election shall hold their office until the next general election, and until their

successors shall have been elected and qualified. In the event that less than a quorum exists to approve bonds of such elected directors, then such bonds shall be approved by the county commissioners court of the county in which such directors reside. [Acts 1913, p. 380, § 76; Act March 19, 1917, ch. 87, § 75.]

**Art. 5107—77. Compensation of directors.**—The directors provided for by this Act shall receive as compensation for their services the sum of five dollars per day for each and every day necessarily taken in the discharge of their duties as such directors, and said directors shall file with the secretary for such district a statement verified by their affidavit of the number of days actually taken by them in the service of said district, said statement to be filed on the last Saturday in each month, or as nearly thereafter as practicable, and before a warrant shall issue for the payment of such services. [Acts 1913, p. 380, § 77; Act March 19, 1917, ch. 87, § 76.]

**Art. 5107—78. Power of eminent domain; condemnation proceedings.**—The right of eminent domain is hereby conferred upon all districts established under the provisions of this Act for the purpose of condemning and acquiring the right-of-way over and through all lands, private and public, except as hereinafter indicated, necessary for making reservoirs, canals, laterals, and for pumping sites, drainage ditches, levees and all other improvements necessary and proper for such districts, and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated beyond the boundary of such districts and in any county within the State of Texas; the right of eminent domain shall not extend to land used for cemetery purposes, nor to property owned by any person, association of persons, corporation or water improvement district, and used for the purpose of supplying water under the laws of this State and necessary for the making of reservoirs, canals, laterals, pumping sites, levee and drainage ditches, or other appurtenant work by such owner. All such condemnation proceedings shall be under the direction of the directors and in the name of the irrigation or water improvement district, and the assessing of damages and all procedure with reference to condemnation, appeal and payment shall be in conformity with the statutes of the State for condemning and acquiring right-of-way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings shall be paid out of the construction and maintenance fund of said district. [Acts 1913, c. 380, § 78; Act March 19, 1917, ch. 87, § 77.]

**Effort to make agreement.**—The testimony of an agent of a corporation, seeking to condemn land for a right of way, that he had asked the owner what he would settle for, and that the owner asked such a price that it was impossible to agree to it, and that no agreement was made, showed an effort by the company to reach an agreement, entitling it to condemn. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Art. 5107—78a. Proceedings had under chapter 172, Acts 33rd Legislature for establishment of districts to be effective as though petition filed under this act; acts validated.**—In all cases where districts have been heretofore established or wherein proceedings are now pending to establish same, and a hearing has heretofore been had upon a petition to establish such districts, and action thereon has been taken by the commissioners' court, or where a public hearing is now pending upon such petition, and the notices thereof and therefor have been given as provided for by Chapter 172, of the Acts of the Thirty-third Legislature, such notices are hereby deemed and declared to be and to have been due and regular notices of such publication under the full meaning, in-

tents and purposes of this Act, and all such districts so established are hereby declared to be duly and regularly established and are hereby declared to be defined districts, or territory within the meaning of the Constitution, and all acts or things done by said district, under the provisions of said Chapter 172, of the Thirty-third Legislature are hereby validated and declared to be the regular and binding act of such district. [Act March 19, 1917, ch. 87, § 78.]

**Art. 5107—79. District, when and how dissolved; debts, how collected, etc.**—In the event that any district established under the provisions of Chapter 172 of the Acts of the Thirty-third Legislature shall not within two years after the taking effect of this Act, or that any district which may hereafter be established under the provisions of this Act shall not within two years after the conclusion of the organization of such district begin to acquire the necessary canals, ditches, flumes, laterals, reservoirs, sites, dam sites, pumping plants or other things necessary to the successful operation of such a district, or shall not diligently pursue the purposes for which said district was created, then and in that event, such district may be dissolved without the necessity of taking any action in connection therewith, and any party having interest therein, or to whom any debt may be due and owing by said district, may collect such debt in the same manner provided by law for the collection of any debt due by any person, association of persons or corporation, and such debt shall be a lien upon the property of such district when established by any court of competent jurisdiction, and the judgment of said court shall provide for the payment of such debt and judgment in the same manner as judgments for debt against cities or towns that have been dissolved may be enforced; and provided further, that any district heretofore organized, or hereafter organized under the provisions of this Act, may voluntarily dissolve by the same vote and in the same manner herein provided for the organization of districts, such election to be held in the manner herein provided for the holding of elections in such districts, but provided further, that no dissolution shall be had until all debts and obligations have been fully paid and discharged. Any such district may also voluntarily abolish its corporate existence in the same manner as provided by law for the dissolution of drainage districts, as set forth in Chapter 28 of the Acts of the Thirty-third Legislature, first called session [Art. 2625a et seq.], and each and all of the provisions of said Act shall apply to and control the abolition of said districts and the legal consequences thereof. [Acts 1913, p. 380, § 79; Act March 19, 1917, ch. 87, § 79.]

**Art. 5107—80. Districts in two or more counties, how established.**—Where any such district proposed to be established lies partly within two or more counties, the petition provided for in this Act shall be presented to the county commissioners' court of each county in which a portion of said district shall lie, and all notices provided for in this Act to be given in the formation of such district shall be given in each and every county in which any portion of said territory proposed to be included in such district shall lie. The elections herein provided for for the establishment of such district shall be ordered as herein provided by the county commissioners court of each county in which any portion of said district may lie, for the portion of said district lying in said county. The election returns in such county shall be made to the commissioners' court and the said commissioners' court shall appoint all necessary officers, furnish all necessary supplies and give all necessary notices as herein provided in the same manner as if the territory lying in said county was in itself to be incorporated in such district, but stating that

same is part of such entire district. The said election shall be held in each county in the portion of the district therein situated and the return of such election shall be made to the county commissioners' court or any other officer authorized to receive same, and shall be by them duly canvassed and the result duly declared. After canvassing, determining and declaring the result of said election the county judge or presiding officer of the commissioners' court shall certify and report the result of said election to the county judge of the county in which the largest portion of any such district is situated and said county judge shall canvass said vote and declare the result thereof, and if it be determined that at least two-thirds of the property taxpayers voting thereon in said entire district have voted in favor of the creation of said district, the said county judge, shall declare the result thereof in the manner herein provided. Said county judge shall make and publish the order provided for in this Act relating to districts wholly within one county, and shall cause copies of such order to be filed with the county clerk of each county in which any portion of said district may lie which shall be held to be a proclamation of the result of said election. The board of directors elected for such district shall meet and qualify and shall have charge of the affairs of the district in the same manner as hereinabove provided for districts lying wholly within one county. The bonds of such directors shall be approved by the commissioners' court of the county in which they reside, a copy of the order approving the bond or bonds, shall be filed with the county clerk of the county in which such district is situated, or in which any portion thereof is situated, and such clerk shall record same in the deed records of said county, and shall properly index the same in the manner provided for the recording and indexing of deeds. [Acts 1913, p. 380, § 80; Act March 19, 1917, ch. 87, § 80.]

**Art. 5107—81. Official bonds and oaths.**—Where a district lies in two or more counties the officers of such district shall furnish bonds and take the oath of office and qualify before the commissioners' court of the county in which the portion of the district lies in which they reside or in which their property is situated. [Acts 1913, p. 380, § 81; Act March 19, 1917, ch. 87, § 81.]

**Art. 5107—82. Petition for district in two or more counties, how heard; appeal from dismissal, etc.**—When a petition asking for the establishment of such district is filed in two or more counties, the commissioners court of each county shall proceed to hear and determine the matters therein set forth with reference to the territory within their said county in the same manner as provided herein for territory wholly within one county, and in the event any one or more commissioners' courts in which any part of said district is situated shall dismiss the petition and find against the petitioners, then the said petitioners or any part of them may appeal from the decision of such court to the district court, in which event they shall file notices of appeal with the commissioners' court of each county in which said petition has been acted upon, and the clerk of each said court shall transmit all original papers and a true copy of all orders made by each said courts to the court to which said appeal is taken, and the said court shall hear and determine said matters by consolidating said causes. The appeal herein provided for shall be taken in the same manner as provided in Section 4 of this Act, and the district court of any county in which any portion of said district is situated shall have jurisdiction to hear and determine said appeal, and said cause shall be tried in said court as provided for the trial and appeal of any civil action, except that no formal pleadings shall be required other than the notices of appeal herein provided. [Acts 1913, p. 380, § 82; Act March 19, 1917, ch. 87, § 82.]

**Art. 5107—83. Lands in adjoining county may be included, how; election.**—Whenever any water improvement district has been formed under this Act, or under the provisions of Chapter 172 of the Acts of 1913, lying wholly within one county, and it is to the advantage of such district and of land owner lying in the adjoining county or counties to have such adjoining lands added to or included in such established district then same may be so included in or added to the territory already included in such established district in the following manner: The owners of the fee shall make application to the directors of the established district to which they desire to be annexed, which application shall be in writing and shall describe the lands covered by the application by metes and bounds and same shall be acknowledged in the same manner and form as now required for the acknowledgment of deeds, and if said land is a homestead or the separate property of a married woman it shall be acknowledged by both husband and wife. The directors of the district shall set said petition or application down for hearing on some certain date and shall give notice of such hearing in the same manner as provided in Section 1 [Art. 5107—1] of this Act, and shall consider same in the same manner as provided for the consideration of petitions by the county commissioners' court as set out and provided in Sections 2 and 3 [Arts. 5107—2, 5107—3] of this Act, and in the event that they shall find and determine that it is for the advantage of such established district and for advantage of the lands sought to be added thereto, to so include said lands in said district, then they shall so find and enter said findings of record in the minutes of said directors and they shall thereupon order an election to be held in said established district to determine whether or not said additional territory shall be permitted to be added thereto, which election shall be held after thirty days notice, which notice shall be given by posting copies of such notice in five public places in said district for at least twenty days next preceding the day of election, and if there be a newspaper published in said district, by publishing such notice for at least once a week for three weeks next preceding the day of said election. The said notice shall be given by the directors, which said directors shall furnish all necessary supplies for said election and shall appoint two judges and two clerks for all polling places in said district to conduct said election and make return thereof, which officers shall take the oath of office prescribed by the general election laws of the State, and they shall make returns of said election to the directors of the district, but in all other things said election shall be held in conformity with the general election laws of the State. At such election there shall be submitted the question, and none other, "Shall the proposed territory be added to the district?" and there shall follow said sentence the word "Yes" and just below it the word "No."

If two-thirds majority of the resident property taxpayers of said district vote yes, then the said territory may be added and become a part of said district in the same manner as if originally incorporated therein and subject to all laws governing said district; provided, that the directors of said district may require the owners of said lands to pay into the interest and sinking fund of said district their proper pro rata part of charges theretofore made against the lands in said district to pay the interest and sinking fund upon bonds of said district. If the application or petition for the addition of lands to the district as herein provided for shall cover a number of different tracts of land, or if there be included in the territory so described in said application or petition property taxpayers other than those signing and acknowledging such application, or if there be included in such territory as many as ten property tax-paying voters, then, at the same time the election above provided for

is held in said established district, there shall also be held and conducted under the same rules and regulations as above provided for elections within such established territory, an election in such territory that is proposed to be added, except that the notice of election shall include a full description by metes and bounds of the territory included within such proposed addition. The ballot for such election shall have printed thereon "For addition to irrigation district" and "Against addition to irrigation district", but shall not contain any other matter whatever. In the event that two-thirds majority of the resident property taxpaying voters voting thereon at said election vote in favor of the addition of such territory, then same may be added to such irrigation district by a proper order of the directors entered upon the minutes of such established district, said order to be made within twenty days after the holding of such election, and said territory so added shall thereafter be and become an integral part of said district subject to all laws governing said district as completely and as fully as if same had been included in the district in its original formation; provided, however, that no water shall be furnished for irrigation of land included within said district until the owners and holders thereof shall have fully paid the charges fixed against each such land by the directors as a condition to their admission into the district as provided for in this Act. Such additions to such district shall not in any manner affect the officers, employees and affairs of such district, but the voters of such added territory shall have a right to participate in all matters of the district considered or voted upon thereafter, and in case contract has been made with the United States as aforesaid, the Secretary of the Interior may assent to such change. [Acts 1913, p. 380, § 83; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 83.]

See note under Art. 5107—15.

**Art. 5107—84. Directors and employes may enter lands, etc.**—The directors of any district and the engineer and employees thereof are hereby authorized to go upon any lands lying within said district, for the purpose of examining same, locating reservoirs, canals, dams, pumping plants, and all other improvements, to make maps and profiles thereof; and are hereby authorized to go upon the lands beyond the boundaries of such districts in any county for the purposes stated, and for any other purposes necessarily connected therewith, whether herein enumerated or not. [Acts 1913, p. 380, § 84; Act March 19, 1917, ch. 87, § 84.]

For penal provision of this section, see Art. 343a, Penal Code, post.

**Art. 5107—85. Contracts, how let; notice; contracts with United States.**—Contracts for making and constructing reservoirs, dams, canals, laterals, pumping plants, check gates, sluice gates, and all improvements whatsoever of said district shall be made by the directors, to the lowest responsible bidder, after giving notice by advertising same in one or more newspapers of general circulation in the State of Texas, and in one newspaper published in the county, if there be one in the county, and one newspaper in such district, if there be one in the the irrigation district, which notice shall be published once a week for four consecutive weeks; and also by posting notices for at least twenty days in five public places in the district, and one at the court house door of the county or counties in which such district is situated; provided that the provisions of this section shall not apply in case of any contract between the district and the United States. [Acts 1913, p. 380, § 85; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 85.]

See note under Art. 5107—15.

**Art. 5107—86. Bidders to receive copies of reports and profiles; bids, how made, etc.**—Any person, corporation or firm, desiring to bid on the construction of any work advertised as provided for herein, shall upon application to the directors be furnished with a copy of the engineer's report, and profile, showing the work to be done, provided the directors may charge therefor the actual cost of having such report and profiles made and furnished. All bids or offers to do any such work shall be in writing, and sealed and delivered to the president or secretary of the board of directors, together with a certified check for at least two per cent of the total amount bid, which said amount shall be forfeited to the district in the event the bidder refused to enter into a proper contract for his bid as accepted. Any or all bids may be rejected in the judgment of the directors. All bids shall be opened at the same time. [Acts 1913, p. 380, § 86; Act March 19, 1917, ch. 87, § 86.]

**Art. 5107—87. Contracts to conform to act; how executed, filed and recorded.**—All contracts made by the districts shall be in conformity with and subject to the provisions of this Act, and the provisions of this Act shall be a part of all contracts in so far as applicable to either the contractor of the district, and the provisions of this Act shall govern whenever the contract is in conflict herewith. The contract shall be reduced to writing and signed by the contractors and directors, and a copy of same so executed shall be filed with the county clerk of the county or counties in which said district is situated, which said copy so filed with said county clerk shall be recorded in a book kept for that purpose, and be subject to public inspection. [Acts 1913, p. 380, § 87; Act March 19, 1917, ch. 87, § 87.]

**Art. 5107—88. Contractors' bonds.**—The person, firm or corporation to whom such contract is let shall give bond payable to the district in such amount as the director may determine, not to exceed the contract price, conditioned that he, they, or it will faithfully perform the obligations, agreements and covenants of such contract, and that in default thereof they will pay to said district all damage sustained by reason thereof. Such bond shall be approved by the directors, and shall be deposited with the depository of the district, a true copy thereof being retained in the office of such directors. [Acts 1913, p. 380, § 88; Act March 19, 1917, ch. 87, § 88.]

**Art. 5107—89. Contracts to contain specifications; supervision; reports of engineer; bridges and culverts across railroads.**—All such contracts shall contain a full statement of the specifications for all work included in the contract, and all such work shall be done in accordance with the specifications under the supervisions of the directors and the district engineer. As the work progresses the engineer of such district will make full reports to the directors, showing in detail whether the contract is being complied with or not in the construction, and when the work is completed the engineer shall make a detailed report of same to the directors, showing whether or not the contract has been fully complied with according to its terms, and if not in what particular it has not been so complied with. The directors, however, will not be bound by such report, but may in addition thereto fully investigate such work and determine whether or not such contract has been complied with. The district is hereby authorized and empowered to make all necessary bridges and culverts across or under any railroad track and roadway of such railway to enable them to construct and maintain any canal, lateral, or ditch necessary to be constructed as a part of the improvements of such district. Such bridges or culverts shall be paid for

by the district; provided, however, that notice shall first be given by such district directors by delivering a written notice to any legal agent, division superintendent or roadmaster of such railway, and the railway company shall be allowed thirty days to build such bridges or culverts at their own expense, if they should desire to do so, and according to their own plans; provided such canal, culvert or ditch shall be constructed of sufficient size not to interfere with the free and unobstructed flow of water passing through the canal or ditch, and shall be placed at such points as are designated by the district engineer, or directors. [Acts 1913, p. 380, § 89; Act March 19, 1917, ch. 87, § 89.]

**Art. 5107—90. Bridges and culverts across canals, etc.**—Such districts are hereby authorized and required to build all necessary bridges and culverts across and over all canals, laterals and ditches made and constructed by such district, whenever the same crosses a county or public road, and shall pay for the same out of the funds of such district. [Acts 1913, p. 380, § 90; Act March 19, 1917, ch. 87, § 90.]

**Art. 5107—91. Surplus moneys, how used.**—After the full and final completion of all the improvements of such district as herein provided for, and after the payment of all the expense incurred under the provisions of this Act, the directors are authorized to use the remaining funds of the district for the best interests of such district in the preservation, upkeep and repair of the works of such district. [Acts 1913, p. 380, § 91; Act March 19, 1917, ch. 87, § 91.]

**Art. 5107—92. Duties of directors; inspection; payment of contract price; contracts with partial payments.**—The directors shall have the right, and it is hereby made their duty, at all times during the progress of the work being done under any contract, to inspect the same; and upon the completion of any contract in accordance with its terms, they shall draw a warrant on the depository of the district for the amount of the contract price in favor of the contractor or his assignee; and if the directors shall deem it advisable in order to obtain more favorable contracts, they may advertise a contract to be paid for in partial payments as the work progresses, and such partial payments shall not exceed in the aggregate eighty-five (85) per cent of the amount of work done, the said amount of work completed to be shown by certified report of the engineer of the district. [Acts 1913, p. 380, § 92; Act March 19, 1917, ch. 87, § 92.]

**Art. 5107—93. Directors to make semi-annual reports.**—The directors shall make a semi-annual report on the first days of July and January of each year, showing in detail the kind, character, and amount of work done in the district, the cost of same, the amount of each warrant drawn, and to whom paid, and for what purpose paid, and other data necessary to show the condition of improvements made under the provisions of this Act, and each report shall be verified by them, a copy of which shall be filed in the office of the county clerk of the county or counties in which such district is situated, and shall be open to public inspection. [Acts 1913, p. 380, § 93; Act March 19, 1917, ch. 87, § 93.]

**Art. 5107—94. District acquiring established system to continue to supply water, etc.**—When a district acquires an established irrigation system which has supplied water to lot owners in a city, town or village, and such city, town or village is not included in such district, such district shall continue to supply water to such lot owners for a reasonable annual rental. [Acts 1913, p. 380, § 94; Act March 19, 1917, ch. 87, § 94.]



**Art. 5107—95.** Persons desiring to receive water to furnish statement; directors to estimate expense; expense, how paid; assessments; contracts with users; directors may borrow money; liens; interest; list of delinquents; in case of contract with United States.—Every person desiring to receive water during the course of the year, or at any time during the year, shall furnish to the secretary of the board of directors a statement in writing of the acreage intended by him to be put under irrigation, and for which water is to be used, and as near as may be, a statement of the several crops to be planted, with the acreage of each, and shall at the same time pay such proportion of the water charge or assessment therefor as may be prescribed by the board of directors. If such statement should not be furnished, or such payment should not be made before the date for fixing the assessments, there shall be no obligation upon the district to furnish such water to such person for that year. The board of directors on or as soon as practicable after a date in each year to be fixed by a standing order of the board, shall carefully estimate the expense to be incurred during the course of the next succeeding twelve months for the maintenance and operation of the irrigation system. A proportionate part of the amount so estimated not less than one-third, nor more than two-thirds, to be determined from year to year, by the board of directors, shall be paid by assessment against all irrigable lands within the district, pro rata per acre; that is to say, against all lands to which the district is in condition to furnish water by its then system of canals and laterals, or through extensions thereto of then existing laterals, but without reference as to whether such land is to be actually irrigated or not; and the remainder of the amount so estimated shall be paid by the persons taking water, or applying for water as aforesaid. This remaining amount shall be equitably pro rated, as nearly as may be, among the applicants for water, and in pro rating same, the board of directors may take into consideration the acreage to be planted by each application for water, the crop to be grown by him and the amount of water per acre to be used by him provided, however that each water user shall pay the same price per acre for use of upon the same class of crops. All assessments shall be paid in installments and at times to be fixed by the order of the board of directors, but if the crop for which such water was furnished shall be harvested prior to the time fixed for the payment of any installment, the entire unpaid assessment shall at once become due and shall be paid within ten days after the harvesting of such crop and before the removal of same from the county or counties in which grown. The board of directors shall have power and authority from time to time to adopt, alter and rescind rules, regulations, standing orders and temporary orders, not in conflict with this Act, governing the methods, ways, terms and conditions of water service, applications for water, assessments for maintenance and operation and the payment and the enforcement of payment of such assessments, and the furnishing of water to persons who have not applied for same before the date of assessment, and to persons who desire to take water for irrigation in excess of their original applications, or for use on other lands than those covered by such applications. The board of directors may, at their discretion, require every person desiring water during the course of the year to enter into a contract with the district, which contract shall indicate the acreage to be watered, the crops to be planted, and the amount to become due, and the terms of payment; and it may be further required that the water taker shall execute a negotiable note or notes for such amounts, or for parts thereof. The making of such contracts shall not constitute a waiver of the lien given by this Act upon the crops of the water taker for the service furnished to

him. If the water taker shall water more land than is called for in his contract, he shall pay for the additional service rendered as and at the times hereinbefore indicated. To secure money for the operating and maintenance expense of the district, the board of directors shall have authority to borrow money with interest not exceeding ten per cent per annum, and may hypothecate any of its notes or contracts with water takers or accounts against them. The district shall have a first lien superior to all other liens upon all crops of whatsoever kind grown upon each tract of land in the district to secure the payment of the assessment herein provided for, and all such assessments shall bear interest from the time due and payable at the rate of ten per cent per annum. And if suit should be filed therefor, or the same should be collected by any legal proceedings, an additional amount of ten per cent on unpaid principal and interest shall be added to the same as collection or attorney's fees, which collection fees, as well as principal and interest of such assessments shall stand secured by the lien aforesaid. All land owners shall be personally liable for all assessments herein provided for, and if they shall fail or refuse to pay same when due the water supply shall be cut off and no water shall be furnished to the land until all back dues are fully paid. This provisions shall bind all parties, persons and corporations owning or thereafter acquiring any interest in said lands. The directors of all districts shall within ten days after any assessment is due post at a public place in said district a list of all delinquents and shall thereafter keep posted a correct list of all such delinquents; provided, however, that if the parties owning such assessments shall have executed notes and contracts as hereinbefore provided they shall not be placed upon such delinquent list until after the maturity of such notes and contracts. In the event that contract shall be made with the United States, the remedies in this Section hereinbefore provided in favor of the district shall apply with regard to the operation and maintenance and rental charges which may become due to the United States. Provided, however, that the Federal reclamation laws and in particular the Reclamation Extension Act approved August 13, 1914, and any Acts amendatory thereof, shall be applicable. Moreover, all water the right to the use of which is acquired by the district under contract with the United States, shall be distributed and apportioned by the district in accordance with the Acts of Congress and rules and regulations of the Secretary of the Interior and the provisions of such contract in relation thereto. [Acts 1913, p. 380, § 95; Act March 19, 1917, ch. 87, § 95.]

**Art. 5107—96. When assessments are more than sufficient, or are insufficient; notice of additional assessments.**—In the event the assessments made as provided for in the preceding section should be more than sufficient to meet the necessary obligations of the district, the balance shall be carried over to the next season; and in the event the assessments made are not sufficient to meet the necessary expenses of such district the balance unpaid shall be assessed, pro rate, in accordance with the assessments previously made for the then current year, and shall be paid under the same conditions and penalties within thirty days from the time such assessment is made. Public notice of all such assessments shall be given by posting printed notices thereof in at least three public places in the district, and printed notices shall be mailed to each land owner; provided, however, each land owner shall furnish to the board of directors his correct postoffice address. Such notice shall be given by posting and mailing such notice five days before the assessment is due, and in the event of special assessments such notice shall be given within

ten days after such assessments are levied. [Acts 1913, p. 380, § 96; Act March 19, 1917, ch. 87, § 96.]

**Art. 5107—97. District may construct or purchase drainage or levee system.**—Included in the plans of any such district may be the necessary drainage ditches, or other facilities for drainage, and necessary levees for the protection of land under the system; and every such district may purchase the system or any part of any system belonging to a drainage district. The purchase, however, shall provide for the payment of the debts of the drainage district, or the assumption of such debts, and the amount of such debts paid or assumed is to be considered in determining the bond issuing capacity of the district. [Acts 1913, p. 380, § 97; Act March 30, 1915, ch. 138, § 1; Act March 19, 1917, ch. 87, § 97.]

See note under Art. 5107—15.

**Art. 5107—98. Assessments for operation and maintenance, how collected; bond and duties of collector.**—All assessments for operation and maintenance expenses made under the provisions of this Act shall be collected under the direction of the directors, by the assessor and collector of taxes, or other person designated by them, which said officer shall give bond in such sum as they may direct conditioned upon the faithful performance of his duties and accounting for all money collected. He shall keep a true account of all money collected, and deposit the same as collected in the district depository, and shall file with the secretary of the directors a true statement of all money collected once each week. The collector shall use duplicate receipt books, and shall give a true receipt for each collection made, retaining in such book a true copy thereof, which shall be preserved as a record of the district. [Acts 1913, p. 380, § 98; Act March 19, 1917, ch. 87, § 98.]

**Art. 5107—99. Accounts and records of district.**—The directors of such district shall keep a true account of all their meetings and proceedings, and shall preserve all contracts, records and notices, duplicate vouchers, duplicate receipts, and all accounts and records of whatsoever kind, in a fireproof vault or safe, and the same shall be the property of the district and shall be delivered to their successors in office. [Acts 1913, p. 380, § 99; Act March 19, 1917, ch. 87, § 99.]

**Art. 5107—100. District depositories.**—The directors for such district shall select a depository for such district under the same provisions as are now provided for the selection of depositories for the counties in this State; and the duties of such depositories shall be the same as now prescribed by law for county depositories. However, in the selection of depositories the directors of such district shall act in the same capacity and perform the same duties as is incumbent upon the county judge and members of the commissioners' court in the selection of county depositories; and all laws now in force or hereafter to be enacted for the government of county depositories shall apply to and become a part of this Act. [Acts 1913, p. 380, § 100; Act March 19, 1917, ch. 87, § 100.]

**Art. 5107—101. Monthly reports of depositories, etc.**—The district depository shall make a report of all moneys received, and of all moneys paid out, at the end of each month, and file such reports with such vouchers among the records of said district in its own vault, and shall furnish a true copy thereof to the directors, and shall, when called upon, allow same to be inspected by any taxpayer or resident of such district. Such records shall be preserved as the property of such district and shall be delivered to the successor of such depository. [Acts 1913, p. 380, § 101; Act March 19, 1917, ch. 87, § 101.]

**Art. 5107—102. Directors to maintain office; meetings.**—The directors of each district shall have and maintain a regular office suitable for conducting the affairs of such district, within such district, or within a town situated within the general boundary lines of such district, and not removed therefrom. And such directors shall hold regular meetings at said office on the first Monday in February, May, August and November of each year, at ten o'clock a. m., and shall hold such other regular special meetings as they may see fit. And any such resident taxpayer or interested party may attend any such meeting of such directors, but shall not participate in any such meetings without the consent of the directors and shall have no authority to vote upon any matter considered by such directors, but may present such matters as they desire to such directors in an orderly manner. [Acts 1913, p. 380, § 102; Act March 19, 1917, ch. 87, § 102.]

**Art. 5107—103. Surety company bonds.**—All officers and employés of any district who may be required to give bond or security, may furnish bonds of surety companies subject to the approval of the directors; provided, however, whenever such surety company bond is furnished by any such officer or employé, the surety company furnishing same shall file for record in the office of the county clerk of the county where such district is situated a duly executed power of attorney, showing the authority of the person signing such bond for said company, to so sign same, and said power of attorney shall be duly executed by the officers of said company, and have attached the company seal; and such power of attorney shall remain on file in said office. All such official bonds shall be preserved by it as the property of said district. [Acts 1913, p. 380, § 103; Act March 19, 1917, ch. 87, § 103.]

**Art. 5107—104. Meetings, where held; vouchers; accounts, etc.**—All meetings of the directors shall be held at the regular office of the district. All vouchers issued for the payment of any funds of the district shall be signed by at least four directors and shall refer to the book and page of the minutes allowing such account. All vouchers shall be issued from a regular duplicate book containing a duplicate which shall be preserved. The directors shall have kept a complete book of accounts for such district, and shall on September first of each year select a competent auditor who shall examine the accounts, books and reports of the depository, the assessor and collector and the directors, and make a full report thereon, a copy of which shall be filed with the depository and a copy with the directors and one with the county clerk of the county or counties in which such district is situated. Such report shall be filed by November 1 of each year. [Acts 1913, p. 380, § 104; Act March 19, 1917, ch. 87, § 104.]

**Art. 5107—105.**

Repealed. See art. 5107—107.

**Art. 5107—105a. Taxes levied under prior acts may be cancelled where bonds are unsold.**—Where a district organized under prior Acts has issued bonds and levied taxes to provide the interest and sinking fund thereon and said bonds or a portion thereof have not been sold at such time, the directors of such district may return all unearned portion of said taxes, if collected, and may cancel, all unearned portion of said taxes not collected and all penalty, interest and costs thereon. At the time of the sale of such bonds, however, a sufficient tax shall be levied to provide all interest and charges thereon. [Act March 19, 1917, ch. 87, § 105.]

**Art. 5107—106. Joint ownership of works by two or more districts; election; letting of contracts; general manager for joint enterprise; terms of contract between districts.**—Two or more districts may jointly own and construct irrigation works and reservoirs under the terms and conditions to be set out in a written contract. Any such contract shall not be binding until same shall have been ratified by a majority vote of each such district. An election shall be held in each such district upon the same day to determine whether such contract shall be adopted. Such contract shall be printed or in writing, and a true copy shall be filed in the office of each district fifteen days prior to such election and be subject to public inspection, and one true copy of same shall be furnished each voter calling at such office for same at any time within fifteen days prior to such election. When improvements are constructed by two or more districts, bids may be jointly called for and may be opened and considered at the designated office of either of such districts, and such districts shall approve the letting of the contract, and the contractor's bond, and may meet for that purpose at a place outside of their district, or at any office established for such joint project and at which office all business of such joint project may be transacted, all bids, bonds, contracts, etc., of said joint project may be in the names of said joint project districts, such districts being empowered and authorized to do all acts by joint action that one district may do. The action of each district being determined by its board of directors, a general manager may be employed for such joint enterprise whose duties may be set forth in the joint ownership contract.

The terms and conditions of such joint ownership contract shall not conflict with the provisions of the law providing for the organization and conduct of districts, but may include provisions for joint construction and operation of same. Such contracts may be amended in the same manner. [Act March 19, 1917, ch. 87, § 106.]

**Art. 5107—107. Repeal; validation of districts created under repealed acts; government of such districts; bonds; change of name; districts in process of organization.**—The Act of the Twenty-ninth Legislature, being Chapter 50 of the Acts of 1905, and the Act of the Thirty-third Legislature, being Chapter 172 of the Acts of 1913, and Chapter 138 of the Acts of 1915, are hereby repealed. All districts heretofore organized under the terms and in accordance with the provisions of said Acts, are hereby expressly declared to be validly created, organized, described and defined with boundaries as prescribed by the order of the commissioners court organizing the same, or as the same have since been changed by the board of directors thereof in the manner provided by said Acts. Such districts, however, shall hereafter be governed by the provisions of this Act, provided, however, that the duly constituted and qualified officers of such districts shall continue to perform the duties of such offices until the next general election held under the provision of this Act.

All bonds issued by such district, which have been declared valid by a judgment of the District Court, shall be and be held to be valid and binding obligations of such district and not subject to attack, except for actual fraud. Any such district may change its name to the name herein provided for such districts by filing a declaration to that effect with the commissioners court of the county or counties in which it is situated, and which said declaration shall be in the form of a deed of conveyance and duly acknowledged by the president and secretary of the district, and shall embody and set forth a copy of the minutes of said board of directors, and show the resolution adopted for the change of such name, and

when such instrument shall have been so recorded, the name of such district shall thereby be changed.

All districts in the process of organization under existing laws repealed by this Act, are hereby declared to be valid districts and entitled to proceed in accordance with the provisions of said Act so repealed until the date upon which this Act shall take effect after which, said districts shall be governed by the provisions of this Act, and said districts shall change their name to conform to the provisions of this Act by filing a declaration as above provided, in the office of the county clerk of the county or counties in which they are situated; and if they have not proceeded to the point of election of directors, they shall change such name by making application to the county commissioners court having jurisdiction thereof, which said court shall change said name upon all orders thereafter issued relating to said district. [Id., § 107.]

**Art. 5107—108. Power to construct works for irrigation of lands, etc.; authority of directors.**—All districts organized under the provisions of this Act shall have full authority, acting by and through the board of directors, to construct all works and improvements necessary for the irrigation of lands in said districts and the conveying of water for such purpose and all other purposes authorized by Section 52 of Article 3 of the Constitution of the State of Texas, and the directors of such districts, subject only to the provisions hereof, shall have full authority to manage such districts and the business of such districts for the purpose of carrying out the intention of the organization. [Id., § 108.]

**Art. 5107—109. Inclusion of land without district but served by irrigation system within district.**—Where a district is organized embracing land irrigated by an established irrigation system and lands entitled to be served with water from such irrigation system are not included in such district, in the manner provided by law, and when so admitted to or included in such district the said land shall become part of said district as if originally included therein and shall be entitled to water service upon an equal basis with the lands originally included in said district. [Id., § 109.]

**Art. 5107—110. Transfer of water right appurtenant to nonirrigable lands.**—Where there is included in a district lands having a water right from a source of supply acquired by such district but which lands it is difficult or impracticable to irrigate, the said district may allow such water rights to be transferred to other lands adjacent to said district and may admit such lands to said district upon an equal basis as to water service with the lands originally included in such district. [Id., § 110.]

**Art. 5107—111. Release from assessment of lands receiving insufficient water service.**—Whenever any district organized or hereafter organized has failed or neglected to furnish water sufficient to irrigate any land within such district within two years from its organization, then such lands shall be relieved of any and all assessments and charges except taxes until such district shall construct the necessary canals and furnish the necessary water to enable the owner of said land to irrigate all of said land on demand therefor. [Id., § 111.]

**Art. 5107—112. Bond tax to remain in force from year to year; increase or diminution.**—The tax as levied in connection with the original issuance of bonds shall remain in force from year to year as the levy for that purpose, until a new levy shall be made. The board of directors may, from time to time, increase or diminish such tax so as to adjust

the same to the taxable values of the property subject to taxation by the district and the amount to be collected, and in such manner as to raise an amount sufficient to pay the annual interest and sinking fund on said bonds then outstanding. [Id., § 112.]

**Art. 5107—113. Investment of sinking fund.**—The board of directors are authorized and empowered, whenever they may deem it advisable, to invest any sinking funds of the district, acquired for the redemption and payment of any of its outstanding bonds, in bonds of the United States, of the State of Texas, of any county of the State of Texas, any irrigation or water improvement bonds or of any incorporated city or town, or of any independent school district, or of any other school district in the State of Texas authorized to issue bonds; provided that no bonds shall be so purchased that according to their terms mature at a date subsequent to the time of maturity of the bonds for the payment of which such sinking fund was created. [Id., § 113.]

**Art. 5107—114. Fees of county clerk for registering bonds, etc.**—The county clerk shall receive for his services in registering said bonds the sum of ten cents for each bond so registered; for entering a payment of any bond, the sum of ten cents; for recording of instruments of the district required to be recorded, and for which no fees are hereinbefore fixed, he shall receive the same fees as provided by law for recording deeds. [Id., § 114.]

**Art. 5107—115. Directors may employ a manager; limitations as to employment contracts.**—The board of directors may employ a manager, who shall have general charge and management of the water distribution system of the district, subject to the general rules and regulations made by the board of directors, and who shall have power to appoint and discharge all other employes except the president and the secretary of the board and the assessor and collector, to purchase and contract for all supplies necessary for the water distribution system, after the board has authorized such purchases, to collect all assessments for operation and maintenance, and to execute on behalf of the district all water contracts and other contracts that are not required by law to be executed by the board or by the president and secretary of the board, and who shall have such other powers and perform such other duties as may be provided by the board of directors. Unless such manager is appointed, all persons employed by or representing the district shall be employed by the board of directors. No contract shall ever be made with any manager or other person or employe, whether employed by the board of directors or by the manager, for a longer period of time than one year, and the salaries of all employes, or the compensation to be received by them, shall be fixed at the time of their employment. [Id., § 115.]

**Art. 5107—116. Issuance of bonds in lieu of bonds issued under prior acts; registration; election; refunding bonds; election; registration.**—Where bonds have been issued, or may be hereafter issued, by a district organized under and in accordance with the provisions of this Act, or where bonds have been issued by any district organized under the Act of the Twenty-ninth Legislature, being Chapter 50 of the Acts of 1905, or the Act of the Thirty-third Legislature, being Chapter 172 of the Acts of 1913, in accordance with the provisions of said Acts, respectively, new bonds bearing the same or a lower rate of interest may be issued in lieu thereof. Such new bonds may be exchanged for old bonds, provided the old bonds are taken in exchange at their face value or at a discount, or they may be sold and the net proceeds applied to the purchase of the old

bonds redeemed at par or at a discount. The Comptroller of Public Accounts shall not register said new bonds until the old bonds in lieu of which they are issued are presented to him for cancellation or until a valid contract has been entered into and a copy thereof filed with the Comptroller for the purchase of a corresponding amount of such old bonds. After registration of the new bonds, the Comptroller shall keep the same in his possession until the old bonds are surrendered to him and cancelled by him, whereupon he shall deliver the new bonds to the proper party or parties; provided, that the old bonds may be so presented for payment, in installments, and a like amount of the new bonds registered and delivered as herein provided.

If the new bonds are in the same amounts and have the same dates of maturity as the old bonds intended to be replaced thereby, they may be authorized by resolution of the board of directors and issued without submitting the question of their issuance to the vote of the property taxpayers, who are qualified voters in the district, and they shall be registered by the Comptroller in the manner hereinbefore provided, and upon the filing with him of a copy of the resolution of the board of directors providing for the cancellation of said old bonds and the issuance of the new bonds in place thereof; and when said old bonds shall have been cancelled and the new bonds registered by the Comptroller, such new bonds shall be the valid and binding obligations of the district, without further proceedings in regard thereto; and the same are hereby declared to have, and are hereby given, the same force, effect and validity as the original issue of bonds that they have replaced.

Any such district is authorized to issue new or refunding bonds in lieu of bonds heretofore or hereafter issued as aforesaid, in such amount, of such denominations, bearing such rates of interest and periods of maturity as may be provided by resolution of the board of directors thereof, within the limits prescribed in this Act in the case of an original issuance of bonds, whenever the board of directors may deem such action advisable, but if such new or refunding bonds are in greater amount, bear a greater rate of interest or have longer periods of maturity, or in any other respect create a greater burden on the district than the old bonds then outstanding, the issuance of such new or refunding bonds shall be submitted to the vote of the resident property taxpayers who are qualified voters of the district, and all provisions of this Act governing the election and the issuance, approval, validation, registration and sale of bonds in the case of an original issue of bonds shall apply to and govern such new or refunding bonds. All such bonds shall be registered and delivered only in the manner provided in this Section. [Id., § 116.]

**Art. 5107—117. Establishment of districts in unorganized counties.**—Should any parties in any unorganized county wish to organize a Water improvement district, under the provisions of this Act, such parties shall have the right to do so by applying to the commissioners' court of the county to which said unorganized county is attached for judicial purposes, and such commissioners' court is hereby authorized to perform for said unorganized county all things which in this Act is required of Commissioners' court of organized counties. [Id., § 117.]



## TITLE 74

## JAILS

**Article 5111. [3135] Duty of commissioners' courts to see that jails are properly kept.**

**Purchase of disinfectant.**—Under this article and Code Cr. Proc. 1911, arts. 49, 52, and 1148, held that, in absence of any order of commissioners' court to contrary and of any provision for purchase of disinfectants for county jail, sheriff was proper agent to represent county in its purchase, and that county was liable therefor unless there was an accessible and adequate supply on hand. *Frederick Disinfectant Co. v. Coleman County (Civ. App.)* 188 S. W. 270.

## TITLE 75

## JURIES IN CIVIL CASES

Chap.

1. Jurors—Their qualifications and exemptions.
2. Jury commissioners for the district court, their appointment, qualifications, etc.
3. Jury commissioners for the county court, appointment, qualification, etc.
5. Selection of jurors in counties with cities of certain population.
- 5a. Interchangeable juries.

Chap.

7. Juries for the week—How made up.
8. Jury trials—Authorized, when and how.
9. Challenges.
10. Formation of the jury for the trial of a cause.
11. Oath of jurors in civil cases.
12. Juries—How constituted and their verdicts.
13. Compensation of jurors of the district and county court in civil cases.

## CHAPTER ONE

## JURORS—THEIR QUALIFICATIONS AND EXEMPTIONS

Art.

5115. Who are disqualified, in general.  
5117. Jurors disqualified in certain cases.

Art.

5118. Who are liable to jury service; who are exempt from jury service.

**Article 5115. [3139] Who are disqualified, in general.**

**Conviction of felony.**—A juror, who had been convicted of a felony in a foreign state and restored to citizenship by a full pardon, held qualified to serve in Texas. *Wickizer v. Williams (Civ. App.)* 173 S. W. 288, rehearing denied 173 S. W. 1162.

**Householder.**—A single man, living with his parents, though paying board or renting a room from the occupant of a house, is not a "householder" so as to be a qualified juror. *Gomez v. State, 75 Cr. R. 239, 170 S. W. 711.*

**Physical defects.**—A juror whose hearing in one ear was defective, but who heard the questions asked him on examination without apparent difficulty, was properly accepted, where the court stated that he would place him so that he could hear everything. *Myers v. State, 77 Cr. R. 239, 177 S. W. 1167.*

**Knowledge of English language.**—The fact that a juror was a naturalized German-American citizen, who might not understand the meaning of some words of the English language, although he appeared to understand questions asked on his examination, did not disqualify him from jury service. *Myers v. State, 77 Cr. R. 239, 177 S. W. 1167.*

**Art. 5117. [3141] Jurors disqualified to try a particular case.**

Cited, *City of Ft. Worth v. Young (Civ. App.)* 185 S. W. 983.

**Discretion of court.**—Trial court may allow challenge for cause on other grounds than those which render juror disqualified in particular case, and when this discretionary power is exercised, it ought not to be reversed, unless it clearly appears that party complaining has been deprived of trial by fair and impartial jury. *McIntosh v. Atchison, T. & S. F. Ry. Co. (Civ. App.)* 192 S. W. 285.

**Other disqualifications.**—A juror, who had lived in America only five years, could read, write, and understand English only a little, and did not understand all that was asked him touching his qualifications as a juror, and who would have to guess at what was said on trial, was not qualified. *Sullenger v. State (Cr. App.)* 182 S. W. 1140.

**Art. 5118. [3142] Who are liable to jury service; who are exempt from jury service.**

**Civil officers.**—Civil officers are not disqualified to serve as petit jurors, but their exemption is a personal privilege to be claimed only by them, and which they may waive. *Counts v. State* (Cr. App.) 181 S. W. 723.

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## CHAPTER TWO

### JURY COMMISSIONERS FOR THE DISTRICT COURT, APPOINTMENT, QUALIFICATION, ETC.

**Article 5123. [3146] Shall serve but once in a year.**

**Same Commission summoning jurors for three terms.**—Under Const. art. 16, § 19, Rev. St. 1895, arts. 3145, 3146, and Code Crim. Proc. 1911, art. 389, the judge of a district in which there were six terms a year had no power to direct jury commissioners appointed for the November, 1911, term to select grand juries for the succeeding January, March, and May, 1912, terms, and a grand jury so selected was illegal. *Whiten v. State* (Cr. App.) 151 S. W. 1182.

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## CHAPTER THREE

### JURY COMMISSIONERS FOR THE COUNTY COURT, APPOINTMENT, QUALIFICATIONS, ETC.

**Article 5133. [3156] Oath.**

Cited, *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

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## CHAPTER FIVE

### SELECTION OF JURORS IN COUNTIES WITH CITIES OF CERTAIN POPULATION

**Art. 5151.** Selection of jurors in certain counties.

**Art. 5154.** Jurors drawn by whom, when, how, etc.

**Article 5151. Selection of jurors in certain counties.**

**Constitutionality.**—This chapter held constitutional. *Merkel v. State*, 75 Cr. R. 551, 171 S. W. 738.

The jury wheel law, as amended by this article, held constitutional and not void as working an improper discrimination against defendants tried where the law is in force, in that nontaxpayers are excluded as jurymen in such counties. *Herrera v. State* (Cr. App.) 180 S. W. 1097.

**Art. 5154. Jurors drawn by whom, when and how.**

**Failure to fill out or certify blanks.**—Failure to properly fill out or certify blanks, after the jury list was drawn from the wheel, as prescribed by statute, held not to vitiate the panel. *Howard v. State* (Cr. App.) 178 S. W. 506.

## CHAPTER FIVE A

## INTERCHANGEABLE JURIES

Art. 5158 $\frac{1}{2}$ .	Applicable to counties having three or more district courts; criminal courts.	Art. 5158 $\frac{1}{2}$ d.	Use of jurors impaneled; additional jurors.
5158 $\frac{1}{2}$ a.	Jury wheel law to remain in force except as modified.	5158 $\frac{1}{2}$ e.	Commissioners' court to provide jury room; custody of jurors.
5158 $\frac{1}{2}$ b.	Judges shall meet and determine number of jurors required; designation of judge to organize juries.	5158 $\frac{1}{2}$ f.	Placing names on the general panel.
5158 $\frac{1}{2}$ c.	Summoning jurors; hearing excuses.	5158 $\frac{1}{2}$ g.	Reducing number in general panel.
		5158 $\frac{1}{2}$ h.	Not to apply to capital and lunacy cases.
		5158 $\frac{1}{2}$ i.	When act takes effect.

**Article 5158 $\frac{1}{2}$ . Applicable to counties having three or more district courts; criminal courts.**—The provisions of this law shall be applicable only to such counties of this State as may now maintain three or more district courts, or in which three or more district courts may be hereafter established. A criminal court in any county possessed of jurisdiction in felony cases shall be considered a district court within the meaning of this Act. [Act March 15, 1917, ch. 78, § 1.]

**Art. 5158 $\frac{1}{2}$ a. Jury wheel law to remain in force except as modified.**—All provisions of the Act of the Thirtieth Legislature of 1907, approved April 18, 1907, and being Articles 5151 to 5158, inclusive, Revised Civil Statutes of Texas, 1911, commonly known as the Jury Wheel Law, shall remain in full force in the counties governed by this Act, except as modified by the special provisions of this Act. [Id., § 2.]

**Art. 5158 $\frac{1}{2}$ b. Judges shall meet and determine number of jurors required; designation of judge to organize juries.**—In every county in this State which now has three or more district courts it shall be the duty of the judges of said district courts to meet together, as soon as practicable after the passage of this Act, and determine approximately the number of jurors that are reasonably necessary for jury service in all the county and district courts of such county, for each week during the period of time the said courts may hold during the year, and shall thereupon order the drawing of such number of jurors from the wheel for each of said weeks, which said jury shall be known as the general panel of jurors for service in all county and district courts of such county for the respective weeks for which they are designated to serve. A majority of the said district judges are authorized to act in carrying out the provisions of this Act. They can at any time, as suggested by their experience in enforcing this Act, increase or diminish the number of jurors to be selected for any week and shall order said jurors drawn for as many weeks in advance of service as they may deem proper. They shall also designate from time to time the judge to whom the said general panel of jurors shall report for duty, and said judge, for the period of time that he is selected to act in that capacity, shall organize said juries and have immediate supervision and control of the same. [Id., § 3.]

**Art. 5158 $\frac{1}{2}$ c. Summoning jurors; hearing excuses.**—The said jurors so limited in number shall, after being regularly drawn from the wheel, be served by the sheriff to appear and report for jury service before the judge of the said district court, as designated in the order of the said judges directing the selection of said general panel. Said judge shall hear the excuses of the said jury and swear them in for service for the

week that they are to serve, to try all cases that may be submitted to them in any of the county or district courts in said county. [Id., § 4.]

**Art. 5158½d. Use of jurors impaneled; additional jurors.**—Said jurors, when impaneled, shall constitute a general panel for the week, for service as jurors in all the county and district courts in said county, and shall be used interchangeably in all of the said courts. In the event of a deficiency of said jurors at any given time to meet the requirement of all said courts, the judges having control of said general panel for the week shall order such additional jurors to be drawn from the wheel as may be sufficient to meet such emergency, but such jurors shall act only as special jurors and shall be discharged as soon as their services are no further needed. Resort to the wheel shall be had in all cases to fill out the general panel, except where waived by the parties or their attorneys. [Id., § 5.]

**Art. 5158½e. Commissioners' court to provide jury room; custody of jurors.**—The commissioners court of each county subject to the provisions of this Act shall set apart for the use and convenience of said general panel of jurors some room or place in or near the court house, which shall be comfortably furnished and fitted up for them to stay when not required for actual jury service. Said quarters shall be occupied by said panel when not in service and they shall remain in or conveniently near thereto so as to be at all times subject to duty in any court when called for, without delaying the proceedings of such court. The sheriff shall assign one of his deputies to look after the said panel, call them when needed by the judges, provide for their wants and to have the general custody and control of them when not in actual service. [Id., § 6.]

**Art. 5158½f. Placing names on the general panel.**—The names of the jurors shall be placed upon the general panel in the order in which they are drawn from the wheel and jurors shall be assigned for service from the top thereof in the order in which they shall be needed, and jurors returned to the general panel after service in any one of the courts shall be enrolled at the bottom, in the order of their respective return. [Id., § 7.]

**Art. 5158½g. Reducing number in general panel.**—When it becomes necessary to diminish the general panel for the week of its selection on account of lack of work in any court or for any other cause, the judge having supervision of said jury for the week shall designate the number to remain. He shall cause the clerk to draw from the names of the general panel the number required and those jurors whose names are so drawn shall continue in service for the remainder of the week and the others excused. [Id., § 8.]

**Art. 5158½h. Not to apply to capital and lunacy cases.**—This Act shall not apply to a selection of jurors in lunacy cases or in capital cases. [Id., § 9.]

**Art. 5158½i. When act takes effect.**—This Act shall take effect on September 1, 1917, and all laws in conflict herewith are hereby repealed. [Id., § 10.]

## CHAPTER SEVEN

## JURIES FOR THE WEEK—HOW MADE UP

Art. 5165. Jurors for the week, how selected.	Art. 5168. May be filled up, how.
5167. If practicable, to be of jurors selected by jury commissioners.	5169. May be adjourned.

**Article 5165. [3179] Jurors for the week, how selected.**

Cited, Galveston, H. &amp; S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374.

**Art. 5167. [3181] If practicable, to be of jurors selected by jury commissioners.**

Not applicable to trial jury.—Mingling jury wheel and additional jurors' names for a trial jury selection is proper though necessitating challenging of additional jurors before jury wheel names are exhausted, for this article refers to forming weekly list, and not a trial jury selection which is governed by articles 5202-5211. Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374.

**Art. 5168. [3182] May be filled up, how.**

Cited, Galveston, H. &amp; S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374.

**Art. 5169. [3183] May be adjourned.**

Pay during adjournment.—Under this article and Rev. St. 1895, art. 3232, where the court on Monday adjourns jurors to the following Wednesday in that term, they are not entitled to pay for Tuesday. Haber v. McClain (Civ. App.) 186 S. W. 871.

Substituting panel.—The court had a right to direct jury panel of one week to be substituted for that of another, in view of this article; and where it does not appear that defendant was injured thereby, it was not error to refuse to quash the panel. Southwestern Telegraph & Telephone Co. v. Clark (Civ. App.) 192 S. W. 1077.

## CHAPTER EIGHT

## JURY TRIALS—AUTHORIZED WHEN AND HOW

Art. 5173. Right of trial by jury to remain in- violate, subject, etc.	Art. 5174. Must be demanded and jury fee paid. 5175. Time of demand.
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**Article 5173. [3187] Right of trial by jury to remain inviolate, subject, etc.**

Right to jury trial.—Where plaintiff suing for current wages converted by defendant and for an attorney's fee and for punitive damages demanded a jury trial, defendant could not complain of trial by jury. Trinity County Lumber Co. v. Conner (Civ. App.) 176 S. W. 911.

The act providing for proceedings against infants as delinquent children, in place of the ordinary common-law criminal procedure, is not unconstitutional as depriving the infants of trial by jury; the proceeding not being criminal in its nature. Ex parte Barteel, 76 Cr. R. 285, 174 S. W. 1051.

There is no right to a jury trial on an interlocutory hearing for a temporary injunction, but only on the final hearing. Campbell v. Peacock (Civ. App.) 176 S. W. 774.

A suit to enjoin the keeping of a bawdyhouse is not a criminal case, but a civil matter as regards right to jury trial. Id.

A party has a right to a jury trial upon a plea of privilege. Holmes v. Coalson (Civ. App.) 178 S. W. 628.

There being under statute a right to jury trial in lunacy proceedings at date of adoption of Const. art. 1, § 15, providing that "right of trial by jury shall remain inviolate," Acts 33d Leg. c. 163 [Vernon's Sayles' Civ. St. 1914, art. 152 et seq.], substituting a commission of doctors for a jury in such proceedings, is invalid. White v. White (Civ. App.) 183 S. W. 369.

Acts 33d Leg. c. 179 [Vernon's Sayles' Civ. St. 1914, art. 5246h et seq.], relating to the liability of the employers and compensation for workmen which provided for determination of contested claims by an industrial accident board, held not invalid as depriving employers and employes of jury trial. Middleton v. Texas Power & Light Co. (Sup.) 185 S. W. 556.

What is not a jury.—The commission to try lunacy charges provided for by Acts 33d Leg. c. 163 [Vernon's Sayles' Civ. St. 1914, art. 152 et seq.], is not a jury within the

constitutional guarantee of right to a trial by jury.—*Loving v. Hazelwood* (Civ. App.) 184 S. W. 355.

**Action of trial court infringing right of trial by jury.**—In trespass to try title, it is improper for the trial court, after verdict by the jury for plaintiffs, to render judgment for defendant upon findings of fact made without the aid of the jury, upon what was claimed to be uncontroverted evidence. *Payne v. Ellwood* (Civ. App.) 163 S. W. 93.

**Mandamus.**—In view of Constitution Bill of Rights, declaring that jury trial shall remain inviolate, and article 5, § 10, held, that district judge, though authorized to issue a writ of mandamus in vacation, cannot issue a writ where facts are disputed and jury trial is demanded. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

#### Art. 5174. [3188] Must be demanded and jury fee be paid.

**In general.**—Failure to object to the discharge of the last jury for the term when present and failure to deposit a jury fee until after its discharge justified the trial court in refusing defendant's demand for a jury. *Downs v. Wilson* (Civ. App.) 183 S. W. 803.

**Jury fee.**—Where a case docketed as a jury case for five years was then consolidated with a subsequent suit and transferred to the same district, held, that plaintiff was entitled to a jury trial in the consolidated action, though the record did not show payment of the jury fee. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

#### Art. 5175. [3189] Time of demand.

**Failure to demand in time.**—Where a jury trial was not applied for until the day prior to trial day, at which time defendant had no answer on file and had only served his answer the preceding day, and plaintiff had no opportunity to file a reply, an order denying defendant a jury trial was not an abuse of discretion. *Power v. First State Bank of Crowell* (Civ. App.) 162 S. W. 416.

## CHAPTER NINE

### CHALLENGES

**Article 5195. [3209] On trial of challenge for cause, evidence to be heard.**

**Examination of Juror.**—On the issue whether property mortgaged by a husband alone was homestead, a question asked jurors, whether they would let the fact that he executed the mortgage influence them, held erroneous. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In a servant's action for injury while in the employ of defendant oil company, it was improper for counsel for plaintiff in the preliminary examination of the jury to ask whether any "heeler" of the defendant had discussed the case with them. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Parties acting together on challenges.**—There is no statute prohibiting parties from consulting and acting together in exercising their challenges. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

## CHAPTER TEN

### FORMATION OF THE JURY FOR THE TRIAL OF A CAUSE

Art. 5203. Shall place names of jurors in the box.	Art. 5206. Challenge for cause to be made, when.
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#### Article 5203. [3217] Shall place names of jurors in the box.

**Mingling jury wheel with additional jurors' names.**—Mingling jury wheel and additional jurors' names for a trial jury selection is proper though necessitating challenging of additional jurors before jury wheel names are exhausted, for Rev. St. art. 5167, requiring selection from jury list names before summoning additional jurors, refers to forming weekly list, and not a trial jury selection which is governed by articles 5202-5211. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 191 S. W. 374.

#### Art. 5206. [3220] Challenge for cause to be made, when.

**Time for objection.**—Irregularity in the drawing of jury is waived when not raised until after adverse verdict. *City of Clarendon v. Betts* (Civ. App.) 174 S. W. 958.

## CHAPTER ELEVEN

## OATH OF JURORS IN CIVIL CASES

**Article 5213. [3227] Form of oath.**

In general.—Code Cr. Proc. 1911, art. 714, requiring a prescribed oath to be administered to the jury in felony cases, is not complied with by swearing the entire jury panel at the beginning of the week pursuant to this article. *Howard v. State* (Cr. App.) 192 S. W. 770.

## CHAPTER TWELVE

## JURIES—HOW CONSTITUTED, AND THEIR VERDICTS

Art. 5214. Jury in district court.	Art. 5217. The entire jury must concur in the verdict.
5215. Death or inability of jurors in district court pending trial.	

**Article 5214. [3228] Jury in district court.**

In general.—Where there is no judicial determination that a juror is ill, but the parties merely agree, on information that he is ill, to go to trial with 11 jurors, the court properly refused to enter a formal order, finding that the juror was ill, and though such order was filed, it could be withdrawn at any time during the term of the court. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Under this article, a jury of 11, obtained by agreement, is a legal jury. *Id.*

Number of jurors.—In view of Const. art. 5, § 17, it is the right to trial by jury, and not the number of jurors previously obtaining, that is guaranteed by article 1, § 15. *White v. White* (Civ. App.) 183 S. W. 369.

**Art. 5215. [3229] Death or inability of jurors in district court pending trial.**

Grounds for discharge.—Serious illness and expected death of juror's child is sufficient reason for discharging him, since he could not give case proper consideration. *Barker v. Ash* (Civ. App.) 194 S. W. 465.

Time of objection.—There was no reversible error in discharging a juror because of his child's serious illness and expected death, where no objection was made until motion for new trial. *Barker v. Ash* (Civ. App.) 194 S. W. 465.

**Art. 5217. [3231] Entire jury must concur in verdict.**

See *Ingram v. State* (Cr. App.) 182 S. W. 290; *Powell v. State* (Cr. App.) 187 S. W. 334; notes under art. 837, Penal Code, post.

Cited, *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

Method of arriving at verdict.—Where ten of the jurors desired to award plaintiff \$15,000, the full amount claimed, and the jurors found the average of the amount each desired to give to be \$12,638; and rendered verdict for \$12,650, the facts indicated a disregard of the rights of defendant warranting the reduction of the verdict. *San Antonio Traction Co. v. Crisp* (Civ. App.) 162 S. W. 422.

In a personal injury action by one whose hurts reduced him practically to invalidism, it did not show misconduct on the part of the jurors that some of them deemed him to be entitled to more than the \$25,000 prayed for in the petition; and an allowance of \$18,000, based on a compromise of the various opinions of the jurors, was not the result of misconduct. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

A verdict in which part of the jurors found the defendant negligent in one particular and the rest in another, is contrary to this article. *Trinity & B. V. Ry. Co. v. Geary* (Sup.) 172 S. W. 545, reversing judgment (Civ. App.) 169 S. W. 201.

A verdict held a quotient verdict and set aside on that ground.—*Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 173 S. W. 522.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2021, a verdict will not be set aside on the ground that it was determined by lot in the absence of an agreement beforehand to abide by the result. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

A verdict, allowing damages in an amount ascertained by adding the amounts placed by the jurors on slips of paper and dividing the sum by 12, is invalid. *Hovey v. Weaver* (Civ. App.) 175 S. W. 1089.

## CHAPTER THIRTEEN

COMPENSATION OF JURORS OF THE DISTRICT AND  
COUNTY COURTS IN CIVIL CASES**Article 5218. [3232] Pay of jurors.**

Pay during adjournment.—Under this article and art. 5169, where the court on Monday adjourns jurors to the following Wednesday in that term, they are not entitled to pay for Tuesday. *Haber v. McClain* (Civ. App.) 186 S. W. 871.

## TITLE 76

## JUVENILES

Chap.

1. State juvenile training school.
2. Girls' training school.

Chap.

3. State training school for negro boys.

## CHAPTER ONE

## THE STATE JUVENILE TRAINING SCHOOL

Art.

5221. Name of institution; board of trustees; tenure; qualifications; compensation; approval of accounts.

Art.

5228. Who to be confined; discharge of inmates.

**Article 5221. [2941] Name of institution; board of trustees; tenure; qualifications; compensation; approval of accounts.**

*Note.*—Act March 22, 1915, makes an appropriation for remodeling the building formerly used as a dormitory for negroes so that same may be used for dormitory and housing purposes.

*Effect of change of name.*—The change of the name of the "State Institution for the Training of Juveniles" to the "State Juvenile Training School," made by Acts 33d Leg. (1st Called Sess.) ch. 6, held not to warrant the discharge of a delinquent child. *Ex parte Bartee*, 76 Cr. R. 285, 174 S. W. 1051.

**Art. 5228. [2948] Who to be confined; discharge of inmates.**

*Necessity of indictment.*—Under this article as amended by Acts 33d Leg. ch. 112, and 1st Called Sess. ch. 6, § 8, a child can be proceeded against as a delinquent without the filing of an indictment against him. *Ex parte Bartee*, 76 Cr. R. 285, 174 S. W. 1051.

## CHAPTER TWO

## GIRLS' TRAINING SCHOOL

**Article 5234i. Appropriation, not accessible until subscriptions from counties and cities, etc.; committee to secure funds, etc.**

*Note.*—Act June 4, 1915, first called session, 34th Legislature, ch. 26, page 54, extends the time for expenditure of the appropriation made by this section to Jan. 1, 1917.



## CHAPTER THREE

## STATE TRAINING SCHOOL FOR NEGRO BOYS

Art. 5234½. School established; management and control; rules and regulations.	Art. 5234½a. Transfer of inmates to new school. 5234½b. Land and buildings to be provided by board of prison commissioners.
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**Article 5234½.** **School established; management and control; rules and regulations.**—There shall be established and maintained at the Ferguson State Farm in Madison County, a school for the education and training of delinquent negro boys, to be named and known as the State Training School for Negro Boys, the government of which shall be vested in the Board of Prison Commissioners, of this State. The said Board of Prison Commissioners shall manage and control said institution in accordance with the law, rules and regulations now governing the State Training School for Boys, located in Coryell County, Texas, so far as said law, rules and regulations are applicable, and practicable. Said Board of Prison Commissioners shall have the same powers as are now conferred upon the Board of Trustees of the State Juvenile Training School and the State Training School for Boys, in the management of the institution, known as the State Training School for Negro Boys. [Act Sept. 25, 1917, ch. 7, § 1.]

**Art. 5234½a.** **Transfer of inmates to new school.**—All negro boys that are now confined in the State Training School for Boys, located in Coryell County, Texas shall as soon as this law be passed and take effect and not later than January, 1, 1918, be transferred to the Ferguson State Farm in Madison County, by the said Board of Prison Commissioners, and the Board of Trustees of the said State Juvenile Training School for Boys, are hereby authorized and are required to deliver to said Board of Prison Commissioners all negro boys now confined in said institution, in order that they may be transferred to the Ferguson State Farm. [Id., § 2.]

**Art. 5234½b.** **Land and buildings to be provided by Board of Prison Commissioners.**—The Board of Prison Commissioners shall set apart for the use of the State Training School for Negro Boys, all necessary grounds, lands, equipments, buildings, etc., now under the supervision of said Board of Prison Commissioners at the Ferguson State Farm, which shall be used for the State Training School for Negro Boys, provided that the unexpended balance of the public free school fund apportioned to said Colored Juveniles at Gatesville in Coryell County, be transferred for their credit to Madison County. [Id., § 4.]

**Note.**—Sec. 5 repeals all laws in conflict and repeals the appropriation of \$50,000 made at the 1st called session of the 35th Legislature, page 93, for land. Sec. 6 makes an appropriation of \$25,000 to make transfer provided for by this act.

## TITLE 77

## LABOR

Chap.

1. Bureau of labor statistics.
2. Hours of labor of females.
4. Hours of labor upon public works.
5. Workmen's compensation law.

Chap.

6. Private employment agencies.
7. Payment of wages.
8. Emigrant agents.

## CHAPTER ONE

## BUREAU OF LABOR STATISTICS

**Article 5243. Salary and compensation of commissioner and employés.**

**Note.**—Art. 7085b, post, fixes the salary of the "Commissioner of Labor" at \$2,400, and that of the inspectors in the bureau at \$1,800.

## CHAPTER THREE

## HOURS OF LABOR OF FEMALES

Art.

- 5246a. Hours of labor in certain employments; emergencies; stenographers and pharmacists excepted.
- 5246b. Laundries.
- 5246bb. Cotton and woolen factories.

Art.

- 5246c. Seats to be provided.
- 5246cc. Partial invalidity.
- 5246ccc. Repeal.
- 5246d. [Repealed.]

**Article 5246a. Hours of labor in certain employments; emergencies; stenographers and pharmacists excepted.**—No female shall be employed in any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph, telephone or other office, express or transportation company, or any State institution, or any other establishment, institution or enterprise where females are employed, except as hereinafter provided, for more than nine hours in any one calendar day, nor more than fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergencies, such as great public calamities, or where it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time not less than double time shall be paid such female with the consent of the said female; provided, this Act shall not apply to stenographers and pharmacists. [Acts 1913, p. 421, § 1; Act March 15, 1915, ch. 56, § 1.]

Took effect 90 days after Legislature adjourned on March 20, 1915.

**Art. 5246b. Laundries.**—No female shall be employed in any laundry for more than fifty-four hours in one calendar week; the hours of such employment to be so arranged as to permit the employment of such female at any time so that she shall not work more than a maximum of eleven hours during the twenty-four hours' period of one day; provided that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such

time as she is employed for more than nine hours per day. [Acts 1913, p. 421, § 1a; Act March 15, 1915, ch. 56, § 1a.]

**Art. 5246bb. Cotton and woolen factories.**—No female shall be employed in any factory engaged in the manufacture of cotton, woolen or worsted goods or articles of merchandise manufactured out of cotton goods for more than ten hours in any one calendar day, nor for more than sixty hours in any one calendar week.

Provided, that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such time as she may be employed for more than nine hours per day. [Act March 15, 1915, ch. 56, § 1b.]

**Art. 5246c. Seats to be provided.**—Every employer owning or operating any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph or telephone or other office, express or transportation company, the superintendent of any State institution or any other establishment, institution or enterprise where females are employed, as provided by Sections 1, 1a and 1b [Arts. 5246a, 5246b, 5246bb], shall provide and furnish suitable seats, to be used by such employes when not engaged in the active duties of their employment, and shall give notice to all such female employes by posting in a conspicuous place, on the premises of such employment in letters not less than one inch in height, that all such female employes will be permitted to use such seats when not so engaged. [Acts 1913, p. 421, § 2; Act March 15, 1915, ch. 56, § 2.]

**Note.**—Sec. 3 makes it a misdemeanor to violate the provisions of the act, and is set forth in Vernon's Pen. Code 1916 as art. 1451l.

**Art. 5246cc. Partial invalidity.**—If any section or provision of this Act is for any reason held or declared to be unconstitutional it shall not affect nor impair nor render invalid the rest of this Act, and changing other sections to conform thereto. [Act March 15, 1915, ch. 56, § 4.]

**Art. 5246ccc. Repeal.**—All laws or parts of laws in conflict herewith, and especially Senate Bill No. 30, entitled "An Act limiting the hours of labor for females, etc., of the Acts of the Thirty-third Legislature, approved April 16, 1913," are hereby repealed. [Id., § 5.]

**Art. 5246d.**

Repealed and carried into new act set forth above as Art. 5246a.

## CHAPTER FOUR

### HOURS OF LABOR UPON PUBLIC WORKS

**Art.**

5246e. Eight hour day.

5246f. Contracts deemed on basis of eight

**Art.**

hour day; laborers employed by contractors; emergencies, etc.

**Article 5246e. Eight hour day.**

**Constitutionality.**—Incidental abridging of freedom of contract by this act, held not to invalidate it. *Bradford v. State* (Cr. App.) 180 S. W. 702.

Const. art. 3, § 35, as to subject and title of acts held not contravened by this act, because of the title not in terms mentioning contractors. *Id.*

**Offenses.**—See Pen. Code art. 1451c and notes.

**Art. 5246f. Contracts deemed on basis of eight hour day; laborers employed by contractors; emergencies, etc.**

**Validity.**—This article held not void for uncertainty or indefiniteness, because of the generality of the emergencies, made exceptions to the limiting of a day's labor on public works to eight hours a day. *Bradford v. State* (Cr. App.) 180 S. W. 702.

## CHAPTER FIVE

## WORKMEN'S COMPENSATION LAW

## Articles 5246h—5246zzzz.

Amended. See arts. 5246—1 to 5246—91, post.

## PART I

- |                 |   |                  |  |
|-----------------|---|------------------|--|
| Art.<br>5246—1. | Actions for personal injuries or resulting death; defenses excluded.  | Art.<br>5246—18. | Compensation for total incapacity.   |
| 5246—2.         | Inapplicable to certain classes of employes.  | 5246—19.         | Compensation for partial incapacity.   |
| 5246—3.         | No right of action against subscribing employer; compensation from Texas Employers' Insurance Association.        | 5246—20.         | What constitutes total incapacity; burden of proof.  |
| 5246—4.         | Notice by employe of election to assert common law liability; subsequent waiver; common law action preserved.     | 5246—21.         | Compensation for specified injuries.   |
| 5246—5.         | Employes waiving common law rights to recover compensation.   | 5246—22.         | Refusal of employe to accept proffered employment suited to his physical condition.  |
| 5246—6.         | Employes, etc., of nonsubscribing employer may sue at common law; may not participate in benefits of association. | 5246—23.         | Claims for hernia; surgical operation; refusal of employe to submit to; examination; compensation in case of successful operation, and in case of resulting death. |
| 5246—7.         | Recovery of exemplary damages in certain cases not excluded; award not to be pleaded or introduced in evidence.   | 5246—24.         | Compensation for subsequent injury.  |
| 5246—8.         | No compensation for incapacity not extending beyond one week; medical aid.  | 5246—25.         | Change in compensation awarded during incapacity; review.  |
| 5246—9.         | Medical and hospital aid during first two weeks; notice of injury; additional hospital services.                  | 5246—26.         | Demand for surgical operation by employe or the association; examination and report; refusal to submit to operation.   |
| 5246—10.        | Board may order change of physician or of treatment.  | 5246—27.         | Contracts with physician to be in writing and filed with board; where not filed employe may procure medical aid.   |
| 5246—11.        | Board may regulate medical and hospital fees and charges; payment.  | 5246—28.         | Contributions from employes prohibited; effect of violation.   |
| 5246—12.        | Attorney's fees subject to approval of board; amount of fees; expenses; payment; lien.                            | 5246—29.         | Contracts to indemnify subscriber void; insurance similar to that provided herein prohibited.  |
| 5246—13.        | Contract of attorneys with beneficiaries where case is carried into courts; amount of fee; allowance by court.    | 5246—30.         | Mode of estimating weekly wage of minors; hazardous employments.   |
| 5246—14.        | Compensation where death results.   | 5246—31.         | Guardian or next friend of minor or incompetent; payments direct to minor.   |
| 5246—15.        | Beneficiaries in case of death; exempt from execution; mode of distribution; to whom paid; how paid.              | 5246—32.         | No waiver of rights.   |
| 5246—16.        | Deduction from death benefit of amount paid for incapacity.   | 5246—33.         | Lump sum for death or total permanent incapacity.  |
| 5246—17.        | Where there are no beneficiaries association shall pay expenses of last sickness and funeral expenses.            | 5246—34.         | Increasing amount of weekly installments.  |
|                 |   | 5246—35.         | Causes of action for death survive.  |
|                 |   | 5246—36.         | Aliens entitled to compensation; consular officers may represent claimants; commutation.   |
|                 |   | 5246—37.         | Failure of association to make payments; forfeiture of right to do business.   |
|                 |   | 5246—38.         | Injury to employe outside the state.   |

**Art. 5246—1 [5246h] Actions for personal injuries or resulting death; defenses excluded.**—In an action to recover damages for personal injuries sustained by an employe in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employe was guilty of contributory negligence.
2. That the injury was caused by the negligence of a fellow employe.

3. That the employé had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employé to bring about the injury, or was so caused while the employé was in a state of intoxication.

4. Provided, however, that in all such actions against an employer who is not a subscriber, as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment. [Acts 1913, p. 429, pt. 1, § 1; Act March 28, 1917, ch. 103, pt. 1, § 1.]

**Explanatory.**—The title of the act purports to amend chapter 179 of the general laws of the State of Texas passed at the regular session of the 33rd Legislature, entitled "An Act relating to employers' liability and providing for the compensation of certain employés," etc. The enacting part recites the same, except that it does not state the session of the Legislature at which the former act was passed. Became a law March 28, 1917.

#### I. DUTIES AND LIABILITIES OF MASTER IN GENERAL

3. **Relation of parties.**—Plaintiff's evidence that he was employed by defendant, corroborated by evidence of another witness and his brother, held sufficient to establish the relation of master and servant. *Peden Iron & Steel Co. v. Jaimes* (Civ. App.) 162 S. W. 965.

A charitable hospital which administers to the sick of all nations and creeds, accepting pay if the patients are able to pay, but otherwise rendering the service gratuitously, is liable for damages to an employé for personal injuries sustained through its negligence, and its property is not exempt from execution to enforce the payment of such demand. *Hotel Dieu v. Armendariz* (Civ. App.) 167 S. W. 181.

In action by workman sent by employer to repair defendants' boiler, evidence held to support jury's finding that plaintiff remained subject to direction and control of employer. *Fink v. Brown* (Civ. App.) 183 S. W. 46.

Servant sent by master to work for third person is, for time being, servant of him who exercises direction and control. *Id.*

4. — **Independent contractors.**—The test of whether one is an independent contractor or merely a servant or agent of the general contractors is not whether they actually exercised control over the manner in which, or the means by which, the work was to be done, but whether they had the right to do so. *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159.

8. **Cause of injury.**—Evidence held to sustain a finding that servant unloading a car was injured by timbers from car falling upon him. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

In servant's action for injuries from blow from pulley detached by tightening of belt around line shaft, alleged to have been due to negligent use of wedge to tighten pulley on line shaft, evidence held to show the wedge caused belt to wind on line shaft, and that it would not have so caught but for wedge. *Rhame Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

In servant's action for injuries from blow from pulley detached by tightening of belt around line shaft, alleged to have been due to negligent use of wedge to tighten pulley on line shaft, evidence held to show defendant's negligence was proximate cause of plaintiff's injury. *Id.*

Evidence, in an employé's action for injuries while using a pinch bar to remove flooring, held to show that plaintiff's fall was due to the giving way of a piece of timber on which he stood, and not to any defect in the pinch bar. *Hattaway v. Planters' Cotton Oil Co.* (Civ. App.) 194 S. W. 1119.

9. **Accidental or improbable injury—Duty to anticipate consequences.**—A master who required his servant to labor in a manhole filled with combustible gas is liable for injuries from an explosion from a spark emitted from the concrete walls of the manhole when struck with a metal bucket, though the precise injury could not have been foreseen. *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137.

An injury to an employé engaged in removing and loading on cars rails of a railroad track, by being struck by a rail, held such as should have been anticipated by the employer. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

Where plaintiff, while seated by an open hatch, lost consciousness and fell into the hold, defendant was not negligent in failing to anticipate such happening. *Gulf Refining Co. v. Simms* (Civ. App.) 168 S. W. 379.

An employé injured by explosion held not entitled to recover because the accident was not one which the vice principal could have contemplated. *Sherrill v. American Well & Prospecting Co.* (Civ. App.) 176 S. W. 658.

Facts tending to show negligence on the part of the master in creating conditions alleged to have caused the injuries are not negated by the fact that an explosion of fireworks in process of manufacture was unusual or extraordinary. *Texas Fireworks Co. v. Gunn* (Civ. App.) 189 S. W. 528.

Whether employé of lumber company snaking logs with mules was negligent in taking short cut from prepared path did not depend on whether he could or would have reasonably foreseen injury to plaintiff, but on whether he should have anticipated that some injury might occur. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

Where an employé is engaged in a dangerous service, it is the master's duty to use all reasonable and necessary means to protect him against any danger which might reasonably be expected to arise from extraneous causes, and the greater the peril the greater the degree of care exacted. *Rule Cotton Oil Co. v. Russell* (Civ. App.) 191 S. W. 802.

11. **Contracts limiting or releasing liability.**—Where an injured lineman was incapable of knowing and appreciating the effect of the release, he was not competent to authorize his brother to execute it for him. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

## II. APPLIANCES AND PLACES FOR WORK

12. **Nature of master's duty and liability and care required in general.**—It is the duty of the master to use ordinary care to provide a safe place for work and safe appliances. *Sherman Oil Mill v. Neff* (Civ. App.) 159 S. W. 137; *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83; *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189; *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389; *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

In using a dangerous object, such as dynamite, a master is bound in the exercise of reasonable care to use greater watchfulness and caution in proportion to the danger. *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441.

It is the duty of an employer, not only to use ordinary care to furnish a reasonably safe place for his employé in which to work, but to use reasonable care to maintain the place of work in such condition. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

The right of an employer to conduct his own business in his own way is limited by his duty to exercise reasonable care to furnish reasonably safe appliances and place in which to work. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

Failure of a master to furnish a servant a reasonably safe place to work rendered the master liable for injury proximately caused thereby. *Houston Lighting & Power Co., 1905, v. Conley* (Civ. App.) 171 S. W. 561.

The ordinary care which a master must exercise to provide his servant with a safe place to work is that degree of care which a person of ordinary prudence would exercise in the same circumstances. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

There is no negligence in the fact that the master employed explosives in the manufacture of fireworks, but he is not thereby discharged from using reasonable care which demands increased watchfulness because of the dangerous nature of the instrumentality employed. *Texas Fireworks Co. v. Gunn* (Civ. App.) 189 S. W. 528.

13. **Delegation of duty.**—Where a master causes a scaffold to be built under his direction, he must exercise ordinary care to see that it is reasonably safe, but he need not supervise the building, where it is erected by the servants without any directions, though he is bound to use ordinary care to furnish suitable material when he directs what material shall be used. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

The employer's duty to stack sacks of meal, so as to render it safe to work about them, is nondelegable, and he is liable for negligent stacking, by which an employé is injured. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

It is the nondelegable duty of the master to exercise ordinary care to provide the servant with a reasonably safe working place. *Houston Car Wheel & Machine Co. v. Murray* (Civ. App.) 181 S. W. 241.

15. **Custom and usage.**—The fact that defendant and other employers had habitually used a certain kind of appliance does not of itself show that they were not negligent in doing so; the question being whether defendant exercised ordinary care in using that particular appliance. *French v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 162 S. W. 406.

16. **Appliances or places owned, controlled or provided by third persons.**—Where a master hired a team from a third party and placed a servant in charge as driver, it was the master's duty to exercise ordinary care to furnish a reasonably safe doubletree, as though it were his own property. *Stone & Webster Engineering Corporation v. Goodman* (Civ. App.) 167 S. W. 10.

That a railroad station regularly used by an express company in its business was owned by the railroad does not relieve the express company from its duty to keep the station reasonably safe for its employés to work in. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

17. **Defects in tools, appliances and places for work in general.**—Where a master furnished a servant wrenches free of defects and reasonably safe for use, and the servant, instead of using one of them, chose and used a defective wrench, the master discharged his duty. *Pruitt v. Frost-Johnson Lumber Co. of Texas* (Civ. App.) 161 S. W. 421.

A master is not required to furnish the newest or safest appliances. *French v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 162 S. W. 406.

Evidence held to show employer's failure to furnish a reasonably safe place to work. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

In an action for injuries to an express company employé, evidence held to warrant finding of negligence which rendered the place of work unsafe. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

Verdict finding that a furnace in which a servant worked was dangerous held sustained. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

In action for personal injury to stationary engine fireman who slipped in a puddle of oil and fell against the driving rod of an engine, evidence held to sustain a finding that defendant was negligent in allowing the puddle to be and remain upon the floor. *Eureka Ice Co. v. Buckloo* (Civ. App.) 188 S. W. 510.

In servant's action for injury from slipping in a puddle of oil and falling against driving rod of an engine, preponderance of evidence held not against the finding that building near the engine was not properly and sufficiently lighted. *Id.*

If master was negligent in failing to replace stays on a car of lumber before directing servant to unload car, it failed to use ordinary care required to provide a safe place for performance of the work. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

**18. Temporary appliances, structures or dangers, and places or operations inherently dangerous.**—No matter how temporary an employment is, it is the duty of the master to furnish his servant with a safe place to work. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

The rule requiring a master to furnish a safe place, does not apply to cases where the work is constantly changing, requiring renewal of precautions to prevent danger. *Horton & Horton v. Hartley* (Civ. App.) 170 S. W. 1046.

Mere temporary dangers created by fellow employes, due to no fault of plan or construction, are not within the rule imposing on an employer the duty to provide a safe place to work. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

Where a working place is made unsafe by the material therein or the construction thereof, an employer who negligently permits it to remain so is liable for injuries to an employé. *Id.*

The master's absolute obligation to see that due care is used to provide safe appliances for his servants is not extended to all the passing risks arising from short-lived causes. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

The master is not liable for failure to provide a safe place to work when such failure results from a risk of operation, but that liability attaches only on failure properly to construct or provide a safe place to work. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389.

While the master is not liable for failure to provide a reasonably safe place for his servants to work where the very progress of the work renders it impossible to supply a safe place, he must exercise ordinary care, since the servant working in such a place does not assume the risk of the master's negligence. *Id.*

Rule requiring master to exercise ordinary care to furnish servant with a reasonably safe place to work held not to apply to car inspector whose work required him to go on cars in unsafe and dangerous condition to discover and remedy such defects. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

**19. Defective or dangerous machinery.**—Where plaintiff's husband was killed in the course of his duties on a merry-go-round, negligence of employer held not to be predicated upon its failure to equip with a spring a switch constantly operated by deceased. *Hutcherson v. Amarillo St. Ry. Co.* (Civ. App.) 176 S. W. 856.

Where plaintiff's husband was killed while in the scope of his employment on defendant's merry-go-round, negligence held not to be predicated upon failure of the employer to furnish certain lock nuts, etc., to steady the machine. *Id.*

Evidence held not sufficient to show actionable negligence in the construction of the finger board of the derrick, or that the construction was the proximate cause of the accident. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

In action for injury to foreman of construction company from fall of hoisting elevator, evidence held to support finding of defendant's negligence. *Burrell Engineering & Construction Co. v. Grisier* (Civ. App.) 189 S. W. 102.

**20. Buildings.**—Employer of servant, injured when he passed through hole in floor, held not liable for resultant fall and injuries. *King v. Dawson* (Civ. App.) 192 S. W. 271.

**22. Scaffolds, ladders and supports.**—In an action by a carpenter injured by the fall of a scaffold upon which he was working, evidence held sufficient to sustain a finding that defendants failed to furnish proper material for the scaffold. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

**22½. Elevators.**—Evidence in an action for the death of a servant killed by a piece of iron falling in an elevator shaft at the bottom of which he was working, where there was not evidence as to how or why it fell, held sufficient to sustain a verdict for plaintiff, within the rule *res ipsa loquitur*. *Selden-Breck Const. Co. v. Kelley* (Civ. App.) 168 S. W. 985.

In an action for death from falling down an elevator shaft, evidence held insufficient to show that the accident was caused by any negligence of defendant. *Bock v. Fellman Dry Goods Co.* (Civ. App.) 173 S. W. 582.

In an action for death of a servant found with his skull crushed on the master's descending elevator, which he had been repairing, evidence held insufficient to establish negligence of the master as the producing cause of the death. *Canode v. Sewell* (Civ. App.) 182 S. W. 421.

**23. Mines and other excavations.**—In an action for injuries to an employé by the fall of the cage in a mine, evidence held to support a finding that the engine controlling the cage was defective, and that the employer was negligent in permitting it to so remain. *Texas & Pacific Coal Co. v. Choate* (Civ. App.) 159 S. W. 1058.

In an action for death of a foreman of a sewer gang by being caught in a cave-in while he was endeavoring to brace the sides of the trench, evidence held insufficient to establish actionable negligence. *Horton & Horton v. Hartley* (Civ. App.) 170 S. W. 1046.

Coal miner, injured by a falling roof while shoveling loose coal into a car, at which he had been engaged all day, a work which did not progressively change his environment, could hold the mining company for its failure to furnish a safe place to work. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

In a coal miner's action for injuries, evidence held sufficient to show that the roof of his room might have been made safe by ordinary care. *Id.*

A coal mining company is not an insurer of the safety of its employes, and need not render the roofs of rooms absolutely safe for the protection of those working therein. *Id.*

**23½. Explosives.**—Evidence held sufficient to show the negligence of the master in permitting dynamite to be carried around already capped and primed and in an open box was the proximate cause of an accident. *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441.

Evidence, in a servant's action for injury from an explosion in the master's cement plant, held to support a finding of negligence in failing to furnish a safe place to work. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 181 S. W. 221.

**26. Covering or guarding dangerous machinery or places.**—Where defendant lumber company maintained a platform some 18 feet high, and plaintiff was knocked from the platform and injured while at work thereon, defendant was negligent in failing to provide the platform with a guard rail. *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 546.

**28. Inspection and test.**—Where a master required his servants to work in manholes, the fact that they were filled with combustible gas, the source of which the master did not know, will not free him from liability for injuries from an explosion, it being his duty to inspect. *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137.

**29. Knowledge by master of defect or danger.**—An employer using dynamite in loosening stone on which an employe is working is chargeable with knowledge that loose stone may fall on the employe, and is liable for failing to remove it. *Paul Stone Co. v. Saucedo* (Civ. App.) 171 S. W. 1038.

An employer is not liable for a mere temporary unsafe condition of place of work of which he has no notice or of which exercise of ordinary diligence would not inform him. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

**31. Improper or unusual use or test.**—If a door had fallen on a servant while being put to its normal use, or had fallen of its own weight and injured the servant, the latter would have had a cause of action against his employer, but not when it fell from a use for which it was not intended. *King v. Dawson* (Civ. App.) 192 S. W. 271.

**32. Proximate cause of injury.**—Where the evidence in an action for personal injuries was sufficient to show that the cause of the accident was an explosion due to a defect in a steam pipe, the plaintiff need not show the precise character of the defect to be entitled to recover. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Evidence held to warrant a finding that the explosion which injured plaintiff was caused by the striking of a metal bucket on the concrete walls or the bottom of the manhole in which he was required to work. *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137.

In an action for injuries to a servant while bunching logs with defective tongs, the movement of a pole by which he was struck as the log was moved, and not the defects in the tongs, held the proximate cause of the accident. *Jones v. Walker County Lumber Co.* (Civ. App.) 162 S. W. 420.

Where plaintiff, while at work on a barge, seated himself during the noon hour by an open hatch, and losing consciousness fell into the hold, defendant's negligence in permitting the hatch to remain open or in failing to erect a barrier around it held not the proximate cause of the injury. *Gulf Refining Co. v. Simms* (Civ. App.) 168 S. W. 379.

Where a master furnished defective lumber for a building of a scaffold, it cannot escape liability for injuries to a servant upon the fall of the scaffold because the use of the scaffold had weakened it, unless the weakened condition of the scaffold was due solely to use. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Negligence of the master in permitting existence of a set screw which caught in the servant's clothing held the proximate cause of the injury. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

Where an employe of a lumber company was injured by being knocked from a high platform not equipped with a guard rail, defendant's negligence in failing to provide such rail was the proximate cause of plaintiff's injury. *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 546.

A master is not liable for injuries caused by a defective appliance, where the defect was caused solely by the act of the employe or others. *Southwestern Telegraph & Telephone Co. v. Sanders* (Sup.) 173 S. W. 865, affirming judgment (Civ. App.) 138 S. W. 1181.

Negligence in failing to repair a leaky gutter held the proximate cause of the injury to a servant who slipped on ice formed thereby during a sudden cold snap. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

In an action by a widow for death of her husband, killed on a merry-go-round in the course of his employment, evidence held insufficient to show that the failure of the employer to supply a certain safety device was the proximate cause of the accident. *Hutcherson v. Amarillo St. Ry. Co.* (Civ. App.) 176 S. W. 856.

Evidence in servant's action for injury from falling from ladder on side of oil derrick,



held to sustain jury's finding that defendant's negligence in affixing a step to the ladder and in allowing it to remain loose and unsafe, was the proximate cause of plaintiff's injury. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

In a carpenter's action for injuries while operating a mechanical saw, evidence held insufficient to prove that the rough table top caused or contributed to cause the injury. *Worden v. Kroeger* (Civ. App.) 184 S. W. 583.

### III. METHODS OF WORK, RULES AND ORDERS

33. **Methods of work and duty to protect servant in general.**—In an action for injuries to an employé struck by steel rods thrown from a car, it was immaterial whether the superintendent gave the order to change the manner of unloading the steel rods, where he was negligent because remaining silent when he saw men preparing to throw steel rods on the side where he had ordered the employé to go. *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810.

In an action for injuries to an employé struck by a rod of steel thrown from a car, evidence held to show negligence of the employer's superintendent. *Id.*

Evidence held not to show master's negligence as to method of work. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

Evidence in servant's action for injury from blowing of newly installed whistle, frightening mules, which started and threw him from wagon, held to sustain findings of master's negligence, proximately causing injury. *Pierce-Fordyce Oil Ass'n v. Farrow* (Civ. App.) 173 S. W. 1607.

In a servant's action evidence held to warrant a finding that the engineer, who started the machine which caused the injury, was negligent. *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

Evidence held to sustain finding of negligence of the foreman in manufacture of fireworks. *Texas Fireworks Co. v. Gunn* (Civ. App.) 189 S. W. 528.

Where plaintiff was employed to unload freight cars, it was the employer's duty to use all reasonable precautions to keep other cars from rolling down a grade siding and colliding with the car in which plaintiff worked. *Rule Cotton Oil Co. v. Russell* (Civ. App.) 191 S. W. 802.

In an action for injury to employé resulting from employer's negligence in not setting brakes on freight cars and coupling them together, evidence held sufficient to sustain a verdict for plaintiff. *Id.*

In servant's action for injuries from blow from pulley detached by tightening of belt around line shaft, alleged to have been due to negligent use of wedge to tighten pulley on line shaft, evidence held to show defendant's negligence. *Rhame Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

In an employé's action for injuries by the fall of a stack of kegs which he was handling, evidence held insufficient to show negligence of the employer in stacking the kegs. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 194 S. W. 989.

33½. **Customary methods.**—Whether a master has provided a safe plan of work cannot be conclusively determined by proof that other persons engaged in the same business have adopted the same method. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

Evidence that no person had ever adopted a different method of demolishing a wall than that used by defendant when plaintiff was injured held not to show that defendant used ordinary care to adopt a safe method. *Id.*

35. **Knowledge of danger.**—Where the employer's vice president and the general foreman frequently passed through a room when stacking sacks of meal was being negligently done, the employer was chargeable with notice of the danger. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

36. **Rules—Reasonableness and sufficiency.**—A master is not bound to adopt the best possible method of doing his work, but, where a formal rule or plan is necessary at all, need only exercise due care to adopt and promulgate reasonably safe rules for doing work. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

### IV. WARNING AND INSTRUCTING SERVANTS.

39. **Duty to warn and instruct in general.**—Where the building was reasonably safe for foundry purposes, the master is not bound to warn plaintiff, who was wiring it in his own way, of the moving of a crane, when plaintiff clutched the track on which ran the crane, when his ladder was shaken, receiving injuries. *Houston Car Wheel & Machine Co. v. Murray* (Civ. App.) 181 S. W. 241.

40. **Delegation of duty.**—The duty to warn and instruct the servant cannot be delegated by the master. *Hotel Dieu v. Armendariz* (Civ. App.) 167 S. W. 181.

41. **Inexperienced or youthful employé.**—It is the primary obligation of an employer to instruct a minor employé as to the dangers of the employment; but, if the minor has when employed or subsequently acquires knowledge and appreciation of the danger, the employer is relieved of liability for his failure to instruct. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

It is the master's duty to warn a minor servant of the danger in approaching machinery about which he had not been in the line of his employment. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

When an inexperienced servant is required to perform a duty with machinery to which

he is not accustomed, it is the duty of the master to warn him of the dangers. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

Where the servant is inexperienced and ignorant of the dangers of the service, it is the duty of the master to warn him. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

A minor who for two years had been employed about a merry-go-round, when ordered to close the doors after the lights were out, held not entitled to be warned not to stumble upon stobs driven into ground between doors. *Dallas Fair Park Amusement Ass'n v. Barrentine* (Civ. App.) 187 S. W. 710.

**42. Dangers known to employé.**—If a minor knows and appreciates the dangers of his employment, the law does not require the master to warn him in relation thereto. *Dallas Fair Park Amusement Ass'n v. Barrentine* (Civ. App.) 187 S. W. 710.

**45. Sufficiency and effect of warnings or instructions.**—Where defendant employed a boy under 14 to act as a clean up boy in a woodworking factory, defendant owed a non-delegable duty to warn him of the dangers of the machinery, which was not performed by mere statements of two other youthful employés, that the rip saw by which plaintiff was injured was dangerous, and would hurt him if he fooled with it. *Stirling v. Bettis Mfg. Co.* (Civ. App.) 159 S. W. 915.

The duty of a master to instruct a minor of the dangers of the task assigned him, assisting in the operation of a gin, comprehends more than the incidental warning to the minor by a customer of the master that it was dangerous to place his hands in the gin stand. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

Where a master owes a servant a nondelegable duty to warn him of a danger, the warning must be reasonably adequate under the circumstances. *Houston Car Wheel & Machine Co. v. Murray* (Civ. App.) 181 S. W. 241.

**46. Proximate cause of injury.**—If a minor servant understands the risk and appreciates the danger, the master's failure to warn is not the proximate cause of his injury. *Dallas Fair Park Amusement Ass'n v. Barrentine* (Civ. App.) 187 S. W. 710.

#### V. NUMBER AND COMPETENCY OF FELLOW EMPLOYÉS

**47. Number required for work.**—In an action for injuries to an employé while assisting in setting an electric light pole, evidence held to support a finding of actionable negligence for the failure of the employer to furnish reasonably safe appliances and a sufficient number of competent employés to do the work. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

In an action for the death of a servant, killed while driving a team which was pulling wire off a reel half a mile away, to string it as feed wire for an electric car, caused by the clevis breaking and doubletree flying back striking him, held that it was the primary duty of the master to distribute a sufficient number of men along the line to transmit signals. *Stone & Webster Engineering Corporation v. Goodman* (Civ. App.) 167 S. W. 10.

Evidence in a servant's action for injuries caused by lifting, under his foreman's orders, a crank pin too heavy to be lifted, held sufficient to show knowledge of the employer that two men could not lift the pin, and therefore to show lack of ordinary care in ordering two men to lift it. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 181 S. W. 238.

**48. Competency.**—A master owes to a servant the duty of exercising ordinary care to employ reasonably competent fellow servants, and for failure to perform such duty, whereby a servant, without fault on his part, is injured by the negligence of an incompetent fellow servant, is liable. *Lutcher & Moore Lumber Co. v. Smith* (Civ. App.) 178 S. W. 656.

In a servant's action, evidence held to warrant recovery on the ground that the master was negligent in employing and retaining in employment an incompetent engineer whose negligence caused the injury. *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

#### VI. NEGLIGENCE OF FELLOW SERVANTS

**51. Negligence as ground of liability in general.**—A servant injured as an immediate result of the negligence of a fellow servant cannot recover. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

Injuries to a servant caused by a barrel falling from a stack carelessly piled by fellow servants held the result of negligence of the fellow servants, in the absence of a showing that the master knew, or by the utmost diligence could have known, of the danger. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389.

If any injury to employé was caused alone by negligence of fellow servant, employé could not recover. *Armour & Co. v. Morgan* (Sup.) 194 S. W. 942.

In an action by a machinist for personal injuries, plaintiff held not entitled to recover, proximate cause of injury being starting of elevator by plaintiff's helper, a fellow servant. *Sauer v. Palmer Press Brick Works* (Civ. App.) 194 S. W. 988.

**52. Nature of common service in general.**—A clerk whose duty it was to check the freight and direct its placement in the warehouse and to direct the manner in which the trucks should be unloaded, but who had no power to employ or discharge workmen, was a fellow servant of a freight handler injured while unloading a truck. *St. Louis & S. F. R. Co. v. Cox* (Civ. App.) 159 S. W. 1042.

Employé of smelting company, engaged in sweeping off car track, and motorman in charge of ore cars, charged with no duties making him a vice principal, held fellow

servants. Consolidated Kansas City Smelting & Refining Co. v. Lopez (Civ. App.) 166 S. W. 498.

53. **Nature of act of fellow servant and performance of duties of master.**—A servant who selected a location for a spool of wire which was to be unwound represented his master, who is liable for the servant's negligence in such act. Houston Lighting & Power Co., 1905, v. Conley (Civ. App.) 171 S. W. 561.

Evidence, in an action for injuries to a servant, held to support a finding that another servant was guilty of negligence in performing a nondelegable duty of the master. *Id.*

An employé injured by an explosion while men, acting with the permission of a coemployé, were preparing to explode powder not in furtherance of their work, held not entitled to recover from the employer. Sherrill v. American Well & Prospecting Co. (Civ. App.) 176 S. W. 658.

Employer held not liable for negligence of employé in permitting plank to fall, as he was not exercising any power or function of a vice principal if he had any such powers. Waterman Lumber & Supply Co. v. King (Civ. App.) 178 S. W. 790.

A master, furnishing a reasonably safe place to work and reasonably safe appliances, cannot be held liable to a servant whose fellow servant has negligently rendered the place or the appliances unsafe, without the master's fault or knowledge. Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189.

Where an appliance is reasonably safe and its operation necessarily rests upon the care and intelligence of the fellow servants of the person injured, the master will not be held liable for an injury from the manner in which the appliance is operated by a fellow servant. *Id.*

A master who delegates the performance of his duty to provide a servant with a safe place to work, so that another servant is injured as a result of negligence in the performance of that duty, cannot at common law invoke the fellow-servant rule to escape liability. *Id.*

The duty resting upon a coal mining company to furnish a miner a reasonably safe place to work was nondelegable, and the negligence of a fellow servant, whose duty it was to timber the roof for the miner's protection, was the company's negligence. Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202.

Although the master's duty to furnish a safe place to work is nondelegable, he is not liable to an injured servant when the place of work is made temporarily dangerous by the act of a fellow servant. San Antonio Brewing Ass'n v. Sievert (Civ. App.) 182 S. W. 389.

54. **Vice principals.**—That an employé had the power to hire and discharge employes, essential to make him a vice principal, may be inferred from evidence that he repeatedly exercised such authority with the knowledge and acquiescence of the employer or his representative. Kirby Lumber Co. v. Williams (Civ. App.) 159 S. W. 309.

One to be a "vice principal" must possess authority not only to superintend, control, and command employes, but also to hire and discharge them. *Id.*

Evidence held to support a finding that an employé guilty of negligence causing injury to a coemployé was a vice principal of the coemployé so as to make the employer liable. *Id.*

To make a servant a vice principal, it is only necessary that he have authority to direct and supervise the work and to hire and discharge subordinate servants engaged in the work. Modern Order of Pratorians v. Nelson (Civ. App.) 162 S. W. 17.

One who had authority to direct and supervise the work of all employes in an office building, as well as the elevators, and to hire and discharge such employes, was a vice principal as to an elevator operator. *Id.*

A foreman in a factory, who had sole charge of the plant and entire management in absence of the general manager, with power to employ and discharge servants, was the "vice principal" of his employer, who was therefore liable for his negligent or wrongful acts causing the death of an employé. Coca-Cola Co. v. Williams (Civ. App.) 164 S. W. 1032.

Where a foreman had been superseded by a superintendent who was a member of the employer firm, the negligence of the superintendent causing injury to the foreman was the negligence of the employer, for which the foreman could recover. Lisle-Dunning Const. Co. v. McCall (Civ. App.) 167 S. W. 810.

One who had no power to either employ or dismiss plaintiff, but who was a kind of general foreman, whom plaintiff generally obeyed, was not a "vice principal." Medlin Milling Co. v. Mims (Civ. App.) 173 S. W. 968.

A servant may serve in the dual capacity of vice principal and fellow servant. Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189.

At common law a master cannot invoke the fellow-servant rule to escape liability for negligence of his servant, who occupies the relation of a vice principal toward an injured servant. *Id.*

Where foreman of a foundry could not hire or discharge plaintiff, who was directed by his own superior to do wiring in the foundry where wanted by the foundry foreman, such foreman was only a fellow servant. Houston Car Wheel & Machine Co. v. Murray (Civ. App.) 181 S. W. 241.

In a servant's action for injury, wherein defendant claimed that at the time of his injury he was a vice principal, verdict for plaintiff held against the weight of the evidence. Winnsboro Cotton Oil Co. v. Carson (Civ. App.) 185 S. W. 1002.

A servant who in addition to his authority to direct and supervise the work of those under him has authority to hire and discharge such subordinate servants becomes a "vice principal." *Id.*

55. — **Nature of act or omission, and performance of duties of master.**—Negligence of a vice principal in giving orders to a servant to do an act in a negligent man-

ner was negligence of the employer. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

That the employer's manager was working as a common laborer in erecting a telephone pole at the time the pole fell and injured an employé likewise working under his direction did not preclude him from being a vice principal as to the injured employé. *Southwestern Telegraph & Telephone Co. v. Coffey* (Civ. App.) 163 S. W. 112.

Where plaintiff and his coemployés worked under the direct orders of the foreman, and the coemployés did what the foreman directed them to do, an injury sustained by plaintiff in consequence thereof was caused by an act of the employer who could not escape liability on the ground that the negligence was that of a fellow servant. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

One directed by defendant's superintendent to hurry certain laborers that they might be moved from one point to another held not thereby made a vice principal, with authority to permit the women of the party to ride in defendant's wagon after the superintendent had ordered them not to do so. *Aguinaga v. Medina Valley Irr. Co.* (Civ. App.) 168 S. W. 78.

Foreman's direction to employés to hurry held not to render employer liable, where injury was not caused by hurrying. *Waterman Lumber & Supply Co. v. King* (Civ. App.) 178 S. W. 790.

Negligence in not putting back part of the floor of tram car, so that plaintiff stepping thereon was injured, held not the act of a vice principal, but of a fellow servant in the performance of an incidental duty, so that plaintiff could not recover. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

**58. Concurrent negligence of master and fellow servant.**—A servant injured by the concurrent negligence of his master and a fellow servant can recover against the master. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

Where an employer's negligence in failing to provide an employé with a safe place to work was the proximate cause of his injury, the employer's liability was not affected by the fact that the employer's negligence combined with the concurrent negligence of a fellow employé. *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 546.

Where an employer's negligence concurred with the negligence of fellow servants in the construction of a stack of sacks of meal, an employé, injured by falling of the stack, could recover. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

In servant's action for injury from negligence of fellow servant, evidence held not to show that master's negligent method of work was a contributing cause of injury. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

If injury to employé was caused by employer's negligence alone, or by its negligence blended with negligence of employé's fellow servant, employé could recover. *Armour & Co. v. Morgan* (Sup.) 194 S. W. 942.

If injury to company's servant was traceable to personal negligence of company in failing to safeguard machinery, negligence of fellow servant was not a defense. *Id.*

Where negligence of employing company was only negligence submitted to jury in action for injuries, it did not prevent employer from having negligence of fellow servant submitted to the jury. *Id.*

## VII. ASSUMPTION OF RISK

**61. Nature and extent in general.**—The doctrine of assumed risk applies to actions for injuries to employés engaged in interstate commerce which were not caused by the violation of federal Employers' Liability Act, § 4, as amended by Act April 22, 1908. *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 160 S. W. 432.

In an action for injuries to a servant, evidence held to sustain a finding that plaintiff did not assume the risk. *Peden Iron & Steel Co. v. Jaimes* (Civ. App.) 162 S. W. 965.

Assumed risk is the voluntary exposure of the servant, without remonstrance, to the ordinary hazards of the particular use of machinery or appliances, claimed by him to be defective or unfit, but of which conditions or dangers he knew, or must necessarily have acquired knowledge in the ordinary pursuit of his duties. *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83; *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

Ordinary and extraordinary risks in the employment of a servant defined. *Houston Lighting & Power Co., 1905, v. Conley* (Civ. App.) 171 S. W. 561.

The defense of assumption of risk implies negligence on the part of the master, and, if there has been no negligence on his part, the defense of assumed risk has no place in the case. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

Evidence held to sustain a finding that servant injured in unloading car of lumber did not assume risk of such injury. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

**63. Dangers incident to nature of work.**—If it was the duty of an employé of a gin company to inspect the machinery and to repair any defects before operating it, he assumed the risk of any defect. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

An electric light company employé whose duty it was to take down and replace unsafe poles held to have assumed the risk in climbing a pole to adjust a wire, whereby he was injured on the pole breaking. *Halbrook v. Orange Ice, Light & Water Co.* (Civ. App.) 181 S. W. 751.

**64. Defective or dangerous tools, appliances and places.**—An experienced engineer held to have assumed risk of injury where base on which engine rested was too high, the space between the base and the wheel pit too narrow, the pit was insufficiently guarded, and the floor was slippery, caused by oil dropped by himself. *Snipes v. Bomar Cotton Oil Co., 106 Tex. 181, 161 S. W. 1.*

In an action for injuries to an employé thrown from an unguarded elevated platform, plaintiff held not to have assumed the risk. *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 546.

The risk of failure to provide a safe place to work is one not ordinarily assumed as incident to servant's employment. *Houston Lighting & Power Co., 1905, v. Conley* (Civ. App.) 171 S. W. 561.

The selection of a safe place for the location of a spool of wire while it was being unreel was not a risk assumed by the servant who assisted in the unreeling. *Id.*

An employé breaking stone at a place fixed by the employer held not to assume the risk of injury by loose rock falling on him. *Paul Stone Co. v. Saucedo* (Civ. App.) 171 S. W. 1038.

Risk of injury from defects in a ladder from the use of nails which were too small, held not assumed. *Alamo Oil & Refining Co. v. Richards* (Civ. App.) 172 S. W. 159.

An employé of a contractor held, in an action for injury by him against the contractor's employer not to have assumed the risk of defendant's putting and leaving the premises in a dangerous condition during the course of the work. *Missouri, K. & T. Ry. Co. of Texas v. Fuels* (Civ. App.) 176 S. W. 600.

An employé killed in course of his employment on a merry-go-round held to have assumed the risk of injury from unguarded cogwheels. *Hutcherson v. Amarillo St. Ry. Co.* (Civ. App.) 176 S. W. 856.

One killed in the course of his employment on a merry-go-round held to have assumed the risk of injury from the controlling switch, defective in that it might be closed by gravity alone. *Id.*

In action for injuries sustained while removing cups from elevator belt, servant held to assume risk of injury due to structure of elevator box. *Sauer v. Palmer Press Brick Works* (Civ. App.) 194 S. W. 988.

**67. Incompetency or negligence of fellow servants.**—At common law a servant assumes the risk of injury resulting from the negligence of a fellow servant, and cannot recover of the master therefor. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

**68. Knowledge by servant of defect or danger.**—An employé does not assume the risk of all danger incident to his employment, simply because he knew that there was some danger connected therewith. *Wichita Falls Motor Co. v. Bridge* (Civ. App.) 158 S. W. 1161.

The law does not require a servant to exercise ordinary care and diligence in ascertaining the danger incident to the work he is performing, but holds that he assumed the risk only of the danger which he knew or would have known by the exercise of ordinary care in the discharge of his duties. *Id.*

A servant injured by a loose belt while oiling the gin stands in a cotton gin, with knowledge that the belt was loose, held to have assumed the risk. *Sherman Oil Mill v. Neff* (Civ. App.) 159 S. W. 137.

A servant, who knew and fully appreciated the danger involved in the use of a wrench so defective as to slip, while he was endeavoring to loosen a nut, yet, who chose such a wrench when he might have chosen one without defect and which would not have slipped, assumed the risk of injury from the defect. *Pruitt v. Frost-Johnson Lumber Co. of Texas* (Civ. App.) 161 S. W. 421.

Where plaintiff, whose duty it was to keep the machines adjusted and repaired, knew that a jam nut was defective and a wrench slipped from it, whereby he was injured, defendant's liability could not be predicated on the defect in the nut. *Id.*

A servant cannot assume a risk that he does not know about. *Industrial Cotton Oil Co. v. Lial* (Civ. App.) 164 S. W. 40.

Where an employé of a gin company knew that a ginhouse was so constructed as to cause excessive vibrations of the machinery and gins while in operation, and also knew of the risk incident to such condition, he assumed any risk of injury due to such condition. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

An employé who did not know of a protruding set screw on the shaft turning the pulley on which he was trying to place a belt did not assume the risk of injury from catching his clothing. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

A servant does not assume the risk of injury from using a defective instrumentality, unless chargeable with knowledge thereof at the time of injury. *Alamo Oil & Refining Co. v. Richards* (Civ. App.) 172 S. W. 159.

A servant undertaking work with knowledge of the usual method of performance assumes the risks of injury, unless relieved by master's promise to change the method of work so as to eliminate the risks. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

A servant assumes only the risks of which he has actual knowledge or of which he may learn by the ordinary circumspection of a prudent man. *Worden v. Kroeger* (Civ. App.) 184 S. W. 583.

A carpenter who used a sawing machine without a cut-off guide, knowing that it was dangerous to operate without one, as he testified, "taking a chance," assumed the risk of injury. *Id.*

The question of assumption of risk could only have arisen under a state of facts tending to show that the duties of the driver of a beer wagon were such as would necessarily have charged him with knowledge of a defect in an axle which broke, resulting in his injury. *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W. 316.

Plaintiff, employed as the driver of a beer wagon and ordered to take out a loaded beer wagon which he had never driven, did not assume the risk of injury from the breaking of its axle. *Id.*

An employé does not assume the negligence of the master unless he knows or should have known thereof. *Texas Glass & Paint Co. v. Reese* (Civ. App.) 187 S. W. 721.

Relative to a night watchman assuming the negligence of the master, held, his go-

ing through a doorway several times before hitting his head on a projecting plank was not conclusive that he knew of it. *Id.*

There may be unusual circumstances rendering situation of car inspector extraordinarily hazardous, and, when he is excusably ignorant thereof, the master may be liable for an injury resulting therefrom. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

Although a servant need not investigate to determine whether the master has discharged his duty of furnishing a safe place to work, yet he assumes the risk of injuries resulting from conditions he knew, or must have known, although caused by the master's negligence. *Patton v. Dallas Gas Co.* (Sup.) 192 S. W. 1060.

In servant's action for injuries from blow from a pulley alleged to have been due to negligent use of wedge to tighten pulley on line shaft, evidence held to show that catching of belt was not an incident of such a gin known to plaintiff and risk of which was assumed by him. *Rhorne Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

**69. Inexperienced or youthful employé.**—The knowledge by an inexperienced servant that his hands would be injured if they came by the knives of a machine does not amount to an assumption of the risk of his hands being thrown against the knives by the jerking of a timber which he was holding. *Wichita Falls Motor Co. v. Bridge* (Civ. App.) 158 S. W. 1161.

It is not sufficient that the risk assumed is obvious and presumably known to a minor servant, but he must have sufficient discretion to appreciate the danger. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

As between a master and a minor servant in a dangerous service, whether instructed by the master or afterwards becoming aware of the danger, the minor's assumption of the risk depends on his having discretion to properly weigh his risk of injury, which is a question for the jury. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

A minor must not only know the danger, but also the extent, and have the capacity to appreciate it, in order to assume the risk. *Dallas Fair Park Amusement Ass'n v. Barrentine* (Civ. App.) 187 S. W. 710.

**70. Obvious or latent dangers.**—Where plaintiff, while at work on a barge, seated himself by an open hatch to eat his lunch and while there suddenly lost consciousness and fell backward into the hold, he assumed the risk; the danger being obvious. *Gulf Refining Co. v. Simms* (Civ. App.) 168 S. W. 379.

Loaded beer wagon held not within the simple-tool doctrine, where the duties of the servant ordered to drive it were not shown to have been such as would necessarily have charged him with knowledge of a defect in an axle, which could not have been discovered by ordinary means. *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W. 316.

Evidence held to show that defendant's servant who fell down a hole while attempting to pass between it and a pile of cinders assumed the risk, since he must necessarily have seen the condition had he looked. *Patton v. Dallas Gas Co.* (Sup.) 192 S. W. 1060.

**72. Promise to remedy defect or remove danger.**—Where the promise to furnish plaintiff proper tools had not induced plaintiff to continue in this employment until they were furnished, plaintiff assumed the risk of the continued use of the defective tools. *Jones v. Walker County Lumber Co.* (Civ. App.) 162 S. W. 420.

Where a master's foreman, on the request of the servant, promised to remedy a defective appliance and failed, the servant did not assume the risk of injury. *Missouri, K. & T. Ry. Co. v. Burton* (Civ. App.) 162 S. W. 479.

Rule relieving a servant of assumed risks on master's promise to remedy defect held not to apply to cases of ordinary labor, as to which the master was not bound to promulgate formal rules. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 963.

Servant complaining of danger in method of work, and promised installation of entirely changed method and continuing work, held not relieved of assumption of risk of old method of work. *Id.*

In servant's action for injury, evidence held to show that person who, on his complaint of danger in the method of work, promised to try to have it fixed, was not a vice principal. *Id.*

**75. Concurrent negligence of master.**—A servant does not assume, as a risk ordinarily incident to his employment, any risk arising from the master's negligence. *Houston Car Wheel & Machine Co. v. Murray* (Civ. App.) 181 S. W. 241.

### VIII. CONTRIBUTORY NEGLIGENCE

**76. Application of the doctrine in general.**—If a servant assumes the risk, the question of contributory negligence does not arise. *Dallas Fair Park Amusement Ass'n v. Barrentine* (Civ. App.) 187 S. W. 710.

**78. Care required of servant.**—In an action for injuries to a servant, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence. *Peden Iron & Steel Co. v. Jaimes* (Civ. App.) 162 S. W. 965.

A servant is required to exercise that degree of care in the performance of his duties which persons of ordinary prudence exercise to the same end when similarly engaged. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

Evidence held to sustain a finding that servant injured in unloading car of lumber was not negligent. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

**79. Inexperienced or youthful employé.**—Where the danger or risk assumed is obvious to a minor servant, his minority alone does not exempt him from the effect of his own negligence. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

**80. Reliance on care of master.**—The servant has a right to presume that a furnace in which he was put to work is reasonably safe. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

**82. Choice of ways and places for work.**—An employé engaged in breaking stone at a place designated by the employer held not guilty of contributory negligence. *Paul Stone Co. v. Saucedo* (Civ. App.) 171 S. W. 1038.

**83. Occupying dangerous position.**—Employé of lumber company standing near skidway as other employé came up snaking log held negligent in failing to move away from the skidway and not entitled to recover, if such negligence was the proximate cause of his injuries. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

**84. Knowledge of defects or dangers.**—An employé whose clothing was caught on a protruding set screw held not guilty of contributory negligence in leaning close to the shaft; he not knowing of the screw. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

An employer is not relieved from liability for an injury by an unguarded machine because the employé knew it was unguarded, where he did not appreciate the danger thereof. *Magnolia Paper Co. v. Duffy* (Civ. App.) 176 S. W. 89.

**85. Duty to discover or remedy defects or dangers.**—It is not the duty of a servant to inspect machinery for defects; the master being required to furnish reasonably safe machinery. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

A servant, in the pursuit of his work, may assume that the master has done his duty and provided for him a safe place to work. *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83.

An employé need not seek for concealed defects in instrumentalities furnished by the master. *Alamo Oil & Refining Co. v. Richards* (Civ. App.) 172 S. W. 159.

Employment contract held not to charge employé with duty to make such inspection of a ladder as would have disclosed hidden structural defects. *Id.*

It being the duty of the master to exercise ordinary care to provide for his servants a safe place to work, a servant required to use a ladder leading to a fuel oil tank is entitled to assume that the master has properly secured the ladder. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

A servant is not required to inspect the place provided him to work in for the purpose of discovering concealed dangers, though they might be disclosed by superficial observation, but he can assume that the master has provided a safe place and safe appliances. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389.

Employé directed by foreman to use running board held entitled to assume that it was secure, and not required to inspect to see whether it was fastened to its supports. *Decatur Cotton Seed Oil Co. v. Taylor* (Civ. App.) 182 S. W. 401.

A servant is not required to inspect the place where his master has put him to work, but has the right to assume that the place furnished by the master is safe. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

A servant owes no duty of inspection of the tools he uses. *Worden v. Kroeger* (Civ. App.) 184 S. W. 583.

Plaintiff driver ordered to take out loaded wagon which he had never driven before was not required to inspect wagon to discover a defective axle. *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W. 316.

A servant has no duty of inspection, but in the pursuit of his work may assume that the master has done his duty and provided a safe place to work. *Winnboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

The master must furnish a reasonably safe place for his servant to work, and a telephone lineman was not required to inspect a pole to ascertain whether it would be dangerous to climb it before obeying the commands of his superior. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

It is duty of master to discover defects in place at which and appliances with which a servant is to work, and servant can rely upon assumption that master has performed his duty, and is not required to use ordinary care to see whether this has been done. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

In action by servant for injuries sustained while working in ditch, evidence examined, and held not to show that he was charged with duty of curbing walls of ditch or securing material for that purpose, relieving employer of duty to provide safe place to work. *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

In servant's action for injuries from blow from a pulley alleged to have been due to negligent use of wedge to tighten pulley on line shaft, evidence held to show that it was not plaintiff's duty to see that machinery was in a proper state of repair. *Rhame Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

**86. Dangerous methods of work.**—A vice principal's negligent manner of doing work held not the proximate cause of injuries sustained by an employé, who was influenced by the vice principal's acts to do the same work in the same negligent manner. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

An employé pursuing a dangerous method of ascending an oil derrick, where an ordinarily prudent person would have pursued a safer method, was guilty of contributory negligence. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

**87. Disobedience of rules or orders.**—That plaintiff did not call one of his superiors to assist him in an operation as such superior directed held no defense to an action for injuries resulting from the negligence of the other superior who assisted in the operation. *Postex Cotton Mill Co. v. McCamy* (Civ. App.) 184 S. W. 569.

## IX. WORKMEN'S COMPENSATION ACT

Cited.—El Paso Sash & Door Co. v. Carraway (Civ. App.) 186 S. W. 363; State v. Clark (Civ. App.) 187 S. W. 760; Smith v. Southern Surety Co. (Civ. App.) 193 S. W. 204; Texas City Transp. Co. v. Winters (Civ. App.) 193 S. W. 366.

92. **Constitutionality.**—The courts of civil appeals have held that the Workmen's Compensation Act is within the police power, and not contrary to public policy (Memphis Cotton Oil Co. v. Tolbert [Civ. App.] 171 S. W. 309; Consumers' Lignite Co. v. Grant [Civ. App.] 181 S. W. 202; Postex Cotton Mill Co. v. McCamy [Civ. App.] 184 S. W. 569), that the act is not violative of the due process of law clause of Const. U. S. Amend. 14, and Const. Tex. art. 1, § 19 (Memphis Cotton Oil Co. v. Tolbert [Civ. App.] 171 S. W. 309; Consumers' Lignite Co. v. Grant [Civ. App.] 181 S. W. 202), and does not violate the equal protection clause of Const. U. S. Amend. 14 (Memphis Cotton Oil Co. v. Tolbert [Civ. App.] 171 S. W. 309; Consumers' Lignite Co. v. Grant [Civ. App.] 181 S. W. 202). But one of such courts, in Middleton v. Texas Power & Light Co., 178 S. W. 956, held that the power of the Legislature to enact an Employers' Liability Act must find its source and authority in the police power of the state; that legislation may be based upon reasonable classification, and, when so done without discrimination among different members of the class, it is not obnoxious to federal and state Constitutions; but that the act, so far as it was optional to the master and compulsory to the servant, violated the due process of law clauses of the federal and state constitutions, denied the equal protection of the laws, and delegated legislative functions to the employer in violation of the federal Constitution and of the provision of the Texas Constitution, vesting in the Legislature the exclusive power to make laws. But the latter case was overruled by the Supreme Court in Middleton v. Texas Power & Light Co. (Sup.) 185 S. W. 556, in which the court holds that the act is valid, and is not unconstitutional as creating a private corporation by special law, as depriving employers and employes of jury trial, as prescribing an unreasonable classification, or as delegating judicial authority to the board; and this, notwithstanding Bill of Rights, § 13. And it was further held in such case that a master has no vested right to the defenses of fellow servant, assumed risk, and contributory negligence, and, while a servant has vested right to a cause of action for master's negligence, which has already accrued, he has no vested right to common-law remedies provided for recovery for injury from master's negligence.

If the sections of the act authorizing the creation and regulation of the Texas Employers' Insurance Association, be unconstitutional, they may be eliminated without impairing the sections relating to the common-law defenses. Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202; Memphis Cotton Oil Co. v. Tolbert (Civ. App.) 171 S. W. 309.

The act is not violative of Const. art. 3, § 35, as it contains only one subject, expressed in its title. Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202; Memphis Cotton Oil Co. v. Tolbert (Civ. App.) 171 S. W. 309; Middleton v. Texas Power & Light Co. (Sup.) 185 S. W. 556.

93. **Negligence of fellow servants.**—Where an injury to a servant occurred in January, 1913, prior to the enactment of Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h, effective September 1, 1913, the common-law rule as to liability for the negligence of a fellow servant governs. Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189.

94. **Assumption of risk.**—Under Employers' Liability Act, § 1, par. 3, assumed risk as a defense is eliminated in cases to which the act applies. Dallas Fair Park Amusement Ass'n v. Barrentine (Civ. App.) 187 S. W. 710; Memphis Cotton Oil Co. v. Tolbert (Civ. App.) 171 S. W. 309.

Under Employers' Liability Act, §§ 1, 2, 4, employers not subscribing to the insurance association and not employing more than five employes can rely on assumption of risk as a defense. Hodges v. Swastika Oil Co. (Civ. App.) 185 S. W. 369.

Servant employed to snake logs held not to assume the risk of being struck by a log negligently handled by other employes, in view of Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h. Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700.

95. **Contributory negligence.**—In a servant's action, evidence held to warrant a finding that servant was guilty of negligence which was a joint contributing cause of injury, so under Employers' Liability Act recovery was properly diminished. Postex Cotton Mill Co. v. McCamy (Civ. App.) 184 S. W. 569.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h, damages to an injured servant would be diminished in proportion to amount of negligence that might be attributed to her. Kampmann v. Cross (Civ. App.) 194 S. W. 437; Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700.

An employer can plead contributory negligence as a defense whether or not the action is governed by Employers' Liability Act. Hodges v. Swastika Oil Co. (Civ. App.) 185 S. W. 369.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h, as to comparative negligence and its effect on the servant's recovery, a servant may recover for injuries, though he is himself negligent. Consolidated Kansas City Smelting & Refining Co. v. Dill (Civ. App.) 188 S. W. 439.

Under the Workmen's Compensation Act, contributory negligence of the servant does not defeat recovery. Kampmann v. Cross (Civ. App.) 194 S. W. 437.

96. **Remedies of employe in general.**—In view of the provisions of the Workmen's Compensation Act, it was proper for an injured servant, suing his employer, who was not a subscriber to the insurance association, to allege that defendant employed large numbers of employes and was not a subscriber. Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202.



Under this act an injured servant can sue for damages, and the burden is then on the employer to show that he is a subscriber within the act. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

97. **Acceptance of act and election of remedies.**—Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h, 5246i, 5246x, 5246xx, held, that if notice is not given liability is imposed by article 5246h, as if employer were not a subscriber. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

Where an employé brought suit at common law against his employer for personal injuries, he made an election, and fact that he subsequently presented a claim to the accident board did not estop him from prosecuting suit at common law. *Id.*

**Art. 5246—2. [5246hh] Inapplicable to certain classes of employés.**—The provisions of this Act shall not apply to actions to recover damages for the personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to employés of any firm, person or corporation having in his or their employ less than three (3) employés, nor to the employés of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Provided, that any employer of three or more employés at the time of becoming a subscriber shall remain a subscriber subject to all the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employés may at times be less than three. [Acts 1913, p. 429, pt. 1, § 2; Act March 28, 1917, ch. 103, pt. 1, § 2.]

Cited, *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

**Assumption of risk.**—Under Employers' Liability Act, §§ 1, 2, 4, employers not subscribing to the insurance association and not employing more than five employés can rely on assumption of risk as a defense. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

**Art. 5246—3. [5246i] No right of action against subscribing employer; compensation from Texas Employers Insurance Association.**—The employés of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employés shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employés and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for; provided that all compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void. [Acts 1913, p. 429, pt. 1, § 3; Act March 28, 1917, ch. 103, pt. 1, § 3.]

**Subscribing under act in general.**—Under Employers' Liability Act, § 3, plaintiff with notice that defendant had a policy with the Texas Employé's Insurance Association, held to have no right of action against defendant for personal injuries while in its employ. *Consolidated Kansas City Smelting & Refining Co. v. Dean* (Civ. App.) 189 S. W. 747.

Though Vernon's Sayles' Ann. Civ. St. 1914, art. 5246i, deprives employés of subscriber of right of action against employer for personal injuries, it must be construed with articles 5246x, 5246xx (post, arts. 5246—77, 5246—78), requiring notice, and in absence of such notice relation of subscriber employer and employé does not exist. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

Under Workmen's Compensation Act, Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h, 5246i, 5246x, 5246xx, held, that if notice is not given liability is imposed by article 5246h, as if employer were not a subscriber. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

**Who may sue.**—Under Compensation Act, pt. 1, §§ 3, 8, 9, a temporary administrator of a deceased employé survived by legal beneficiaries entitled to compensation for his death cannot maintain an action for such compensation. *Smith v. Southern Surety Co.* (Civ. App.) 193 S. W. 204.

**Action by employé against insurer.**—Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246i, 5246yyy, post, art. 5246—82, an injured employé can sue the company which insures the employer's liability. *Fidelity & Casualty Co. of New York v. House* (Civ. App.) 191 S. W. 155.

**Art. 5246—4. Notice by employé of election to assert common law liability; subsequent waiver; common law action preserved.**—An employé of a subscriber shall be held to have waived his right of action at common law or under any statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right or if the contract of hire was made before the employer became a subscriber, if the employé shall not have given the said notice within five (5) days of notice of such subscription. An employé who has given notice to his employer that he claimed his right of action at common law or under any statute may thereafter waive such claim by notice in writing, which shall take effect five (5) days after its delivery to his employer or his agent; provided further, that any employé of a subscriber who has not waived his right of action at common law or under any statute to recover damages for injury sustained in the course of his employment, as above provided in this section, shall, as well as his legal beneficiaries and representatives have his or their cause of action for such injuries as now exist by the common law and statutes of this State, which action shall be subject to all defenses under the common law and statutes of this State. [Act March 28, 1917, ch. 103, pt. 1, § 3a.]

**Art. 5246—5. Employés waiving common law rights to recover compensation.**—If an employé who has not given notice of his claim of common law or statutory rights of action, as provided in Section 3a, Part I [Art. 5246—4], of this Act, or who has given such notice and waived the same, sustains an injury in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if his employer is a subscriber at the time of the injury. [Id., § 3b.]

**Art. 5246—6. [5246ii] Employés, etc., of nonsubscribing employer may sue at common law; may not participate in benefits of association.**—Employés whose employers are not at the time of the injury subscribers to said association, and the representatives and beneficiaries of deceased employés who at the time of the injury were working for nonsubscribing employers can not participate in the benefits of said insurance association, but they shall be entitled to bring suit and may recover judgment against such employers, or any of them, for all damages, sustained by reason of any personal injury received in the course of employment or by reason of death resulting from such injury, and the provisions of Section 1 [Art. 5246—1] of this Act shall be applied in all such actions. [Acts 1913, p. 429, pt. 1, § 4; Act March 28, 1917, ch. 103, pt. 1, § 4.]

Cited, *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

**Assumption of risk.**—Under Employers' Liability Act, §§ 1, 2, 4, employers not subscribing to the insurance association and not employing more than five employés can rely on assumption of risk as a defense. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

**Art. 5246—7. [5246j] Recovery of exemplary damages in certain cases not excluded; award not to be pleaded or introduced in evidence.**—Nothing in this Act shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employé whose death is occasioned by homicide from the willful act or omission or gross negligence of any person, firm or corporation from the employer of such employé at the time of the injury causing the death of the latter. Provided, that in any suit so brought for exemplary damages the trial

shall be de novo, and no presumption shall exist that any award, ruling or finding of the Industrial Accident Board was correct; and in such suit brought by the employé or his legal heirs or representatives against such association or employer, such award, ruling or finding shall neither be pleaded nor introduced in evidence. [Acts 1913, p. 429, pt. 1, § 5; Act March 28, 1917, ch. 103, pt. 1, § 5.]

**Art. 5246—8. [5246jj] No compensation for incapacity not extending beyond one week; medical aid.**—No compensation shall be paid under this Act for an injury which does not incapacitate the employé for a period of at least one week from earning full wages, but if incapacity extends beyond one week compensation shall begin to accrue on the eighth day after the injury. Provided, however, the medical aid, hospital services, and medicines, as provided for in Section 7 [Art. 5246—9], hereof, shall be supplied as and when needed and according to the terms and provisions of said Section 7. And provided further, that if incapacity does not follow at once after the infliction of the injury or within eight (8) days thereof but does result subsequently that compensation shall begin to accrue with the eighth day after the date incapacity commenced. In any event the employé shall be entitled to the medical aid, hospital services and medicines as provided elsewhere in this Act. [Acts 1913, p. 429, pt. 1, § 6; Act March 28, 1917, ch. 103, pt. 1, § 6.]

**Art. 5246—9. [5246k] Medical and hospital aid during first two weeks; notice of injury; additional hospital services on certificate of attending physician.**—During the first two weeks of the injury, dating from the date of its infliction, the association shall furnish reasonable medical aid, hospital services and medicines. If the association fails to so furnish same as and when needed during the time specified, after notice of the injury to the association or subscriber, the injured employé may provide said medical aid, hospital services and medicines at the cost and expense of the association. The employé shall not be entitled to recover any amount expended or incurred by him for said medical aid, hospital services or medicines nor shall any person who supplied the same be entitled to recover of the association therefor, unless the association or subscriber shall have had notice of the injury and shall have refused, failed or neglected to furnish it or them within a reasonable time. Provided, however, that at the time of the injury or immediately thereafter, if necessary, the employé shall have the right to call in any available physician or surgeon to administer first-aid treatment as may be reasonably necessary at the expense of the association. During the second or any subsequent week of continuous total incapacity requiring the confinement to a hospital, the association shall, upon application of the attending physician or surgeon certifying the necessity therefor to the Industrial Accident Board and to the association, furnish such additional hospital services as may be deemed necessary, not to exceed one week, unless at the end of such additional week the attending physician shall certify to the necessity for another week of hospital services, or so much thereof, as may be needed; provided, however, that such additional hospital services as are provided for in this paragraph shall not be held to include any obligation on the part of the association to pay for medical or surgical services not ordinarily provided by hospitals as a part of their services. [Acts 1913, p. 429, pt. 1, § 7; Act March 28, 1917, ch. 103, pt. 1, § 7.]

**Art. 5246—10. Board may order change of physician or of treatment.**—If it be shown that the association is furnishing medical aid, hospital services and medicines provided for by Section 7 [Art. 5246—9], hereof in such manner that there is reasonable ground for believing that the life, health or recovery of the employé is being endangered or impaired thereby, the board may order a change in the physician or other requirements of said section, and if the association fails promptly to comply with such order after receiving it, the board may permit the employé or some one for him to provide the same at the expense of the association under such reasonable regulations as may be provided by said board. [Act March 28, 1917, ch. 103, pt. 1, § 7a.]

**Art. 5246—11. Board may regulate medical and hospital fees and charges; payment.**—All fees and charges under Sections 7 and 7a [Arts. 5246—9, 5246—10] hereof shall be fair and reasonable, shall be subject to regulation of the board and shall be limited to such charges as are reasonable for similar treatment of injured persons of a like standard of living where such treatment is paid for by the injured person himself or some one acting for him. In determining what fees are reasonable, the board may also consider the increased security of payment afforded by this Act. Where such medical aid, hospital service or medicines are furnished by a public hospital or other institution, payment thereof shall be made to the proper authorities conducting the same, and the amount so paid shall be promptly reported to the board. [Id., § 7b.]

**Art. 5246—12. Attorney's fees subject to approval of board; amount of fees; expenses; payment; lien.**—All fees of attorneys for representing claimants before the board under the provisions of this Act shall be subject to the approval of the board. No attorney's fees for representing claimants before the board shall be allowed or approved against any party or parties not represented by such attorney, nor exceeding an amount equal to fifteen per cent of the amount of the first one thousand dollars or fraction thereof recovered, nor ten per cent of the excess of such recovery, if any, over one thousand dollars. And in addition to the reasonable expenses incurred by the attorney in the preparation and presentation of the said claim before the Board, such expenses to be allowed by the Board; further provided that where an attorney represents only a part of those interested in the allowance of a claim before the Board and his services in prosecuting such claim and obtaining an award therein inures to the benefit of others jointly interested therein, then the Board may take these facts into consideration and allow the attorney a reasonable charge, to be assessed against the interest of those receiving benefits of the service of such attorney. The attorney's fees herein provided for may be redeemed by the association by the payment of a lump sum or may be commuted by agreement of the parties subject to the approval of the board, but not until the claim represented by said attorney has been finally determined by the board and recognized and accepted by the association. After the approval, as first above provided for, if the association be notified in writing of such claim or agreement for legal services, the same shall be a lien against any amount thereafter to be paid as compensation; provided, however, that where the employés compensation is payable by the association in periodical installments the board shall fix at the time of approval the proportion of each installment to be paid on account of said legal services. [Id., § 7c.]

**Art. 5246—13. Contract of attorneys with beneficiaries where case is carried into courts; amount of fee; allowance by court.**—For repre-

senting the interest of any Claimant in any manner carried from the Board into the Courts, it shall be lawful for the attorneys representing such interest to contract with any of the beneficiaries under this Act for an attorney's fee for such representation, not to exceed one third (1-3) of the amount recovered, such fee for services so rendered to be fixed and allowed by the trial court in which such matter may be heard and determined. [Id., § 7d.]

**Art. 5246—14. [5246kk] Compensation where death results.**—If death should result from the injury, the association hereinafter created shall pay the legal beneficiaries of the deceased employé a weekly payment equal to sixty per cent of his average weekly wages, but not more than \$15.00 nor less than \$5.00 a week, for a period of three hundred and sixty weeks from the date of the injury. [Acts 1913, p. 429, pt. 1, § 8; Act March 28, 1917, ch. 103, pt. 1, § 8.]

**Who may sue.**—Under Compensation Act, pt. 1, §§ 3, 8, 9, a temporary administrator of a deceased employé survived by legal beneficiaries entitled to compensation for his death cannot maintain an action for such compensation. *Smith v. Southern Surety Co.* (Civ. App.) 193 S. W. 204.

**Art. 5246—15. Beneficiaries in case of death; exempt from execution; mode of distribution; to whom paid; how paid.**—The compensation provided for in the foregoing section of this Act shall be for the sole and exclusive benefit of the surviving husband who has not for good cause and for a period of three years prior thereto abandoned his wife at the time of the injury, the wife who has not at the time of the injury without good cause and for a period of three years prior thereto abandoned her husband and the minor children, without regard to the question of dependency, dependent parents and dependent grandparents and dependent step-mothers and dependent children or dependent brothers and sisters of the deceased employé, and the amount recovered thereunder shall not be liable for the debts of the deceased nor the debts of the beneficiary or beneficiaries, and shall be distributed among such beneficiaries as may be entitled to same as hereinbefore provided according to the laws of descent and distribution of this State; and provided such compensation shall not pass to the estate of the deceased to be administered upon, but shall be paid directly to said beneficiaries when the same are capable of taking, under the laws of the State, or to their guardian or next friend, in case of lunacy, infancy or other disqualifying cause of any beneficiary. And the compensation provided for in this Act shall be paid weekly to the beneficiaries herein named and specified, subject to the other provisions of this Act. [Act March 28, 1917, ch. 103, pt. 1, § 8a.]

**Art. 5246—16. Deduction from death benefit of amount paid for incapacity.**—In case death occurs as a result of the injury after a period of total or partial incapacity, for which compensation has been paid, the period of incapacity shall be deducted from the total period of compensation and the benefits paid thereunder from the maximum allowed for the death, respectively state in this Act. [Id., § 8b.]

**Art. 5246—17. [5246l] Where there are no beneficiaries association shall pay expenses of last sickness and funeral expenses.**—If the deceased employé leaves no legal beneficiaries, the association shall pay all expenses incident to his last sickness as a result of the injury and in addition a funeral benefit not to exceed \$100.00; provided, however, that where any deceased employé leaves legal beneficiaries, but who is buried at the expense of his employer or any other person, the expense

of such burial, not to exceed \$100.00, shall be payable out of the compensation due the beneficiary or beneficiaries of such deceased employé, subject to the approval of the Board. [Acts 1913, p. 429, pt. 1, § 9; Act March 28, 1917, ch. 103, pt. 1, § 9.]

**Who may sue.**—Under Compensation Act, pt. 1, §§ 3, 8, 9, a temporary administrator of a deceased employé survived by legal beneficiaries entitled to compensation for his death cannot maintain an action for such compensation. *Smith v. Southern Surety Co.* (Civ. App.) 193 S. W. 204.

**Art. 5246—18. [5246ll] Compensation for total incapacity.**—While the incapacity for work resulting from injury is total, the association shall pay the injured employé a weekly compensation equal to sixty per cent of his average weekly wages, but not more than \$15.00 nor less than \$5.00, and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury. [Acts 1913, p. 429, pt. 1, § 10; Act March 28, 1917, ch. 103, pt. 1, § 10.]

**Art. 5246—19. [5246m] Compensation for partial incapacity.**—While the incapacity for work resulting from the injury is partial, the association shall pay the injured employé a weekly compensation equal to sixty per cent of the difference between his average weekly wages before the injury and his average weekly wage earning capacity during the existence of such partial incapacity, but in no case more than \$15.00 per week; and the period covered by such compensation to be in no case greater than three hundred weeks; provided that in no case shall the period of compensation for total and partial incapacity exceed four hundred and one (401) weeks from the date of the injury. [Acts 1913, p. 429, pt. 1, § 11; Act March 28, 1917, ch. 103, pt. 1, § 11.]

**Art. 5246—20. What constitutes total incapacity; burden of proof.**—In cases of the following injuries, the incapacity shall conclusively be held to be total and permanent, to wit:

- (1) The total and permanent loss of the sight in both eyes.
- (2) The loss of both feet at or above the ankle.
- (3) The loss of both hands at or above the wrist.
- (4) A similar loss of one hand and one foot.
- (5) An injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg.
- (6) An injury to the skull resulting in incurable insanity or imbecility.

In any of the above enumerated cases it shall be considered that the total loss of the use of a member shall be equivalent to and draw the same compensation during the time of such total loss of the use thereof as for the total and permanent loss of such member.

The above enumeration is not to be taken as exclusive, but in all other cases the burden of proof shall be on the claimant to prove that his injuries have resulted in permanent, total incapacity. [Act March 28, 1917, ch. 103, pt. 1, § 11a.]

**Art. 5246—21. [5246mm] Compensation for specified injuries.**—For the injuries enumerated in the following schedule the employé shall receive in lieu of all other compensation except medical aid, hospital services and medicines as elsewhere herein provided, a weekly compensation equal to sixty per cent of the average weekly wages of such employé, but not less than \$5.00 per week nor exceeding \$15.00 per week, for the respective periods stated herein, to-wit:

For the loss of a thumb sixty per cent of the average weekly wages during sixty weeks.

For the loss of a first finger, commonly called the index finger, sixty per cent of the average weekly wages during forty five weeks.

For the loss of a second finger 60 per cent of the average weekly wages during 30 weeks.

For the loss of a third finger 60 per cent of the average weekly wages during 21 weeks.

For the loss of a fourth finger, commonly known as the little finger, 60 per cent of the average weekly wages during 15 weeks.

The loss of the second or distal phalange of the thumb shall be considered to be equal to the loss of one-half of such thumb; the loss of more than one-half of such thumb shall be considered to be equal to the loss of the whole thumb.

The loss of the third or distal phalange or any finger shall be considered to be equal to the loss of one-third of such finger.

The loss of the middle or second phalange or any finger shall be considered to be equal to the loss of two-thirds of such finger.

The loss of more than the middle or distal phalange of any finger shall be considered to be equal to the loss of the whole finger; provided, however, that in no case shall the amount received for the loss of a thumb and more than one finger on the same hand exceed the amount provided in this schedule for the loss of a hand.

For the loss of the metacarpal bone (bone of palm) for the corresponding thumb, finger, or fingers above, add ten weeks to the number of weeks as above, subject to the limitation that in no case shall the amount received for the loss or injury to any one hand be more than for the loss of the hand.

For ankylosis (total stiffness of) or contracture (due to sears or injuries) which make the fingers useless, the same number of weeks shall apply to such finger or fingers or parts of fingers (not thumb) as given above.

For the loss of a hand 60 per cent of the average weekly wages during 150 weeks.

✓ ( For the loss of an arm at or above the elbow 60 per cent of the average weekly wages during 200 weeks. )

For the loss of one of the toes, other than the great toe, 60 per cent of the average weekly wages during 10 weeks.

For the loss of the great toe 60 per cent of the average weekly wages during 30 weeks.

The loss of more than two-thirds of any toe shall be considered to be equal to the loss of the whole toe.

The loss of less than two-thirds of any toe shall be considered to be equal to the loss of one-half of the toe.

For the loss of a foot 60 per cent of the average weekly wages during 125 weeks.

For the loss of a leg at or above the knee 60 per cent of the average weekly wages during 200 weeks.

For the total and permanent loss of the sight of one eye 60 per cent of the average weekly wages during 100 weeks.

In the foregoing enumerated cases of permanent, partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member.

For the complete and permanent loss of the hearing in both ears 60 per cent of the weekly wages during 150 weeks.

For the loss of an eye and leg above the knee 60 per cent of the average weekly wages during a period of 350 weeks.

For the loss of an eye and an arm above the elbow 60 per cent of the average weekly wages during a period of 350 weeks.

For the loss of an eye and a hand 60 per cent of the average weekly wages during a period of 325 weeks.

For the loss of an eye and a foot 60 per cent of the average weekly wages during a period of 300 weeks.

Where the employé sustains concurrent injuries resulting in concurrent incapacities, he shall receive compensation only for the injury which produces the longest period of incapacity; but this section shall not affect liability for the concurrent loss or the loss of the use thereof of more than one member, for which members compensation is provided in this schedule; compensation for specific injuries under this act shall be cumulative as to time and not concurrent.

In all cases of permanent, partial, incapacity, it shall be considered that the permanent loss of the use of the member be equivalent to and draw the same compensation as the loss of that member; but the compensation in and by said schedule provided shall be in lieu of all other compensation in such cases.

In all other cases, partial incapacity, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employé, compensation shall be determined according to the percentage of incapacity, taking into account, among other things, any previous incapacity, the nature of the physical injury or disfigurement, the occupation of the injured employé and the age at the time of the injury; the compensation paid therefor shall be 60 per cent of the average weekly wages of the employé, but not to exceed \$15.00 per week, multiplied by the percentage of incapacity caused by the injury for such period as the board may determine not exceeding 300 weeks. Whenever the weekly payments under this paragraph would be less than \$3.00 per week, the period may be shortened, and the payments correspondingly increased by the board. [Acts 1913, p. 429, pt. 1, § 12; Act March 28, 1917, ch. 103, pt. 1, § 12.]

**Art. 5246—22. Refusal of employé to accept proffered employment suited to his physical condition.**—If the injured employé refuses employment reasonably suited to his incapacity and physical condition, procured for him in the locality where injured or at a place agreeable to him, he shall not be entitled to compensation during the period of such refusal, unless in the opinion of the Board such refusal is justifiable. This section shall not apply in cases of specific injuries for which a schedule is fixed by this Act. [Act March 28, 1917, ch. 103, pt. 1, § 12a.]

**Art. 5246—23. Claims for hernia; surgical operation; refusal of employé to submit to; examination; compensation in case of successful operation, and in case of resulting death.**—In all claims for hernia resulting from injury sustained in the course of employment, it must be definitely proven to the satisfaction of the Board.

First. That there was an injury resulting in hernia.

Second. That the hernia appeared suddenly and immediately following the injury.

Third. That the hernia did not exist in any degree prior to the injury for which compensation is claimed.

Fourth. That the injury was accompanied by pain.

In all such cases where liability for compensation exists, the association shall provide competent surgical treatment by radical operation. In case the injured employé refuses to submit to the operation, the



Board shall immediately order a medical examination of such employé by a physician or physicians of its own selection at a time and place to be by them named, at which examination the employé and the association, or either of them, shall have the right to have his or their physician present. The physician or physicians so selected shall make to the Board a report in writing, signed and sworn to, setting forth the facts developed at such examination and giving his or their opinion as to the advisability or non-advisability of an operation. If it be shown to the Board by such examination and the written report thereof and the expert opinions thereon that the employé has any chronic disease or is otherwise in such physical condition as to render it more than ordinarily unsafe to submit to such operation he shall, if unwilling to submit to the operation, be entitled to compensation for incapacity under the general provisions of this Act. If the examination and the written report thereof and the expert opinions thereon then on file before the Board do not show to the Board the existence of disease or other physical condition rendering the operation more than ordinarily unsafe and the board shall unanimously so find and so reduce its findings to writing and file the same in the case and furnish the employé and the association with a copy of its findings, then if the employé with the knowledge of the result of such examination, such report, such opinions and such findings, thereafter refuses to submit within a reasonable time, which time shall be fixed in the findings of the Board, to such operation, he shall be entitled to compensation for incapacity under the general provisions of this Act, for a period not exceeding one year.

If the employé submits to the operation and the same is successful, which shall be determined by the Board, he shall in addition to the surgical benefits herein provided for be entitled to compensation for 26 weeks from the date of the operation. If such operation is not successful and does not result in death, he shall be paid compensation under the general provisions of this Act the same as if such operation had not been had; other than in determining the quantum of compensation to be paid to the employé, the Board may take into consideration any minor benefits that accrued to the employé by reason thereof or any aggravation or increased injury which accrued to him by reason thereof:

If the hernia results in death within one year after it is sustained, or the operation results in death, such death shall be held a result of the injury causing such hernia and compensated accordingly under the provisions of this Act. This paragraph shall not apply where the employé has wilfully refused to submit to an operation which has been found by the examination herein provided for not to be more than ordinarily unsafe. [Id., § 12b.]

**Art. 5246—24. Compensation for subsequent injury.**—If an employé who has suffered a previous injury shall suffer a subsequent injury which results in a condition of incapacity to which both injuries or their effects have contributed, the association shall be liable because of such injury only for the compensation to which the subsequent injury would have entitled the injured employé had there been no previous injury. [Id., § 12c.]

**Art. 5246—25. Change in compensation awarded during incapacity; review.**—Upon its own motion or upon the application of any person interested showing a change of conditions, mistake, or fraud, the board at any time within the compensation period may review any award or order, ending, diminishing or increasing compensation previously award-

ed within the maximum and minimum provided in this Act, or change or revoke its previous order sending immediately to the parties a copy of its subsequent order or award. Review under this section shall be only upon notice to the parties interested. [Id., § 12d.]

**Art. 5246—26. Demand for surgical operation by employé or the association; examination and report; refusal to submit to operation.—**In all cases where liability for compensation exists for an injury sustained by an employé in the course of his employment and a surgical operation for such injury will effect a cure of the employé or will materially and beneficially improve his condition the association or the employé may demand that a surgical operation be had upon the employé as herein provided, and the association shall provide and pay for all necessary surgical treatment, medicines and hospital services incident to the performance of said operation, provided the same is had. In case either of said parties demands in writing to the board such operation the board shall immediately order a medical examination of the employé in the same manner as is provided for in the section of this Act relating to hernia. If it be shown by the examination, report of facts and opinions of experts, all reduced to writing and filed with the board, that such operation is advisable and will relieve the condition of the injured employé or will materially benefit him, the board shall so state in writing and upon unanimous order of said board in writing, a copy of which shall be delivered to the employé and the association, shall direct the employé at a time and place therein stated to submit himself to an operation for said injury. If the board should find that said operation is not advisable, then the employé shall continue to be compensated for his incapacity under the general provisions of this Act. If the board shall unanimously find and so state in writing that said operation is advisable, it shall make its order to that effect, stating the time and place when and where such operation is to be performed, naming the physicians therein who shall perform said operation, and if the employé refuses to submit to such operation, the board may order or direct the association to suspend the whole or any part of his compensation during the time of said period of refusal. The results of such operation, the question as to whether the injured employé shall be required to submit thereto and the benefits and liabilities arising therefrom shall attach, be treated, handled and determined by the board in the same way as is provided in the case of hernia in this Act. [Id., § 12e.]

**Art. 5246—27. Contracts with physician to be in writing and filed with board; where not filed employé may procure medical aid.—**In all cases where a subscriber or the association has in his or its employ a physician or physicians regularly paid in any manner whatsoever by such subscriber or association to administer to or treat injured employés, the name or names of such physicians at the date of employment of the same shall be filed with the board together with a copy of the contract of such employment. If the contract of such physician or physicians is not in writing, then the same shall be reduced to writing and a copy thereof filed with the board. Such contract shall state fully the extent and scope of the employment and the compensation to be paid such physician or physicians. If the association or subscriber wilfully fails or refuses to comply with this provision of this Act, then an injured employé or any person acting for him shall have the right to provide hospital services, medical aid and medicine for said injured employé, at the expense of and the same shall be charged to the association, and the

subscriber or association shall notify the employé at or before the time of injury what physician or physicians are contracted with to treat his or its employés. [Id., § 12f.]

**Art. 5246—28. Contributions from employés prohibited; effect of violation.**—It shall be unlawful for any subscriber or any employer who seeks to comply with the provisions of this Act to either directly or indirectly collect of or from his employés by any means or pretense whatever any premium under this Act or part thereof paid or to be paid upon any policy of such insurance under this Act which covers such employés, or any intended policy of such insurance designed to cover such employés, and, if any such subscriber or any employer of labor in this State violates this provision of this Act, then any employé or the legal beneficiary of any employé of such employer or subscriber shall be entitled to all the benefits of this Act and in addition thereto shall have a separate right of action to recover damages against such employer without regard to the compensation paid or to be paid to such employé or beneficiary under this Act, and the association shall in no wise be responsible because of such separate action by such employé or beneficiary against such employer on such separate cause of action. [Id., § 12g.]

**Art. 5246—29. Contracts to indemnify subscriber void; insurance similar to that provided herein prohibited.**—Every contract or agreement of an employer, the purpose of which is to indemnify him from loss or damage on account of the injury of an employé by accidental means or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it also covers liability for the payment of the compensation provided for by this Act. Provided, that this section of this Act shall not apply to employers of labor who are not eligible under the terms of this Act to become subscribers thereto, nor to employers whose employés have elected to reject the provisions of this Act, nor to employers eligible to come under the terms of this Act who do not elect to do so, but who choose to carry insurance upon their employés independently of this law and without attempting in such insurance to provide compensation under the terms of this Act; but further provided that any evasion of this section whereby an insurance company shall undertake, under the guise of writing insurance against the risk of the employers who do not see proper to come under this Act, to write insurance substantially or in any material respect similar to the insurance provided for by this Act, that such insurance shall be void as provided for by the foregoing provisions of this Section. [Id., § 12h.]

**Art. 5246—30. Mode of estimating weekly wage of minors; hazardous employments.**—If it be established that the injured employé was a minor when injured and that under normal condition his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages and compensation may be fixed accordingly. This section shall not be considered as authorizing the employment of a minor in any hazardous employment which is prohibited by any statute of this State. [Id., § 12i.]

**Art. 5246—31. [5246n] Guardian or next friend of minor or incompetent; payments direct to minor.**—If an injured employé is mentally incompetent or is a minor or is under any other disqualifying cause at the time when any rights or privileges accrue to him or exist under

this Act, his guardian or next friend may in his behalf claim and exercise such rights and privileges except as otherwise herein provided.

In case of partial incapacity or temporary total incapacity payment of compensation may be made direct to the minor and his receipts taken therefor, if the authority to so pay and receipt for said compensation is first obtained from the board. [Acts 1913, p. 429, pt. 1, § 13; Act March 28, 1917, ch. 103, pt. 1, § 13.]

**Art. 5246—32. [5246nn] No waiver of rights.**—No agreement by any employé to waive his rights to compensation under this Act shall be valid. [Acts 1913, p. 429, pt. 1, § 14; Act March 28, 1917, ch. 103, pt. 1, § 14.]

**Art. 5246—33. [5246nnn] Lump sum for death or total permanent incapacity.**—In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement save and except as herein specified; provided, however, that in special cases where in the judgment of the board manifest hardship and injustice would otherwise result, the board may compel the association in the cases provided for in this section to redeem their liability by payment of a lump sum as may be determined by the Board. [Acts 1913, p. 429, pt. 1, § 15; Act March 28, 1917, ch. 103, pt. 1, § 15.]

**Art. 5246—34. Increasing amount of weekly installments.**—In any case where compensation is payable weekly at a definite sum and for a definite period, and it appears to the Board that the amount of compensation being paid is inadequate to meet the necessities of the beneficiary the Board shall have the power to increase the amount of compensation by correspondingly decreasing the number of weeks for which the same is to be paid allowing such discount to the company increasing such payments as is applicable in cases of lump sum settlement. [Act March 28, 1917, ch. 103, pt. 1, § 15a.]

**Art. 5246—35. [5246o] Causes of action for death survive.**—In all cases of injury resulting in death, where such injury was sustained in the course of employment, cause of action shall survive. [Acts 1913, p. 429, pt. 1, § 16; Act March 28, 1917, ch. 103, pt. 1, § 16.]

**Art. 5246—36. Aliens entitled to compensation; consular officers may represent claimants; commutation.**—Non-resident, alien beneficiaries and resident alien beneficiaries shall be entitled to compensation under this Act. Nonresident alien beneficiaries may be officially represented by the consular officers of the nation of which such alien or aliens may be citizens or subject, and in such cases the consular officers shall have the right to receive for distribution for such non-resident, alien beneficiaries all compensation awarded hereunder, and the receipt of such consular officers shall be a full discharge of all sums paid to and received by them. The association may at any time, subject to the approval of the Board, commute all future instalments of compensation payable to alien beneficiaries, not resident of the United States, by paying to such alien beneficiaries the sum agreed upon and filing receipts therefor with the Board. [Act March 28, 1917, ch. 103, pt. 1, § 17.]

**Art. 5246—37. Failure of association to make payments; forfeiture of right to do business.**—It is the purpose of this Act that the compensation herein provided for shall be paid from week to week and as it ac-

cruces and directly to the person entitled thereto, unless the liability is redeemed as in such cases provided elsewhere herein, and, if the association wilfully fails or refuses to pay compensation as and when the same matures and accrues, the Board shall notify said association that such is the course it is pursuing and if after such notice the association continues to wilfully refuse and fail to meet these payments of compensation as provided for in this Act, the Board shall have the power to hold that such association is not complying with the provisions of this Act. And shall certify such fact to the Commissioner of Insurance and Banking and said certificate shall be sufficient cause to justify said Commissioner of Insurance and Banking to revoke or forfeit the license or permit of such Association to do business in Texas; provided, said power of the Board shall not be held to deny the association the right to bring suit or suits to set aside any ruling, order or decision of the Board. [Id., § 18.]

**Art. 5246—38. Injury to employé outside the state.**—If an employé who has been hired in this State sustained injury in the course of his employment he shall be entitled to compensation according to the law of this State, even though such injury was received outside of the State. [Id., § 19.]

## PART II

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| <p><b>Art.</b><br/>5246—39. Industrial accident board created; how constituted and appointed; term of members.</p> <p>5246—40. Qualifications of members; legal adviser and chairman.</p> <p>5246—41. Salaries and expenses; secretary, clerks, etc.; offices; free transportation.</p> <p>5246—42. Duties and powers of board; examination of injured employés; reduction or suspension of compensation; process and procedure; subpoena of witnesses; oaths; examination of books, etc.; ruling to be on questions of fact.</p> <p>5246—43. Employé shall give notice of injury and file claim within what time; waiver of limitation by board.</p> <p>5246—44. Questions to be determined by board; suit by person aggrieved; notice; suit how determined; parties; if suit not brought within 20 days, award of board may be enforced by forfeiture of license of association.</p> | <p><b>Art.</b><br/>5246—45. Suit to enforce award; damages and attorney's fee; maturity of installments on failure to make payment; venue.</p> <p>5246—46. Compensation where sub-contractor is employed; right of action against sub-contractor.</p> <p>5246—47. Where injury caused by third person employé shall elect; subrogation of association; compromise; notice; approval of board.</p> <p>5246—48. Employés to keep record of injuries; reports; penalty for failure.</p> <p>5246—49. Quorum of board; vacancy; seal; orders, etc., admissible in evidence.</p> <p>5246—50. Certified copies of orders; fees and disposition thereof; fund for clerk hire.</p> <p>5246—51. Sessions of board or members; inspectors and adjusters.</p> <p>5246—52. Association to notify board of suspension of payments.</p> <p>5246—53. Compensation may be paid monthly or quarterly; compromise or commutation in doubtful cases.</p> |
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**Article 5246—39. [524600] Industrial accident board created; how constituted and appointed; terms of members.**—There shall be an Industrial Accident Board consisting of three members, and the same is hereby created to be appointed by the Governor, one of whom shall be Chairman, and said board shall have the powers, duties and functions hereinafter conferred. Beginning with September 1, 1917, one member thereof shall be appointed for a term of two years, one for four years and one for six years; thereafter the term of office for members of the board shall be six years. Appointments to fill vacancies on the board shall be for the unexpired terms. [Acts 1913, p. 429, pt. 2, § 1; Act March 28, 1917, ch. 103, pt. 2, § 1.]

**Art. 5246—40. [5246000] Qualifications of members; legal adviser and chairman.**—One member of the Industrial Accident Board shall

be at the time of his appointment an employer of labor in some industry or business covered by this Act; one shall be at the time of his appointment employed in some business industry as a wage earner, and the third member shall be at the time of his appointment a practicing attorney of recognized ability, said member to act in the capacity of legal adviser to the Board, in addition to his other duties as a member thereof and to be Chairman of said Board. [Acts 1913, p. 429, pt. 2, § 2; Act March 28, 1917, ch. 103, pt. 2, § 2.]

**Art. 5246—41. [5246p] Salaries and expenses; secretary, clerks, etc.; offices; free transportation.**—The salaries and expenses of the Industrial Accident Board shall be paid by the State. The salaries of the said members of the Board shall be as follows: For the Chairman of said Board \$3000.00 per year, and for each of the other members thereof \$2500.00, payable in equal monthly installments. The Board may appoint a Secretary at a salary not to exceed \$2000.00 a year. And may appoint such other clerical and other assistants as may be necessary to properly administer this Act. It shall also be allowed an annual sum, the amount to be determined by the Legislature, for clerical and other services, office equipment, traveling and all other necessary expenses. The board shall be provided suitable offices in the Capitol or some convenient building in the city of Austin where its records shall be kept.

The members of said board, or any employé thereof, shall have the right to travel upon free railroad transportation in the prosecution of the duties of their respective offices in the State of Texas without violating any provision of the anti-pass laws of this State, and any railroad company issuing such transportation shall not be deemed nor held to have violated any law of this State by reason thereof. [Acts 1913, p. 429, pt. 2, § 3; Act March 28, 1917, ch. 103, pt. 2, § 3.]

*Note.*—This article is in part superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the chairman of the board at \$4,000, and of the other two members of the board at \$3,000 each.

**Art. 5246—42. [5246pp] Duties and powers of board; examination of injured employés; reduction or suspension of compensation; process and procedure; subpoena of witnesses; oaths; examination of books, etc.; rulings to be on questions of fact.**—The Board may make rules not inconsistent with this Act for carrying out and enforcing its provisions, and may require any employé claiming to have sustained injury to submit himself for examination before such board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicians authorized to practice under the laws of this State. If the employé or the association requests, he or it shall be entitled to have a physician or physicians of his or its own selection present to participate in such examination. Refusal of the employé to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. If any employé shall persist in unsanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the board may in its discretion order or direct the association to reduce or suspend the compensation of any such injured employé. No compensation shall be reduced or suspended under the terms of this section without reasonable notice to the employé and an opportunity to be heard.

The association shall have the privilege of having any injured employé examined by a physician or physicians of its own selection, at reasonable times, at a place or places suitable to the condition of the injured employé and convenient; and accessible to him; provided, however, that the association shall pay for such examination and the reasonable expense incident to the injured employé in submitting thereto; and provided further that the injured employé shall have the privilege to have a physician or physicians of his own selection, at the expense of such injured employé, present to participate in such examination.

Process and procedure shall be as summary as may be under this Act. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of this Act. [Acts 1913, p. 429, pt. 2, § 4; Act March 28, 1917, ch. 103, pt. 2, § 4.]

**Art. 5246—43. [5246ppp] Employé shall give notice of injury and file claim within what time; waiver of limitation by board.**—Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this Act shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of same; or, in case of death of the employé or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided that for good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing the claim before the Board. [Acts 1913, p. 429, pt. 2, § 4a; Act March 28, 1917, ch. 103, pt. 2, § 4a.]

Cited, *Fidelity & Casualty Co. of New York v. House* (Civ. App.) 191 S. W. 155.

**Art. 5246—44. [5246q] Questions to be determined by board; suit by person aggrieved; notice; suit how determined; parties; if suit not brought within 20 days award of board may be enforced by forfeiture of license of association.**—All questions arising under this Act, if not settled by agreement of the parties interested therein and within the terms and provisions of this Act, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of such claim, other than as hereinafter provided; provided, however, that whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this Act, and the suit of the injured employé or person suing on account of the death of such employé shall be against the association if the employer of such injured or deceased employé at the time of such injury or death was a subscribed as defined in this Act. If the final order of the board is against the association then the association and not the em-

ployer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. In case of recovery the same shall not exceed the maximum compensation allowed under the provisions of this Act. If any party to any such final ruling and decision of the board, after having given notice as above provided, fails within said twenty days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto, and, if the same is against the association, it shall at once comply with such final ruling and decision, and failing to do so the board shall certify that fact to the Commissioner of Insurance and Banking, and such certificate shall be sufficient cause to justify said Commissioner of Insurance and Banking to revoke or forfeit the license or permit of such association to do business in Texas. [Acts 1913, p. 429, pt. 2, § 5; Act March 28, 1917, ch. 103, pt. 2, § 5.]

**Conclusiveness of award.**—Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5246q, the industrial accident board having with consent of the injured employé adjusted his claim, its determination is final, and he cannot sue thereon. *Fidelity & Casualty Co. of New York v. House* (Civ. App.) 191 S. W. 155.

**Art. 5246—45. Suit to enforce award; damages and attorney's fee; maturity of installments on failure to make payment; venue.**—In all cases where the board shall make a final order, ruling or decision as provided in the foregoing Section 5 [Art. 5246—44] hereof, and against the association, and the association shall fail and refuse to obey or comply with the same and shall fail or refuse to bring suit to set the same aside as in said Section 5 is provided, then in that event, the claimant in addition to the rights and remedies given him and the board in said Section 5 may bring suit in some court of competent jurisdiction where the injury occurred, upon said order, ruling or decision, and if he secures a judgment in said court sustaining such order, ruling or decision in whole or in part, he shall also be entitled to recover the further sum of twelve per cent as damages upon the amount of compensation so recovered in said judgment, together with a reasonable attorney's fee for the prosecution and collection of such claim.

It is further provided that where the Board has made an award against an association requiring the payment to an injured employé or his beneficiaries of any weekly or monthly payments, under the terms of this Act, and such association should thereafter fail or refuse, without justifiable cause, to continue to make said payments promptly as they mature, then the said injured employé or his beneficiaries, in case of his death, shall have the right to mature the entire claim and to institute suit thereon in any court of competent jurisdiction where the injury occurred to collect the full amount thereof, together with twelve per cent penalties and attorney's fees, as provided for in the foregoing paragraph of this Section. Suit may be brought under the provisions of this Section of the Act, either in the county where the accident occurred, or in any county where the claimants reside, or where one or more of such claimants may have his place of residence at the time of the institution of the suit. [Act March 28, 1917, ch. 103, pt. 2, § 5a.]

**Art. 5246—46. [5246qq] Compensation where sub-contractor is employed; right of action against sub-contractor.**—If any subscriber to this Act with the purpose and intention of avoiding any liability imposed by the terms of the Act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the



event any employé of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this Act to be the employé of the subscriber, and in addition thereto such employé shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this Act. [Acts 1913, p. 429, pt. 2, § 6; Act March 28, 1917, ch. 103, pt. 2, § 6.]

**Art. 5246—47. Where injury caused by third person employé shall elect; subrogation of association; compromise; notice; approval of board.**—Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages or against the association for compensation under this Act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this Act; if compensation be claimed under this Act by the injured employé or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employé in so far as may be necessary and may enforce in the name of the injured employé or of his legal beneficiaries or in its own name and for the joint use and benefit of said employé or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employé or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employé or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employé or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employé or his beneficiaries and the approval of the board, upon a hearing thereof. [Act March 28, 1917, ch. 103, pt. 2, § 6a.]

**Art. 5246—48. [5246qqq] Employer to keep record of injuries; reports; penalty for failure.**—Every subscriber shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employés in the course of their employment. Within eight days after the occurrence of an accident resulting in an injury to an employé, causing his absence from work for more than one day, a report thereof shall be made in writing to the board on blanks to be procured from the board for that purpose. Upon the termination of the incapacity of the injured employé, or if such incapacity extends beyond a period of sixty days, the subscriber shall make a supplemental report upon blanks to be procured for that purpose. The said report shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employé and the character of work in which he was engaged at the time of the injury, and shall state the date and hour of receiving such injury and the nature and cause of the injury, and such other information as the board may require. Any employer willfully failing or refusing to make any such report within the time herein provided, or willfully failing or refusing to give said board any information demanded by said board relating to any injury to any employé, which information is in the possession of or can be as-

certained by the employer by the use of reasonable diligence, shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand dollars for each and every offense, the same to be recovered in a suit to be instituted and prosecuted in Travis county by the Attorney General or by the district or county attorney under his direction in a district court thereof. [Acts 1913, p. 429, pt. 2, § 7; Act March 28, 1917, ch. 103, pt. 2, § 7.]

Cited, *Fidelity & Casualty Co. of New York v. House* (Civ. App.) 191 S. W. 155.

**Art. 5246—49. Quorum of board; vacancy; seal; orders, etc., admissible in evidence.**—A majority of the Board shall constitute a quorum to transact business, and the act or decision of any two members of the Board shall be held the act or decision of the Board, except as otherwise herein specifically provided. No vacancy shall impair the right of the remaining member or members of the Board to exercise all the powers of the Board. The Board shall provide itself with a seal for the authentication of its orders, awards or proceedings on which shall be inscribed the words "Industrial Accident Board, State of Texas, Official Seal." And any order, award or proceeding of said Board when duly attested and sealed by the Board or its secretary shall be admissible as evidence of the act of said Board in any court in this State. [Act March 28, 1917, ch. 103, pt. 2, § 8.]

**Art. 5246—50. Certified copies of orders; fees, and disposition thereof; fund for clerk hire.**—Upon the written request and payment of the fees therefor, which fees shall be the same as those charged for similar services in the Secretary of State's office, the Board shall furnish to any person entitled thereto a certified copy of any order, award, decision or paper on file in the office of said Board, and the fees so received for such copies shall be covered into the Treasury of the State of Texas into the fund for assistant clerical hire in the department of the Industrial Accident Board, and so much thereof as may be necessary may be used by said department upon proper voucher therefor to pay the necessary clerks to make such copies, and any excess that may exist at the end of any fiscal year in such fund shall lapse into the general revenue fund of this State, and no fee or salary shall be paid to any clerk or other person in said department for making such copies in excess of the fees charged for such copies. [Id., § 9.]

**Art. 5246—51. Sessions of board or members; inspectors and adjusters.**—Said Board or any member thereof may hold hearings or take testimony or make investigations at any point within the State of Texas, reporting the result thereof, if the same is made by one member, to the Board, or it can employ or use the assistance of an inspector or adjuster for the purpose of adjusting and settling claims for compensation or developing the facts relating to any claim for compensation. [Id., § 10.]

**Art. 5246—52. Association to notify board of suspension of payments.**—When the association suspends or stops payment of compensation, it shall immediately notify the Board of that fact, giving to said Board the name, number and style of the claim, the amount paid thereon, the date of the suspension or stopping of payment thereon and the reason for such suspension or stopping of payment of compensation. [Id., § 11.]

**Art. 5246—53. Compensation may be paid monthly or quarterly; compromise or commutation in doubtful cases.**—The Board upon application of either party may, in its discretion, having regard to the welfare

of the employé and the convenience of the association, authorize compensation to be paid monthly or quarterly.

In any case where the liability of the association or the extent of the injury of the employé is uncertain, indefinite or incapable of being satisfactorily established the Board may approve any compromise, adjustment, settlement or commutation thereof made between the parties. [Id., § 12.]

## PART III

Art. 5246—54. Texas Employers' Insurance Association created; corporate powers.	Art. 5246—70. Dividends; groups; assets liable for compensation claims.
5246—55. Governor to appoint first directors; term and election of successors; increase or decrease of number.	5246—71. Assessments suspended in case of surplus; certificate of insurance commissioner.
5246—56. To exercise powers of subscribers until their first meeting; by-laws.	5246—72. Nonparticipating policies.
5246—57. Election of president and officers.	5246—73. Classes and rates.
5246—58. Quorum of directors; vacancies.	5246—74. Acts subject to approval of Commissioner of Insurance and Banking.
5246—59. Executive committee.	5246—75. Rules for prevention of accidents; access to premises; review of rules.
5246—60. Who may be subscriber.	5246—76. Employer shall give notice to board on becoming a subscriber; association to give notice; penalty for failure.
5246—61. First meeting of board; notice.	5246—77. Notice to employés of securing of policy.
5246—62. Voting power of subscribers.	5246—78. Notice to incoming employés; notice of discontinuance of policy; filing copy of notice with board.
5246—63. When association may issue policies.	5246—79. Association shall pay subscriber amount of judgment, when.
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5246—65. Issuance of policies to be suspended, when.	5246—81. Reserves.
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5246—67. Groups of subscribers, premiums, dividends, etc.	
5246—68. May fix limit of liability.	
5246—69. Assessments; duty to pay.	

**Article 5246—54. [5246r] Texas Employers' Insurance Association created; corporate powers.**—The "Texas Employers' Insurance Association" is hereby created, a body corporate with the powers provided in this Act and with all the general corporate powers incident thereto. [Acts 1913, p. 429, pt. 3, § 1; Act March 28, 1917, ch. 103, pt. 3, § 1.]

**Constitutionality.**—Even if the sections of the Workmen's Compensation Act, authorizing creation and regulation of the Texas Employers' Insurance Association, violate Const. art. 12, §§ 1, 2, as to creation of private corporations, they may be eliminated without impairing the sections as to contributory negligence, assumed risk, and fellow servants. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309; *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

**Art. 5246—55. [5246rr] Governor to appoint first directors; term and election of successors; increase or decrease of number.**—The Governor shall appoint a board of directors of the association consisting of twelve members, who shall serve for a term of one year or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide; provided that at any annual meeting of subscribers the number of directors may be increased or decreased by resolution duly recorded in the minutes of such meeting. [Acts 1913, p. 429, pt. 3, § 2; Act March 28, 1917, ch. 103, pt. 3, § 2.]

**Art. 5246—56. [5246rrr] To exercise powers of subscribers until first meeting; by-laws.**—Until the first meeting of the subscribers, the board of directors shall have and exercise all the powers of the subscribers and may adopt by-laws, not inconsistent with the provisions of this Act, which shall be in effect until amended or repealed by the subscribers. [Acts 1913, p. 429, pt. 3, § 3; Act March 28, 1917, ch. 103, pt. 3, § 3.]

**Art. 5246—57. [5246s] Election of president and officers.**—The board of directors shall immediately choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officials as the by-laws may provide. [Acts 1913, p. 429, pt. 3, § 4; Act March 28, 1917, ch. 103, pt. 3, § 4.]

**Art. 5246—58. [5246ss] Quorum of directors; vacancies.**—Seven or more of the directors shall constitute a quorum for the transaction of business. Vacancies in any office may be filled in such manner as the by-laws shall provide. [Acts 1913, p. 429, pt. 3, § 5; Act March 28, 1917, ch. 103, pt. 3, § 5.]

**Art. 5246—59. Executive committee.**—The board of directors may appoint an executive committee which may have and exercise all of the powers of the board of directors except when the board is in session. [Act March 28, 1917, ch. 103, pt. 3, § 5a.]

**Art. 5246—60. [5246sss] Who may become subscribers.**—Any employer of labor in this State may become a subscriber except as provided in Section 2, Part I [Art. 5246—2], of this Act. [Acts 1913, p. 429, pt. 3, § 6; Act March 28, 1917, ch. 103, pt. 3, § 6.]

**Necessity of election.**—Employers' Liability Act, pt. 4, § 2, held to bring within act not only every employer who has become a subscriber to the Insurance Association, but also every employer who has procured insurance, in some other insurance company, so that, despite part 3, §§ 6, 9-11, operation of act is not dependent upon whether employer elects to subscribe to association. *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229.

**Art. 5246—61. [5246t] First meeting of board; notice.**—The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his residence or place of business not less than ten days before the date fixed for the meeting. [Acts 1913, p. 429, pt. 3, § 7; Act March 28, 1917, ch. 103, pt. 3, § 7.]

**Art. 5246—62. [5246tt] Voting power of subscribers.**—In any meeting of the subscribers each subscriber shall have one vote, and if a subscriber has 500 employes to whom the association is bound to pay compensation he shall be entitled to two votes and he shall be entitled to one additional vote for each additional 500 employes to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by right of proxy, more than 20 votes. [Acts 1913, p. 429, pt. 3, § 8; Act March 28, 1917, ch. 103, pt. 3, § 8.]

**Art. 5246—63. [5246ttt] When association may issue policies.**—No policies shall be issued by the association until not less than 50 members have subscribed, who have not less than 2,000 employes to whom the association may be bound to pay compensation. [Acts 1913, p. 429, pt. 3, § 9; Act March 28, 1917, ch. 103, pt. 3, § 9.]

**Necessity of election.**—Employers' Liability Act, pt. 4, § 2, held to bring within act not only every employer who has become a subscriber to the Insurance Association, but also every employer who has procured insurance, in some other insurance company, so that, despite part 3, §§ 6, 9-11, operation of act is not dependent upon whether employer elects to subscribe to association. *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229.

**Art. 5246—64. [5246tu] Statement and certificate before issuance of policies; license to association.**—No policies shall be issued by the association until a list of the subscribers with the number of employes of each, together with such information as the Commissioner of Insurance and Banking may require, shall have been filed with the Department of Insurance and Banking, nor until the president and secretary of the as-

sociation shall have certified under oath that every subscription on the list so filed is genuine and made with an agreement with each subscriber that he will take the policy so subscribed for by him within thirty days of the granting of a license to the association by the Commissioner of Insurance and Banking to issue policies. [Acts 1913, p. 429, pt. 3, § 10; Act March 28, 1917, ch. 103, pt. 3, § 10.]

**Necessity of election.**—See *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229; note under art. 5246—63.

**Art. 5246—65. [5246uu]** **Issuance of policies to be suspended, when.**—If the number of subscribers falls below fifty, or the number of employés to whom the association may be bound to pay compensation falls below 2,000, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than fifty, who have not less than 2,000 employés to whom the association may be bound to pay compensation, said subscriptions to be subject to the provisions of the preceding section. [Acts 1913, p. 429, pt. 3, § 11; Act March 28, 1917, ch. 103, pt. 3, § 11.]

**Necessity of election.**—See *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229; note under art. 5246—63.

**Art. 5246—66. [5246uuu]** **License to issue policies, when granted.**—Upon the filing of the certificates provided for in the two preceding sections, the Commissioner of Insurance and Banking shall make such investigations as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies. [Acts 1913, p. 429, pt. 3, § 12; Act March 28, 1917, ch. 103, pt. 3, § 12.]

**Art. 5246—67. [5246v]** **Groups of subscribers; premiums, dividends, etc.**—The Board of directors may distribute the subscribers into groups for the purpose of segregating the experience of each such group as to premiums and losses, and for the purpose of determining dividends payable to and assessments payable by the subscribers within each group, but for the purpose of determining the solvency of the association the funds of the association shall be deemed one and indivisible. The board of directors shall have power to re-arrange any of the groups by withdrawing any subscriber and transferring him wholly or in part to any group and to set up new groups at its discretion. [Acts 1913, p. 429, pt. 3, § 13; Act March 28, 1917, ch. 103, pt. 3, § 13.]

**Art. 5246—68. [5246vv]** **May fix limit of liability.**—The association may, in its by-laws and policies, fix the limit of liability of the subscribers for the payment of assessments hereinafter provided, for, but such limit of liability of the subscribers shall not, except by special agreement in writing between the association and subscriber, be fixed at an amount greater than an amount equal to and in addition to an annual premium. [Acts 1913, p. 429, pt. 3, § 14; Act March 28, 1917, ch. 103, pt. 3, § 14.]

**Art. 5246—69. [5246vvv]** **Assessments; duty to pay.**—If the association, at the end of any calendar year, is not possessed of admitted assets in excess of unearned premiums sufficient for the payment of its incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, first upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a deficiency for the group, and second only upon the subscribers within each group whose earned premiums compared with its incurred losses and expenses shows a surplus, and in no event shall it make an assessment for any aggregate amount more than is needed to

pay losses and expenses. Every subscriber shall, in accordance with the law and his contract, pay his proportionate part of any assessment which may be levied by the association on account of losses and expenses incurred during any calendar year while he is a subscriber. [Acts 1913, p. 429, pt. 3, § 15; Act March 28, 1917, ch. 103, pt. 3, § 15.]

**Art. 5246—70. [5246w] Dividends; groups; assets liable for compensation claims.**—The board of directors may by vote from time to time fix the amount to be paid as dividends on the policies in force during each calendar year after retaining sums sufficient to pay all compensation which may be payable on account of injuries sustained and expenses incurred during the calendar year. Dividends and assessments shall be fixed by and for groups, but the entire assets of the association, including the liability of the subscriber to assessment within the limits fixed by the by-laws or by special agreement in writing as authorized, shall be subject to the payment of any approved claim for compensation against the association. [Acts 1913, p. 429, pt. 3, § 16; Act March 28, 1917, ch. 103, pt. 3, § 16.]

**Art. 5246—71. Assessments suspended in case of surplus; certificate of insurance commissioner.**—Whenever the association shall have accumulated at the end of any calendar year an admitted surplus in excess of incurred losses, expenses and unearned premiums amounting to the sum of two hundred thousand dollars, the liability of its members to assessment shall be suspended during the ensuing calendar year, or for such further period as the association shall maintain unimpaired such surplus of two hundred thousand dollars or more, and the certificate of the Commissioner of Insurance and Banking, after an examination and report, shall be conclusive evidence as to the fact in any proceeding in which the fact may be an issue. [Act March 28, 1917, ch. 103, pt. 3, § 16a.]

**Art. 5246—72. Nonparticipating policies.**—Whenever by reason of having qualified under Section 16a, Part III [Art. 5246—71], to issue policies which are not subject to assessment, the association may issue policies which will not entitle the holder to participate in any distribution of surplus. [Id., § 16b.]

**Art. 5246—73. Classes and rates.**—The board of directors shall determine hazards by classes, and fix the rates of premium which shall be applicable to the pay roll in each of such classes at the lowest possible rate consistent with the maintenance of solvency and the creation of adequate reserves and a reasonable surplus, and for such purpose may adopt a system of schedule and experience rating in such a manner as to take account of the peculiar hazard of each individual risk. [Id., § 16c.]

**Art. 5246—74. [5246ww] Acts subject to approval of Commissioner of Insurance and Banking.**—Any proposed rate of premium, assessment or dividend or any distribution of subscribers shall not take effect until approved by the Commissioner of Insurance and Banking after such investigation as he may deem necessary. [Acts 1913, p. 429, pt. 3, § 17; Act March 28, 1917, ch. 103, pt. 3, § 17.]

**Art. 5246—75. [5246www] Rules for prevention of accidents; access to premises; review of rules.**—The association shall make and enforce reasonable rules for the prevention of injuries on the premises of subscribers and for this purpose the inspector of the association or of the board shall have free access to all such premises during regular working hours. Any subscriber aggrieved by such rule or regulation

may petition the board for a review and it may affirm, amend or annul the rule or regulation. [Acts 1913, p. 429, pt. 3, § 18; Act March 28, 1917, ch. 103, pt. 3, § 18.]

**Art. 5246—76. Employer shall give notice to board on becoming a subscriber; association to give notice; penalty for failure.**—Whenever any employer of labor in this State becomes a subscriber to this Act, he shall immediately notify the board of such fact, stating in such notice his name, place of business, character of the business, approximate number of employes, estimated amount of his pay roll and the name of the insurance company carrying his insurance, the date of issuing the policy and the date when the same will expire, and whenever any policy is renewed that fact shall be made known to the board and the notice thereof shall contain the above facts. The association shall also report the same to the board, giving the name of the employer, place of business, character of the business, approximate number of employes, estimated amount of pay roll, date of issuance and date of expiration of said policy. Any employer or association willfully failing or refusing to make any such report shall be liable for and shall pay to the State of Texas, a penalty of not more than one thousand dollars (\$1,000.00) for each and every offense, the same to be recovered in a suit to be instituted and prosecuted in Travis County by the Attorney General or by the district or county attorney under his direction in the district court thereof. [Act March 28, 1917, ch. 103, pt. 3, § 18a.]

**Art. 5246—77. [5246x] Notice to employes of securing of policy.**—Every subscriber shall, as soon as he secures a policy, give notice in writing or print, or in such manner or way as may be directed or approved by the Board, to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the association. [Acts 1913, p. 429, pt. 3, § 19; Act March 28, 1917, ch. 103, pt. 3, § 19.]

**Construction and operation in general.**—Workmen's Compensation Act requiring the employer who becomes subscriber to give notice thereof should be strictly construed. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

Vernon's Sayles' Ann. Civ. St. 1914, art. 5246yyy, defining subscriber to Workmen's Compensation Act, and articles 5246x, 5246xx, as to notice to employe are not in conflict. *Id.*

**Necessity of notice.**—Though Vernon's Sayles' Ann. Civ. St. 1914, art. 5246i, deprives employes of subscriber of right of action against employer for personal injuries, it must be construed with articles 5246x, 5246xx, requiring notice, and in absence of such notice relation of subscriber employer and employe does not exist. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437; *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

Though employer has become subscriber under Workmen's Compensation Act, she might still be liable under common law to injured servant if she failed to give the servant required notice. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

Under Workmen's Compensation Act, Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx, 5246yyy and 5246yyyy, held, that the requirement that person taking insurance shall be regarded as a "subscriber" so far as applicable under act fixes duty of insured, so that statute requires employers taking either class of insurance provided by act to give such notice. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

Under Workmen's Compensation Act, Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x and 5246xx, held, that in order to establish election by employe after notice that employer had become subscriber and that contract of employment was thus made subject to compensation act, employer should show that notice in writing or print was given or waived. *Id.*

**Form and sufficiency of notice.**—Mere posting of notice in place of business that employer is subscriber under Workmen's Compensation Act is not as matter of law notice to employe, but it is a question of fact whether it was sufficient. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

**Evidence.**—In employe's action for injuries, evidence that notices under Workmen's Compensation Act that employer was subscriber were posted after accident held admissible. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

Evidence held insufficient to show that employer had posted notice that she was subscriber under Workmen's Compensation Act. *Id.*

**Art. 5246—78.** [5246xx] **Notice to incoming employés; notice of discontinuance of policy; filing copy of notice with board.**—Every subscriber shall, after receiving a policy, give notice in writing or print, or in such manner or way as may be directed or approved by the Board to all persons with whom he is about to enter into a contract of hire that he has provided for payment of compensation for injuries by the association. If any employer ceases to be a subscriber, he shall on or before the date on which his policy expires, give notice to that effect in writing or print or in such other manner or way as the Board may direct or approve to all persons under contract of hire with him. In case of the renewal of his policy no notice shall be required under this Act. He shall file a copy of said notice with the Board. [Acts 1913, p. 429, pt. 3, § 20; Act March 28, 1917, ch. 103, pt. 3, § 20.]

See notes under art. 5246—77.

**Art. 5246—79.** [5246xxx] **Association shall pay subscriber amount of judgment, when.**—If a subscriber who has complied with all the rules, regulations and demands of the association is required by any judgment of a court at law to pay any employé any damages actual or exemplary, on account of any personal injury sustained by such employé in the course of his employment during the period of subscription, the association shall pay to the subscriber the full amount of the judgment and the cost assessed therewith, if the subscriber shall have given the association notice of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend same in his or its name. [Acts 1913, p. 429, pt. 3, § 21; Act March 28, 1917, ch. 103, pt. 3, § 21.]

**Art. 5246—80.** [5246y] **Corporate powers shall not expire, etc.**—The corporate powers of the association shall not expire because of failure to issue policies or to make insurance. [Acts 1913, p. 429, pt. 3, § 22; Act March 28, 1917, ch. 103, pt. 3, § 22.]

**Art. 5246—81.** [5246yy] **Reserves.**—The association shall set up and maintain reserves adequate to meet anticipated losses and carry all claims to maturity and policies to termination, which reserves shall be computed in accordance with such rules as shall be approved by the Commissioner of Insurance and Banking. [Acts 1913, p. 429, pt. 3, § 23; Act March 28, 1917, ch. 103, pt. 3, § 23.]

#### PART IV

Art. 5246—82. Terms defined.	Art. 5246—87. Effect of amendment on rights acquired under previous law.
5246—83. Officers and directors of subscriber corporation not deemed "employés."	5246—88. Meaning of words "employé" and "board"; singular and plural; gender.
5246—84. Employer holding policy of insurance company deemed a subscriber; insurer subject to provisions of this act; rates; mutual organizations.	5246—89. Partial invalidity.
5246—85. Employer may withdraw as subscriber.	5246—90. Advance payments of compensation.
5246—86. Misrepresentations affecting premium rates; penalty.	5246—91. Reports of subscriber not evidence against association or subscriber.

**Article 5246—82.** [5246yyy] **Terms defined.**—The following words and phrases as used in this Act shall, unless a different meaning is plainly required by the context, have the following meanings, respectively: "Employer" shall mean any person, firm, partnership, association of



persons or corporations or their legal representatives that makes contracts of hire.

“Employé” shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of trade, business, profession or occupation of his employer.

The words “legal beneficiaries” as used in this Act shall mean the relatives named in Section 8a, Part I [Art. 5246—15], of this Act. “Association” shall mean the “Texas Employers’ Insurance Association” or any other insurance company authorized under this Act to insure the payment of compensation to injured employés or to the beneficiaries of deceased employés.

“Subscriber” shall mean any employé who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance and Banking, as provided for in Section 12, Part III [Art. 5246—66], of this Act.

“Average weekly wages” shall mean,

1. If the injured employé shall have worked in the employment in which he was working at the time of the injury, whether for the same employer or not, substantially the whole of the year immediately preceding the injury, his average annual wages shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

2. If the injured employé shall not have worked in such employment during substantially the whole of the year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed.

3. When by reason of the shortness of the time of the employment of the employé, or other employé engaged in the same class of work in the manner and for the length of time specified in the above subsections 1 and 2, or other good and sufficient reasons, it is impracticable to compute the average weekly wages as above defined, it shall be computed by the Board in any manner which may seem just and fair to both parties.

4. Said wages shall include the market value of board, lodging, laundry, fuel, and other advantage which can be estimated in money, which the employé receives from the employer as part of his remuneration. Any sums, however, which the employer has paid to the employé to cover any special expenses entailed on him by the act of his employment shall not be included.

5. The average weekly wages of an employé shall be one-fifty-second (1-52) part of the average annual wages.

The terms “injury” of “personal injury” as used in this Act shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.

The term “injury sustained in the course of employment,” as used in this Act, shall not include:

1. An injury caused by the act of God, unless the employé is at the time engaged in the performance of duties that subject him to a greater hazard from the act of God responsible for the injury than ordinarily applies to the general public.

2. An injury caused by an act of a third person intended to injure the employé because of reasons personal to him and not directed against him as an employé, or because of his employment.

3. An injury received while in a state of intoxication.

4. An injury caused by the employé's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employé while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere. [Acts 1913, p. 429, pt. 4, § 1; Act March 28, 1917, ch. 103, pt. 4, § 1.]

**Construction in general.**—Vernon's Sayles' Ann. Civ. St. 1914, art. 5246yyy, defining subscriber to Workmen's Compensation Act, and articles 5246x, 5246xx, as to notice to employé are not in conflict. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

**Necessity of notice.**—Under Workmen's Compensation Act, Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx, 5246yyy and 5246yyyy, held, that the requirement that person taking insurance shall be regarded as a "subscriber" so far as applicable under act fixes duty of insured, so that statute requires employers taking either class of insurance provided by act to give such notice. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

**Suit by employé against insurer.**—Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246i, 5246yyy, an injured employé can sue the company which insures the employer's liability. *Fidelity & Casualty Co. of New York v. House* (Civ. App.) 191 S. W. 155.

**Art. 5246—83. Officers and directors of subscriber corporation not deemed "employés."**—The president, vice president or vice presidents, secretary or other officers thereof provided in its charter or by-laws and the directors of any corporation which is a subscriber to this Act shall not be deemed or held to be an employé within the meaning of that term as defined in the preceding section hereof. [Act March 28, 1917, ch. 103, pt. 4, § 1a.]

**Art. 5246—84. [5246yyyy] Employer holding policy of insurance company deemed a subscriber; insurer subject to provisions of this Act; rates; mutual organizations.**—Any insurance company which term shall include mutual and reciprocal companies, lawfully transacting a liability or accident business in this State shall have the same right to insure the liability and pay the compensation provided for in Part I of this Act, and when such company issues a policy conditioned to pay such compensation, the holder of such said policy shall be regarded as a subscriber so far as applicable under this Act, and when such company insures such payment of compensation it shall be subject to the provisions of Parts I, II, and IV and of Sections 10, 17, 18a, and 21 of Part III [Arts. 5246—64, 5246—74, 5246—76, 5246—79] of this Act, and shall file with the Commissioner of Insurance and Banking its classification of hazards with the rates of premium respectively applicable to each, none of which shall take effect until the Commissioner of Insurance and Banking has approved same as adequate to the risks to which they respectively apply and not less than charged by the association, and such company may have and exercise all of the rights and powers conferred by this Act on the association created hereby, but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers who have not less than 2,000 employés. [Acts 1913, p. 429, pt. 4, § 2; Act March 28, 1917, ch. 103, pt. 4, § 2.]

**Necessity of election and notice.**—Employers' Liability Act, pt. 4, § 2, held to bring within act not only every employer who has become a subscriber to the Insurance Association, but also every employer who has procured insurance, in some other insurance company, so that, despite part 3, §§ 6, 9-11, operation of act is not dependent upon whether employer elects to subscribe to association. *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229.

Under Workmen's Compensation Act, Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246x, 5246xx, 5246yyy and 5246yyyy, held, that the requirement that person taking insurance

shall be regarded as a "subscriber" so far as applicable under act fixes duty of insured, so that statute requires employers taking either class of insurance provided by act to give such notice. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

**Art. 5246—85. [5246z] Employer may withdraw as subscriber.**—Any subscriber who has paid a premium as provided in Section 1, Part IV [Art. 5246—82], of this Act may upon application to the board and to the association and after a showing satisfactory to the board that he has notified all of his employes in such manner as may be required by the board cease to be a subscriber and be entitled to a refund of the unearned portion of his premium, subject, however, to any rule approved by the Commissioner of Insurance and Banking as to the minimum premiums or short rate cancellation. [Acts 1913, p. 429, pt. 4, § 3; Act March 28, 1917, ch. 103, pt. 4, § 3.]

**Art. 5246—86. Misrepresentations affecting premium rates; penalty.**—Any subscriber who shall willfully misrepresent the amount of his pay roll to the association writing his insurance upon which any premium under this Act is to be based shall be liable to the association insuring the compensation of his employes in an amount not to exceed ten times the amount of the difference between the premium which he paid and the amount which said subscriber should have paid had his pay roll been correctly computed; and the liability to said association for such misrepresentation if it was deceived thereby, may be enforced in a civil action in any court of competent jurisdiction in this State. [Act March 28, 1917, ch. 103, pt. 4, § 3a.]

**Art. 5246—87. Effect of amendment on rights acquired under previous law.**—No inchoate, vested, matured, existing or other rights, remedies, powers, duties or authority, either of any employe or legal beneficiary, or of the board, or of the association, or of any other person shall be in any way affected by any of the amendments herein made to the original law hereby amended, but all such rights, remedies, powers, duties, and authority shall remain and be in force as under the original law just as if the amendments hereby adopted had never been made, and to that end it is hereby declared that said original law is not repealed, but the same is, and shall remain in full force and effect as to all such rights, remedies, powers, duties and authority; and further this Act in so far as it adopts the law of which it is an amendment is a continuation thereof, and only in other respects a new enactment. [Id., § 3b.]

**Art. 5246—88. Meaning of words "employe" and "board"; singular and plural; gender.**—Any reference to any employe herein who has been injured shall, when the employe is dead, also include the legal beneficiaries, as that term is herein used, of such employe to whom compensation may be payable. Whenever the word "board" is used in this Act it shall be construed to mean Industrial Accident Board created by this Act. Whenever in this Act the singular is used, the plural shall be included; whenever the masculine gender is used, the feminine and neuter shall be included. [Id., § 3c.]

**Art. 5246—89. [5246zz] Partial invalidity.**—Should any part of this Act for any reason be held to be invalid, unconstitutional or inoperative, no other part or parts thereof shall be held affected thereby, and if any exception to or any limitation upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective the general provisions shall nevertheless stand effective and valid as if it has been enacted without limitation or exceptions. [Acts 1913, p. 429, pt. 4, § 4; Act March 28, 1917, ch. 103, pt. 4, § 4.]

**Art. 5246—90. Advance payments of compensation.**—In cases of emergency or impending necessity the association may make advance payments of compensation to any employé during the period of his incapacity or to his beneficiaries within the terms of this Act, and when the same is either directed or approved by the Board it shall be credited as against any unaccrued compensation due said employé or beneficiaries. [Act March 28, 1917, ch. 103, pt. 4, § 5.]

**Art. 5246—91. Reports of subscriber not evidence against association or subscriber.**—The reports of accidents required by this Act to be made by subscribers shall not be deemed and considered as admissions and evidence against the association or the subscriber in any proceedings before the Board or elsewhere in a contested case where the facts set out therein or in any one of them is sought to be contradicted by the association or subscriber. [Id., § 6.]

## CHAPTER SIX

### PRIVATE EMPLOYMENT AGENCIES

Art.	Art.
5246—92. License required; bond.	5246—95. Private agency defined.
5246—93. Register to be kept; amount of fee; repayment to applicant.	5246—96. Employment agency fund; transfer of unexpended balance to school fund.
5246—94. Securing employment in houses of ill fame prohibited; false advertising and entries; inducing employés to leave employment.	5246—97. Books and forms.

**Article 5246—92. License required; bond.**—No person, firm or corporation in this state shall open, operate or maintain a private employment agency for hire, or where a fee is charged to either applicant for employment or for help, without first obtaining a license for the same from the Commissioner of Labor Statistics, and such license fee shall be \$25.00 (twenty-five dollars). Such license shall be of force for one year, but may be renewed from year to year upon the payment of a fee of \$25.00 (twenty-five dollars) for each renewal. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agencies. The license, together with a copy of this Act, shall be posted in a conspicuous place in each and every employment agency. The Commissioner of Labor Statistics shall require with each application for a license a good and sufficient bond in the penal sum of five hundred (\$500.00) dollars, to be approved by said commissioner, and conditioned that the obligor will not violate any of the duties, terms, conditions, provisions, or requirements of this Act. The said Commissioner of Labor Statistics is authorized to cause an action to be brought on said bond in name of the State for any violation of any of its conditions, and may revoke, upon a full hearing, any license whenever, in his judgment, the party licensed shall have violated any of the provisions of this Act. [Act March 22, 1915, ch. 108, § 1.]

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

**Art. 5246—93. Register to be kept; amount of fee; repayment to applicant.**—It shall be the duty of every licensed agency to keep a register in a substantial book, in the form prescribed by the Commissioner of Labor Statistics, in which shall be entered the age, sex, nativity, trade

or occupation, name and address of every applicant. Such licensed agency shall also enter in a register the name and address of every person who shall make application for help or servants, and the name and nature of the employment for which such help shall be wanted. Such register shall, at all reasonable hours, be open to the inspection and examination of the Commissioner of Labor Statistics or his deputies or inspectors. Where a registration fee is charged for filing or receiving application for employment or help, said fee shall in no case exceed the sum of two (\$2.00) dollars, for which a receipt shall be given, in which shall be stated the name of the applicant, the amount of the fee, the date, the name or character of the work or the situation to be secured. In case the said applicant shall not obtain a situation or employment through such licensed agency within one month after registration as aforesaid, then said licensed agency shall forthwith repay and return to such applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to said licensed agency; provided, that such demand be made within thirty (30) days after the expiration of the period aforesaid. [Id., § 2.]

**Art. 5246—94. Securing employment in houses of ill fame prohibited; false advertising and entries; inducing employés to leave employment.**—No agency shall send or cause to be sent any female help or servants to any place of bad repute, house of ill fame or assignation house, or any house or place kept for immoral purposes. No such licensed agency shall publish, or cause to be published, any false information, or to make any false promise concerning or relating to work or employment to anyone who shall register for employment, and no such licensed agency shall make any false entries in the register to be kept as herein provided, and all entries in such registers shall be made in ink. Any licensed person or agency shall not by himself or itself, agent or otherwise, induce, or attempt to induce, any employé to leave his employment with a view to obtaining other employment through such agency. [Id., § 3.]

**Note.**—Sec. 4 prescribes penalties for violation of the act, and is set forth in Vernon's Pen. Code 1916 as art. 999nnn.

**Art. 5246—95. Private agency defined.**—A private agency for hire is defined and interpreted to mean any person, firm or corporation engaging in the occupation of furnishing employment or help, or giving information as to where employment or help may be secured, or displaying any employment sign or bulletin, or, through the medium of any card, circular or pamphlet, offering to secure employment or help; provided, that charitable organizations not charging a fee shall not be included in said term. [Id., § 5.]

**Art. 5246—96. Employment agency fund; transfer of unexpended balance to school fund.**—The Commissioner of Labor Statistics shall, at the end of each month, make an itemized account of all moneys received by him from fees and fines, under the provisions of this Act, and pay the same into the State Treasury, to be held in a separate fund known as the employment agency fund, and to be used for expenses incurred in inspecting, regulating and printing blanks and books to be furnished such employment agencies by the Commissioner of Labor Statistics. The unexpended moneys remaining in the State Treasury at the end of the fiscal year shall be transferred into the school fund. [Id., § 6.]

**Note.**—Sec. 7 relates to disposition of fines assessed, and is set forth in Vernon's Pen. Code 1916 as art. 999ooo.

**Art. 5246—97. Books and forms.**—The Commissioner of Labor Statistics shall furnish to each licensed employment agency blank books upon which their record shall be kept, as provided for in this Act, together with forms for receipts, etc., and all necessary blanks upon which reports shall be made to the Commissioner of Labor Statistics. [Id., § 8.]

## CHAPTER SEVEN

### PAYMENT OF WAGES

**Art.**  
5246—98. Time when wages shall be paid;  
absent employés.

**Art.**  
5246—99. Penalty for violation of act; suits  
to recover.  
5246—100. Enforcement of act.

**Article 5246—98. Time when wages shall be paid; absent employés.**—From and after January 1, 1916, each and every manufacturing, mercantile, mining, quarrying, railroad, street railway, canal, oil, steamboat, telegraph, telephone and express company, employing more than ten persons, and each and every water company not operated by a municipal corporation, and each and every wharf company, and every other corporation engaged in any business within the State of Texas, which employs more than ten persons, or any person, firm or corporation engaged in or upon any public work for the State or for any county or any municipal corporation thereof, either as a contractor or a sub-contractor, therewith, shall pay each of its employés the wages earned by him or her as often as semi-monthly, and pay to a day not more than sixteen days prior to the day of payment.

An employé who is absent at the time fixed for payment, or who for any other reason is not paid at that time, shall be paid thereafter on six days' demand, and any employé leaving his or her employment, or discharged therefrom, shall be paid in full on six days' demand. [Act March 1, 1915, ch. 25, § 1.]

See arts. 5646 and 6623.

**Art. 5246—99. Penalty for violation of act; suits to recover.**—Every person, partnership or corporation, wilfully failing or refusing to pay the wages of any employé at the time and in the manner provided in this statute shall forfeit to the State of Texas the sum of fifty (\$50.00) dollars for each and every such failure or refusal, and suits for penalties accruing under this act shall be brought in any court having jurisdiction of the amount in the county in which the employé should have been paid, or where employed. Such suits shall be instituted at the direction of the Commissioner of Labor Statistics by the Attorney General or under his direction or by the County or District Attorney for the county or district in which suit is brought; and the attorney bringing any such suit shall be entitled to receive and shall receive as compensation for his service therein \$10.00 of the penalty or penalties recovered in such suit, and the fees and compensation so allowed shall be over and above the fees allowed to the Attorney General, County or District Attorneys under the general fee act. [Id., § 2.]

**Art. 5246—100. Enforcement of act.**—It shall be the duty of the Commissioner of Labor Statistics to inquire diligently for violations of this Act and institute prosecutions and see that the same are carried to final termination and generally to see to the enforcement of the provision hereof. [Id., § 3.]

## CHAPTER EIGHT

### EMIGRANT AGENTS

<b>Art.</b>	<b>Art.</b>
5246—101. Shall procure license.	limitation of fees that may be collected from laborers; return of fees collected where employment not secured.
5246—102. Definition of "Emigrant Agent."	
5246—103. Application for license; fee; bond; action on bond; revocation of license.	5246—105. Duties of commissioner of labor statistics.
5246—104. Office and record to be kept by licensee; examination by commissioner of labor statistics;	5246—106. Disposition of license fees.
	5246—107. Appropriations available.

**Article 5246—101. Shall procure license.**—That no person, firm or private employment agency shall carry on the business of an emigrant agent in this State without first having obtained a license therefor from the Commissioner of Labor Statistics of the State of Texas. [Act Oct. 18, 1917, ch. 36, § 1.]

**Art. 5246—102. Definition of "Emigrant Agent."**—The term "Emigrant Agent" as contemplated in this Act shall be construed to mean any person who for compensation or fees paid or to be paid directly or indirectly by those employed or solicited to emigrate is engaged in hiring laborers of soliciting emigrants in this State to be employed beyond the limits of this State. [Id., § 2.]

**Art. 5246—103. Application for license; fee; bond; action on bond; revocation of license.**—Any person, firm or private employment agency desiring to be licensed hereunder as an emigrant agent shall make application to the Commissioner of Labor Statistics on forms to be prescribed by said Commissioner, in which he shall state his name, age, place where his business is to be conducted, his previous occupation for the past five years, and the names of the counties of the State in which he expects to engaged in the business of hiring laborers or soliciting emigrants in this State to be employed beyond the limits of the State, such application shall, also, be accompanied by affidavits of at least three credible men that the applicant is to good moral character. The Commissioner of Labor Statistics may require other and additional evidence of the moral character of the applicant, if necessary; and no license shall be granted to any person except one of good moral character. Such application shall be examined by the Commissioner of Labor Statistics and if he finds that the same in all respects complies with the law and that the applicant is entitled to a license under this Act, then he shall issue a license to the applicant for each county for which applications is made, and shall deliver such license to the applicant upon the payment of a license fee of Fifty Dollars for each county in which an office is to be maintained by said agent, and the execution of a good and sufficient bond in the penal sum of Five Hundred Dollars for each county to be approved by said Commissioner of Labor Statistics and conditioned that the obligor will not violate any of the duties, terms, conditions and requirements of this Act. Said Commissioner is authorized to cause action to be brought on said bond by the Attorney General for any violation of any of its conditions; and any person aggrieved by any action or conduct of any such licensed party may bring action for damages against such party on said bond and recover thereon and against the bondsmen in any Court of competent jurisdiction without the necessity of making the State a party thereto. On a full hearing the Commissioner may revoke any license for any violation of the provisions of this Act. [Id., § 3.]

**Art. 5246—104. Office and record to be kept by licensee; examination by Commissioner of Labor Statistics; limitation of fees that may be collected from laborers; return of fees collected where employment not secured.**—It shall be the duty of every party licensed hereunder to keep and maintain an office, at which office a complete record of the business transacted shall be kept; there shall be kept a substantial book in the form prescribed by the Commissioner of Labor Statistics, in which shall be entered the age, sex, nativity, trade or occupation, name and address of every person or laborer hired or emigrant solicited to be employed beyond the limits of this State and where such person or emigrant was directed to go, and the address of such person or emigrant was directed to go, and the address of such person or emigrant, if known. Such licensed party shall also enter in a register the name and address of every person who shall make application for laborers or emigrants to be employed beyond the limits of this State. All the books and registers, correspondence, memoranda, papers and records of every party licensed hereunder shall be subject to examination at any time by the Commissioner of Labor Statistics, his deputies and inspectors. The fees charged for hiring laborers or soliciting emigrants in this State for employment beyond the limits of this State shall not exceed Two Dollars (\$2.00) for each such person or emigrant; and the fees charged any person who desires to find labor beyond the State or to emigrants beyond the boundaries of the State for the purpose of obtaining employment shall not exceed Two Dollars (\$2.00) for each such person, and in no event shall more than Two Dollars (\$2.00) be collected from any one for the same person who seeks employment beyond the State as a laborer or emigrant. Provided that all cases where the applicant who seeks employment beyond the State does not obtain such employment through the party licensed hereunder, then such party must return all fees collected from such applicant within thirty days after same has been collected. [Id., § 4.]

**Art. 5246—105. Duties of Commissioner of Labor Statistics.**—It shall be the duty of the Commissioner of Labor Statistics to enforce this Act, and when any violation thereof comes to his knowledge it shall be his duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. [Id., § 5.]

Sec. 9 creates an offense and is set forth post as art. 999½ of the Penal Code.

**Art. 5246—106. Disposition of license fees.**—The license fees collected under the provisions of this Act by the Commissioner of Labor Statistics shall be paid directly into the State Treasury, provided that all such fees collected during the fiscal year, beginning September 1, 1917, and ending August 31, 1918, and during the fiscal year beginning September 1, 1918 and ending August 31, 1919, are hereby appropriated for the use of the Commissioner of Labor Statistics to be used by him in the enforcement of the provisions of this Act and shall be paid out on warrants properly drawn by the Commissioner of Labor Statistics and approved and countersigned by the Comptroller of the State of Texas, and any surplus thereof remaining at the end of either of said years shall remain in the State Treasury and be by the State Treasurer placed in the General Funds of the State. [Id., § 7.]

**Art. 5246—107. Appropriations available.**—All appropriations heretofore made for the support and maintenance of the Department of the Commissioner of Labor Statistics may be used in the enforcement and administration of this Act. [Id., § 8.]



## TITLE 78

## LANDS—ACQUISITION FOR PUBLIC USE

## DECISIONS RELATING TO LAW OF EMINENT DOMAIN IN GENERAL

1. **Nature and source of power.**—Land cannot be taken for private use. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

6. **Necessity of compensation.**—Where land is taken for public use, compensation must be paid. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

## TITLE 79

## LANDS—PUBLIC

## Chap.

1. Public domain.
2. General land office.
4. County and district surveyors.
5. Surveys and field-notes.
6. Patents.

## Chap.

8. General provisions.
9. Sale and lease of public free school and asylum lands.
10. Suits to recover public lands, rents and damages.

## CHAPTER ONE

## PUBLIC DOMAIN

## Article 5278. Vacant public lands belong to free school fund.

5. **Giving away lands.**—Since all public lands in the state were set aside to the school fund by the act of 1900 (Acts 26th Leg. 1st Called Sess. c. 11), a resurvey in 1905 and 1906 of public lands by a state surveyor appointed under Acts 20th Leg. c. 115, so as to include unappropriated lands in a patented survey by extending the lines thereof beyond their original location, constitutes a giving away of such lands in violation of Const. art. 7, § 4. *State v. Post*, 169 S. W. 401 (Civ. App.) certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

**Special acts.**—Acts 1st called session, 34th Leg. ch. 21, amending ch. 26 of Acts 1st called session, 33rd Leg., provides for the sale of certain submerged lands on the shore of Galveston Bay for the erection of dry docks.

Act March 15, 1915, Acts 34th Leg., Regular Sess. c. 52, ratifies and confirms certain titles on the Jose Maria Mora grant of land in Nacogdoches county. It is omitted from this compilation as being local.

## DECISIONS RELATING TO SUBJECT IN GENERAL

2. **Spanish and Mexican grants.**—Where the state of Texas placed grants made by a former sovereign on the same footing as those made by the state any grant by the state of a part of lands embraced in a grant of a former sovereign was void. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

In relation to property rights in that part of the Mexican state of Tamaulipas over which the state of Texas extended sovereignty on December 19, 1836, acquired before such sovereignty was extended, the treaty of Guadalupe Hidalgo has the force of law in Texas. *State v. Gallardo*, 166 S. W. 369, 106 Tex. 274, affirming judgment (Civ. App.) 135 S. W. 664.

Act Feb. 10, 1852 (Laws of 1851-52, c. 69), requiring the field notes of surveys made prior to the passage of that act to be returned to the general land office, does not relate to nor affect Mexican titles or surveys, but only refers to surveys made under the laws of the republic or state of Texas. *Id.*

Where lands between the Nueces and Rio Grande rivers had been sold, by a description sufficient to identify them, under the authority of the governor of the Mexican state of Tamaulipas, the purchase price paid and a survey ordered, prior to the extension of the sovereignty of Texas over such territory, the purchasers had acquired a perfected right to the legal title, which was good against the Mexican government and will be protected by the Texas court. *Id.*

Whatever rights were acquired by towns under grants of "ejidos" from the Spanish king, such grants did not convey an indefeasible title, and when the town was removed to another locality, and the public use of the lands was abandoned, the lands reverted to the sovereignty. *Id.*

The treaty of Guadalupe Hidalgo protects all titles to lands formerly within the Mexican state of Tamaulipas over which the sovereignty of Texas was extended, which were good against the Mexican government. *Id.*

**13. Land certificates—Transfer of certificates.**—An unlocated certificate for public lands may be assigned. *Hennessy v. Blair* (Sup.) 173 S. W. 871, affirming judgment *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

The transfer of a land certificate from the original grantee before its location may be shown by circumstances, but where the original grantee is dead a transfer may not be shown by subsequent dealings of the alleged transferee, who is alive. *Magee v. Paul*, 159 S. W. 325.

The mere possession of an unlocated original land certificate is not evidence of title in the possessor. *Id.*

Under the law of 1837, there was no prohibition or restraint upon the grantee's sale of a conditional certificate. *Baugh v. McLain* (Civ. App.) 173 S. W. 922.

Under Act Sept. 4, 1850 (3 Gammel's Laws, p. 38), recital in an unconditional certificate that one K. was assignee of deceased grantee of conditional certificate was conclusive of K.'s ownership of the certificate, and as against a prior assignee of a grantee, whose certificate had not been filed. *Id.*

Where there was no proof that one who purchased a conditional certificate from the original grantee was then county surveyor, and it was found that he was not, the sale of the certificate to him was not void. *Id.*

A certificate to county lands, under which land in controversy in trespass to try title was located, held transferred by the original holder. *Houston Oil Co. of Texas v. Miller & Vidor Lumber Co.* (Civ. App.) 178 S. W. 830.

An unlocated land certificate may be transferred by parol. *Id.*

Unlocated land certificates are personal property subject to verbal sale and delivery. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**16. Entries and locations under former law—Vacant public land.**—Where holder of an unconditional certificate failed to file field notes within one year from date of relocation, the land commissioner was authorized to forfeit relocation, the effect of which, under Acts 1852 (3 Gammel's Laws, p. 936), was to make the land subject to survey as vacant land by holders of valid certificates. *Baugh v. McLain* (Civ. App.) 173 S. W. 922.

**18. — Surveys.**—Under Const. 1869, art. 10, § 3, providing that any location of land certificates subsequent to October 30, 1856, was void when made upon land previously titled, and the present Constitution (article 14, § 2), held that a mere apparent conflict, shown upon an inaccurate map or by erroneous certificates of survey, would not invalidate a subsequent location if there was no actual conflict on the ground. *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

**23. — Priorities.**—Lands previously located by defendants by surveys older than those under which plaintiffs claim cannot be recovered in trespass to try title. *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

**24. Homestead donations under former law.**—The doctrine of stale demand does not apply as against the legal owners of a donation certificate and the land located by virtue thereof. *Moody v. Bonham* (Civ. App.) 178 S. W. 1020; *Moody v. Bonham* (Civ. App.) 179 S. W. 670.

A donation certificate issued by the state to the heirs of one who fell at the Alamo in 1836, being a mere gratuity, did not belong to his estate. *Id.*

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## CHAPTER TWO

### GENERAL LAND OFFICE

#### Article 5281. [4043] Commissioner to have custody of books, etc.

**Powers of Commissioner.**—A commissioner of the land office has no authority except that conferred on him by law. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

## CHAPTER FOUR

## COUNTY AND DISTRICT SURVEYORS

- |   |   |
|---|---|
| Art.<br>5305. Shall record all field-notes in his district. | Art.<br>5306. Shall plat surveys upon map, etc. |
|---|---|

**Article 5305. [4073] Shall record all field-notes in his district.**

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Art. 5306. [4074] Shall plat surveys upon map, etc.**

**Presumption.**—Under this article, maps from the land office would be presumed to be a reproduction of such plats and sketches, etc. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Under this article, it would be presumed that when a patent issued in the case of a block for any subdivision thereof to the grantee, the land commissioner had not only the field notes, but the plat returned with the field notes before him. *Id.*

## CHAPTER FIVE

## SURVEYS AND FIELD-NOTES

- |   |   |
|---|---|
| Art.<br>5336. Field-notes shall describe what.  | Art.<br>5353. General authority of commissioner to have surveys made; compensation of official; state surveys, etc. |
| 5338. Surveys on navigable streams.             | 5357. Surveyor's duties in adjusting conflicts.   |
| 5339. Surveys shall be in a square.             |   |
| 5340. Notice to settlers.                       |   |
| 5347. Commissioners to have surveys made, when. |   |
| 5349. May have lands surveyed, when.            |   |

**Article 5336. [4144] Field-notes shall describe what.**

**Meaning of word "survey."**—Rev. St. 1895, art. 4269 (Acts 18th Leg. c. 40), does not mean that in ascertaining the boundaries of county school lands such construction will be given to field notes as to give the county the benefit of those calls most favorable to the county; and the word "survey," in the expression "the land included in the lines of the survey" does not mean the diagram or map required by this article, but is used synonymously with "field notes." *Cross v. Wilkinson* (Civ. App.) 187 S. W. 345.

**Art. 5338. [4147] Surveys on navigable streams.**

Cited, *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

**Title to bed of stream.**—A patent to public lands abutting on a navigable stream, the channel of which is reserved to the state, does not give the riparian owner any rights to the bed. *State v. Macken* (Civ. App.) 162 S. W. 1160.

Under the provision declaring all streams 30 feet wide to be navigable, riparian owners upon a stream 30 feet in width only acquire title to the margin of the stream, and hence could not obstruct the channel to the injury of one using the stream for floating logs. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 164 S. W. 878.

Finding of jury as to navigability as affecting question of title, see *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

**Public rights.**—If a stream in its ordinary condition or in periodical floods can be used for transporting timber, etc., the public has an easement therein for that purpose which cannot be unreasonably obstructed by riparian owners. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 164 S. W. 878.

**Art. 5339. [4148] Surveys shall be in a square.**

Cited, *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

**Art. 5340. [4150] Notice to settlers.**

**Necessity of notice.**—Under this article, if the notice required has not been given, the survey is not legal. *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Presumption.**—Where the survey is proved, the giving of the notice will be presumed, in absence of contrary proof. *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Art. 5347. [4261] Commissioner to have surveys made, when.**

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Surveys, how made.**—In the absence of a natural or artificial marks called for in the field notes showing error in course or distance and in the absence of proof as to how surveys were actually made, the lines must, on a resurvey by a state surveyor appointed under Acts 20th Leg. c. 115, be run out course and distance from known corners with which they connect by their callings. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

Calls for course and distance in the field notes of a resurvey made of public land by the state surveyor appointed under Acts 20th Leg. c. 115, may, in a proper case, be extended and varied to fulfill other calls in its field notes, but not to satisfy the calls in a junior survey. *Id.*

Where the original surveys of public land left an unappropriated space between two grants, the state surveyor appointed under Acts 20th Leg. c. 115, had no authority to extend the original surveys so as to include such land, where it did not appear that there were any conflicts or material errors, or attempt to correct conflicts or errors in the original surveys. *Id.*

**Correction of field notes of previous survey.**—Under Rev. St. 1895, arts. 4130, 4141, where a resurvey of public land is made under the Acts 20th Leg. c. 115, the surveyor cannot correct the field notes of the previous survey without having the certificate in his hands, unless such survey was in conflict with land previously appropriated, and then only to the extent of such conflict, nor can he include in the corrected field notes any land not included in the original file or location. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

**Including other lands in patented survey.**—Upon resurvey of a grant of public lands, it is not permissible to include other and different lands from those included in the original file and survey. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

Since all public lands in the state were set aside to the school fund by the act of 1900 (Acts 26th Leg. 1st Called Sess. c. 11), a resurvey in 1905 and 1906 of public lands by a state surveyor appointed under Acts 20th Leg. c. 115, so as to include unappropriated lands in a patented survey by extending the lines thereof beyond their original location, constitutes a giving away of such lands in violation of Const. art. 7, § 4. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

**Erroneous survey.**—Where a surveyor making an office survey of a patent of land erroneously supposed the corner of a county, which was the starting point of the survey, to be further north than it was in fact, such supposition could not control the boundary between the survey and other surveys. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

The power conferred on the commissioner of the land office by Acts 20th Leg. c. 115, to have lands resurveyed, does not authorize him, by approving erroneous surveys, to change the lines and corners of patented surveys so as to include additional land. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

**Conclusiveness and effect.**—A resurvey of public lands under the Acts 20th Leg. c. 115, was not conclusive against the state as to the true location of the land owned by plaintiff under a prior grant. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 106 Tex. 468, 169 S. W. 407, and judgment reversed *Post v. State*, 106 Tex. 500, 171 S. W. 707.

Where a state surveyor appointed under Acts 20th Leg. c. 115, surveys patented lands without having the certificate for the same in his hands, the corrected field notes then made by him have no force, unless the owners of such lands surrender their patents and accept new patents in accordance with the resurvey. *Id.*

**Art. 5349. [4263] May have lands surveyed, when.**

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Art. 5353. General authority of commissioner to have surveys made; compensation of official; state surveys, etc.**

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

**Art. 5357. Surveyor's duties in adjusting conflicts.**

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

## BOUNDARIES IN GENERAL

**2. Relative importance of conflicting elements.**—In locating land, recourse will be had: First, to natural objects; second, to artificial objects; and, third, to courses and distances. *Baker v. Henry* (Civ. App.) 166 S. W. 19.

The object of the rules for the ascertainment of boundary lines is to determine where the line was originally in fact located by the surveyor. *Kendrick v. Johnson* (Civ. App.) 173 S. W. 914.

3. — **Control of elements consistent with intention.**—Of two identified lines in a block survey neither can control the other where the calls are conflicting, but effect should be given to the one most in harmony with the field notes and with the lines of contiguous surveys. *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

4. — **Control of natural objects and monuments over other elements in general.**—The call for course and distance is a lower grade of evidence, and must yield to a call for a natural object, marked tree, or a fixed, determinable corner. *Kendrick v. Johnson* (Civ. App.) 173 S. W. 914.

A location call for rivers, creeks, trees, and other natural objects ordinarily controls a call for course and distance. *Kelly v. Kelly* (Civ. App.) 173 S. W. 686.

Call for a mound, meaning a point, if the point could be located upon a well-marked line by course and distance would control a purely descriptive call for an unmarked corner. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

In determining suits involving boundary lines, it must be determined whether or not survey lines sought to be located were actually traced on ground when survey was made, and, to find and identify such lines, marks and natural objects found on ground control course and distance. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.

While ascertaining the surveyor's intention is the primary object in locating boundaries, it is a rule of evidence that calls for natural objects, artificial objects, and distance and course rank in the order given. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

In a boundary location calls for natural or artificial objects prevail over those for course and distance only when they can be identified with reasonable certainty. *Id.*

In an action of trespass to try title to land claimed by plaintiffs under mineral land patents from state, held, that monuments placed by surveyor controlled erroneous calls in patents. *Plummer v. McLain* (Civ. App.) 192 S. W. 571.

5. — **Control of water courses, highways and fences over other elements.**—Where there is a conflict between calls for course and distance in grants of adjacent lands and calls therein for the bank of an old bed of a river as the boundary between the grants, the latter must prevail. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

Where description starts from a beginning point and runs a certain distance in a certain course to the bank of a river, the course controlled the distance, and the point where such course touched the bank was the true point located. *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

6. — **Control of metes and bounds or courses and distances over other elements.**—Where a deed had no conflict in the calls, though the general description as including a survey was in conflict with the field notes of such survey, the particular description by calls controlled. *McFaddin v. Johnson* (Civ. App.) 180 S. W. 306.

An excess of 1,500 varas in an 18-mile line is not so great as to require rejection of all calls in the survey. *Nanny v. Vaughn* (Civ. App.) 187 S. W. 499.

7. — **Control of lines marked or surveyed over other elements.**—Where earlier blocks have already been located on the ground, their location cannot be changed because there is a conflict between them and the description of subsequently located blocks. *McSpadden v. Vannerson* (Civ. App.) 169 S. W. 1079.

A surveyor's original location of the line should be accepted as the true line, notwithstanding conflicting calls of the deed. *Cariker v. Davis* (Civ. App.) 172 S. W. 728.

Calls in a later deed cannot aid in fixing the location of the corners in a former one. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

A patentee's field notes, calling for course and distance and for the western boundary of a section as the eastern boundary, held to make the call for the boundary prevail over calls for course and distance. *Braumiller v. Burke* (Civ. App.) 173 S. W. 609.

Where a description of land in a judgment, in an action of trespass to try title, calls for a well-described corner at variance with the distance, the distance must give way to the call for the corner. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

In trespass to try title involving lines of a block as appearing in field notes of sections of another block, held, that the rule that the lines of a prior survey cannot be controlled by the call of the junior survey, did not apply. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Where the eastern tiers of surveys were located before the western tiers and their east lines can be ascertained, their calls should prevail over the western calls even if there is a slight variance. *Nanny v. Vaughn* (Civ. App.) 187 S. W. 499.

In determining boundaries, the footsteps of the surveyor are the determining factor, and when found and identified, as called for in the field notes, they must control. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

Where the line traced by a surveyor can be fixed by reference to meander calls of a river which has since changed its course, the contention that a call of a subsequent survey must be determined by the present course of the river, cannot be sustained. *Id.*

For a marked line or corner to control a call for course and distance, it must be identified upon the ground. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.

The real object in applying the various calls is to find the footsteps of the surveyor, and, when found and identified, all classes of calls must yield to them. *Miller v. Meyer* (Civ. App.) 190 S. W. 247.

Where boundaries of a grant as actually located and measured on ground were so described in deed, they are limits of grantee's rights, although parties intended to make northern line in common with northern boundary of a larger tract subsequently found to be further north than boundary described in deed. *Chesson v. La Flore* (Civ. App.) 191 S. W. 745.

Where commissioners in partition disregarded survey in their decree, the rule that lines and corners established by survey and marked on the ground cannot be changed has no application in subsequent proceedings to try title. *McGuire v. Blair* (Civ. App.) 193 S. W. 185.

A corner actually located and marked will control the call for another corner or line mistakenly assumed to be in the same place. *Polk v. Reinhard* (Civ. App.) 193 S. W. 687.

Where field notes call for the line of a certain survey but also call for a marked bearing tree, the marked corner and distance control the call for the line of the older survey. *Id.*

If marks called for by a first survey existed at time second survey was made, but not when controversy arose, but location of old line can be identified, same rule would be applied as if marks still existed at time of controversy. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

8. — **Control of calls for adjoiners over other elements.**—Where a description of a survey called for well-established surrounding surveys on all sides, such calls controlled the courses and distances, and the mere fact that by running courses and distances there was an excess was immaterial. *Baker v. Heney* (Civ. App.) 166 S. W. 19.

A call for a line of an adjoining survey should not be permitted to prevail over a call for distance unless such line itself can be located with reasonable accuracy and certainty, and where the line of an adjoining survey called for and the corner of a part thereof could not be so located, they should be disregarded and the terminus fixed according to the call for distance. *Hermann v. Thomas* (Civ. App.) 168 S. W. 1037.

The rule that a call for a corner or line of an adjoining survey controls a call for distance is not of absolute application in all cases. *Miller v. Campbell* (Civ. App.) 171 S. W. 251.

The fact that land office certificate stipulated that two surveys should connect with each other will not affect the actual location as shown by field notes which do not connect owing to a mistake in surveying. *Polk v. Reinhard* (Civ. App.) 193 S. W. 687.

9. — **Control of maps, plats and field notes over other elements.**—In field notes of a section in block, calls tying the northwest corner of the section to surveys in block M—8 and a survey in block M—13 held descriptive calls, and not locative calls. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

10. — **Control of quantity over other elements.**—Mention of the acreage conveyed by a deed describing the land specifically by metes and bounds does not control as to the property conveyed. *Standefer v. Miller* (Civ. App.) 182 S. W. 1149.

Where there was an inconsistency in a deed, in that the boundaries of the land included a greater acreage than the deed recited was intended to be conveyed, the trial court, having found the fact, could treat the statement of the quantity as false; the description being sufficient without it. *Id.*

11. **Natural and permanent objects.**—Lines and boundaries cannot be constructed with reference to objects that may be found on the ground as indicating the footsteps of the surveyor, where there are no calls in the grant for such objects. *Stark v. Adams* (Civ. App.) 183 S. W. 58.

13. **Courses and distances.**—If the first call in a deed is indefinite or erroneous, the subsequent calls, if they agree and may be readily ascertained, are entitled to as much consideration as the first call. *Hinkle v. Hays* (Civ. App.) 162 S. W. 435.

Calls given by mistake should be disregarded. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

That the meander calls of a survey do not balance in that they do not close by a distance of 114 varas, is not important in determining the sufficiency of the survey to fix the location of boundary. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

14. — **Reversing calls.**—In determining the boundary of a survey, the calls may be reversed only when the survey was actually made. *Baker v. Heney* (Civ. App.) 166 S. W. 19.

Calls in field notes should be followed in order given, unless the call for a more recent line is more definitely located and shows more certainly the footsteps of the surveyor. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.

A senior survey may be constructed by reversal of calls from a junior survey tied to it by the same surveyor who, as county surveyor, certified to the correctness of the field notes of the senior survey, though none of the original bearing trees or corners thereof are found on the ground. *Houston Oil Co. of Texas v. Wing* (Civ. App.) 194 S. W. 221.

15. **Location of corners.**—Evidence held to show that the first call in the description of a tract of land, which read, "Beginning at a stake set on the extremity of the sand bar" of a certain river, located the beginning point at the extremity of the bar furthest from the river. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

In fixing a disputed boundary between a patent and a railroad survey, which called for another survey, which in turn called for another, etc., where only two of the original corners of such surveys could be definitely located, court held to have properly constructed the survey from one of such corners, rather than from the other, which was more remote. *Clarke v. Klein* (Civ. App.) 166 S. W. 1179.

16. **Location of lines.**—In an action for cutting and removing timber from land, evidence on the issue of boundaries held to show that the timber was cut and removed from a tract of plaintiff. *Kirby Lumber Co. v. Stewart* (Civ. App.) 161 S. W. 372.

A marked line or corner in a block or system of surveys belongs as much to one block as to another. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

17. **Designation, quantity and location of land.**—The term "southeast one-half," in a lease of one-half of a school section, the easterly and westerly lines of which run north

27° west, and the northerly and southerly lines, south 63° west, means that part of section south of a line bisecting the easterly and westerly lines. *Pruett v. Robison* (Sup.) 192 S. W. 537.

18. **Maps, plats and field notes.**—Where surveys were not actually run on the ground, they could not be located by calls in the field notes, except calls for courses and distances from the corners on the bank of a river called for. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

The field notes of a block constituting a prior survey, might be explained by subsequently made field notes of another block. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Where field notes of one survey are complete and contain no inconsistent calls, it is not permissible to look to field notes of another survey to create an inconsistency. *Polk v. Reinhard* (Civ. App.) 193 S. W. 687.

19. **Adjoining or adjacent lands.**—Evidence held to require the rejection, in the description contained in a deed, of a call for a corner made for a former grantee of the same grantor. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

Field notes of survey on west side of river describing survey as being in front of league previously surveyed on east side, mean that the lines of the older survey if extended across the river would trace the upper and lower lines of the new survey. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

Adjoining surveys by same surveyor within a few days of each other, mapped with a common division line and calling for each other, will appropriate the land the one to the other, and only very clear evidence will justify conclusion of existence of any vacancy between such surveys as actually made. *Miller v. Meyer* (Civ. App.) 190 S. W. 247.

20. **Waters and water courses.**—Though land abutting on a river is overflowed and remains submerged for some time, the owner does not lose his rights therein. *Marks v. Sambrano* (Civ. App.) 170 S. W. 546.

21. — **Meandered waters.**—A call in a deed for a course up a river with the meanders held, under the evidence, to refer to the meanders of a sand bar along the river, and not the river itself. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

22. — **Accretion and avulsion.**—Where the Rio Grande changed its course by avulsion, shifting lands from Texas into Mexico, the ownership did not shift as in the case of changes by erosion, and on a subsequent avulsion returning the land to Texas the ownership continued in the original owner. *Marks v. Sambrano* (Civ. App.) 170 S. W. 546.

23. — **Islands.**—In a suit over land which the state claimed on the ground that its title had never been divested because it was an island in the bed of a navigable stream, evidence held sufficient to sustain a finding that the locus in quo at the time it was patented merely abutted on the stream. *State v. Macken* (Civ. App.) 162 S. W. 1160.

24. **Public ways.**—A deed conveying lots adjoining an alley passes title to the center of the alley. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

Where plaintiff sold lot on platted unopened street to defendant railroad, after abandonment of street by city ordinance, title to middle of street passed under the deed. *Amerman v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 182 S. W. 54.

26. **Priority of grants and deeds.**—An excess of four acres held not to invalidate a senior patentee's title, and a junior survey could not encroach thereon. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

27. **Priority of surveys.**—Where a location of public lands is fixed by actual survey upon the ground, being the first or eldest in location, the lines so fixed upon the ground control. *Newman v. Davis* (Civ. App.) 184 S. W. 1078.

Where the field notes of a survey do not give the meanders of a river on the east line, but the west line of an older survey on the east side of the river gives such meanders, the meanders given in the older survey control the later survey. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

31. **Remedies for establishment of boundaries—Weight and sufficiency of evidence.**—In trespass to try title to recover land under ancient grants, evidence held to sustain a finding that the land claimed had not been located and surveyed on the ground, so as to embrace the land claimed by plaintiff. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

In trespass to try title involving the location of a boundary between adjacent grants, evidence held to sustain a verdict fixing the boundary. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

Evidence held not to show the location of a boundary line. *Harkrider v. Gaut* (Civ. App.) 167 S. W. 164.

That a survey was merely an office survey may be established by circumstantial evidence. *McSpadden v. Vannerson* (Civ. App.) 169 S. W. 1079.

Evidence held to sustain a finding locating a corner at a different point than that called for by the course and distance. *Kendrick v. Johnson* (Civ. App.) 173 S. W. 914.

In a boundary suit, evidence held to show, contrary to the finding, that a certain line ran southwesterly, rather than due west, as called by course and distance. *Id.*

In an action between claimants to public lands, previously surveyed and located, evidence held sufficient to show that defendants' surveys were located on the south bank of a river, although the distance, to be run from the beginning point of the survey to such river was erroneous. *Stark v. Stout* (Civ. App.) 174 S. W. 1014.

In an action between claimants to public lands previously surveyed and located, evidence held insufficient to warrant finding that the river on which the surveys, under

which defendants claimed, were located, had changed its course considerably since such surveys. *Id.*

In an action between claimants to public lands previously surveyed and located, evidence held insufficient to show that plaintiff's survey crossed a certain creek. *Id.*

In an action by a county against others to locate its school lands, evidence held sufficient to sustain the jury's finding as to the position of the southeast corner of a certain survey. *Colorado County v. Travis County (Civ. App.) 176 S. W. 845.*

Evidence held insufficient to show that those under whom plaintiff claimed had recognized the true location of the boundary line as being the location contended for by defendants. *Bundick v. Moore-Cortes Canal Co. (Civ. App.) 177 S. W. 1030.*

Where the evidence leaves no room for doubt as to the true location of a boundary line, proof of acquiescence in the erroneous line will not support a verdict in favor thereof. *Id.*

In a suit involving disputed boundary, evidence held insufficient to show that the line was as claimed by plaintiffs. *Harris v. Kiber (Civ. App.) 178 S. W. 673.*

In an action involving boundary, evidence held to show that the plat, as made, was result of a mistake, and that it was not intended to include in the addition in which plaintiff bought property other unplatted property not belonging to plaintiff's grantor. *Lockwood Inv. Co. v. Geiselman (Civ. App.) 179 S. W. 549.*

In trespass to try title, evidence held to show the location of the northwest corner of a certain survey, and that a boundary line should run north 43 degrees east from such corner to the northeast corner of the survey, unless arrested. *Goodrich v. West Lumber Co. (Civ. App.) 182 S. W. 341.*

Under the facts shown on the issue as to location of a corner, held that a verdict for plaintiff was unauthorized. *Stark v. Adams (Civ. App.) 183 S. W. 58.*

Testimony of surveyor that he ran an east line the distance called for in certain field notes, held insufficient to identify such line where the field notes called for no distance. *Kincheon v. Edwards (Civ. App.) 183 S. W. 92.*

Evidence held sufficient to sustain the finding of the jury as to proper location of boundaries of plaintiff's land. *Thatcher v. Matthews (Civ. App.) 183 S. W. 810.*

Evidence held to show that none of the original witness or bearing trees called for in field notes of a survey can be located on the ground. *Maddox v. Dayton Lumber Co. (Civ. App.) 188 S. W. 958.*

Evidence held to show that the lines of a survey were never run on the ground by the surveyor. *Id.*

In action to recover strip of unlocated and unappropriated public lands lying between west boundary of a survey and east boundary of another survey, where the maps or plats had made such boundaries the same line, evidence held to sustain verdict for defendant. *Miller v. Meyer (Civ. App.) 190 S. W. 247.*

Adjoining surveys by same surveyor within a few days of each other, mapped with a common division line and calling for each other will appropriate the land, the one to the other, and only very clear evidence will justify conclusion of existence of any vacancy between such surveys as actually made. *Id.*

Original survey agreeing with maps in use for many years should not be held erroneous because not agreeing with subsequent resurveys on assumption that statements of living persons as to locality of lines and corners was absolutely correct, nor where based upon an indefinite and uncertain starting point. *Id.*

A verdict finding no conflict between surveys, held sustained by the evidence. *W. T. Carter & Bro. v. Collins (Civ. App.) 192 S. W. 316.*

In trespass to try title, finding that boundary line established by partition decree was not surveyed line contended for by plaintiff, but that decree disregarded such survey, held supported by evidence. *McGuire v. Blair (Civ. App.) 193 S. W. 185.*

**34. — Judgment and enforcement thereof.**—Judgment for plaintiff for the possession of land indefinitely described held ineffectual. *Campbell Banking Co. v. Hamilton (Civ. App.) 173 S. W. 1012.*

Where plaintiff is not entitled to recover all the land described in the petition, he may recover a portion thereof, though his proof does not describe it sufficiently for the jury to locate it. *Hermann v. Schroeder (Civ. App.) 175 S. W. 788.*

In a suit to establish boundaries, in form of trespass to try title, the judgment need not recite the boundaries established, but it is sufficient if the corners are established by monuments and barriers, if such a description would enable the sheriff to put the successful party in possession. *Thatcher v. Matthews (Civ. App.) 183 S. W. 810.*

**35. Agreements between parties.**—An agreement between the parties as to the line of a certain survey not in controversy, held not to bind the parties as to the lines in controversy. *Moore v. Lehmann (Civ. App.) 165 S. W. 81.*

Where adjacent owners knew that the boundary between their land was a creek called for in their deeds, but their dispute involved which creek was called for, a boundary by oral agreement not following the meanders of either creek was invalid. *Voigt v. Hunt (Civ. App.) 167 S. W. 745.*

Failure of party to boundary agreement to tell other party of survey by state surveyor establishing the boundary line some distance from a fence adopted as the boundary by the agreement held fraud justifying a rescission. *Denton v. English (Civ. App.) 171 S. W. 248.*

In action to quiet title, the issue being a disputed boundary, evidence held to show valid agreement and location of boundary between defendant and a predecessor in title of plaintiff. *Bigham v. Stamps (Civ. App.) 187 S. W. 733.*

Where the grantee of a small tract particularly described as a part of a larger tract located his land on another part of the larger tract, and such grantee and the purchaser of the larger tract exchanged deeds so as to permit the grantee of the lesser tract to



retain the part located on the heirs of the original owner of the entire tract had no remaining interest, since the two purchasers became tenants in common of the entire land, and could divide it as they saw fit. *Whitfield v. La Grone* (Civ. App.) 191 S. W. 1169.

**37. Recognition and acquiescence.**—Evidence in trespass to try title held not to show a recognition of, and acquiescence in, a certain line as a boundary line by the person under whom defendant claimed. *Beebe v. Sweeney* (Civ. App.) 158 S. W. 235.

Acquiescence in a boundary line established by an adjoining owner affords a strong presumption that it is the true line, but the weight of such acquiescence is for the jury. *Id.*

Even where there is no estoppel, long acquiescence as to the location of a corner or line is entitled to weight, especially where the owner lives upon the land. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

An agreement fixing a boundary may be implied from acts and long acquiescence, especially if a failure to recognize such boundary would injure subsequent purchasers, or where one of the proprietors has made valuable improvements induced by the acts and acquiescence of the other owner. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

Grantees of part of a tract of land are not bound by any line other than that fixed in their deed, unless they consent to the establishment of a line or have acquiesced in the establishment of a boundary by the others. *Harris v. Kiber* (Civ. App.) 178 S. W. 673.

Evidence that the line contended for by plaintiff in trespass to try title had been recognized as the western boundary line of a grant since decision of the Supreme Court in another case, and that witness after such decision had made all the surveys for locations of state land certificates between the east line of another grant and the line contended for by plaintiff, should have been excluded. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**39. Private surveys.**—In a suit to determine the location of boundaries, circumstantial evidence held to show that the surveyor who located the survey in controversy did not make an actual survey on the ground in whole or in part. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

In trespass to try title, evidence held sufficient to warrant the jury in finding that the corner of one of the surveys in controversy was that located by a surveyor who testified for the plaintiff, and not that located by one who testified for the defendant. *Moore v. Lehmann* (Civ. App.) 165 S. W. 81.

## CHAPTER SIX

### PATENTS

Art.  
5361. Requisites of patent.

Art.  
5362. When patent to be issued.

#### Article 5361. [4175] Requisites of patent.

**Validity.**—A patent issued on a forged assignment of an unlocated land certificate is voidable only. *Hennessy v. Blair* (Sup.) 173 S. W. 871, affirming judgment *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

Where conditional land certificate was transferred, neither a subsequent purchaser of the land in administration of the original grantee's estate, nor his heirs, could question issuance of patent in virtue of the certificate. *Baugh v. McLain* (Civ. App.) 173 S. W. 922.

Plaintiffs, in an action for possession of real estate claimed by adverse possession for 10 years, cannot question the validity of a patent from the state covering part of the land claimed and executed before their possession had ripened into title. *Williamson v. Miller-Vidor Lumber Co.* (Civ. App.) 178 S. W. 800.

Only the state or one holding a prior legal or equitable claim to real estate can set up the illegality in a patent from the state. *Id.*

**Conclusiveness.**—One holding a patent from the state to certain lands can recover such lands, unless his patent conflicts with a prior survey admitted to be owned by another party. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

**Patent as evidence of title.**—A patent regular on its face confers legal title. *Hennessy v. Blair* (Sup.) 173 S. W. 871, affirming judgment *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

In view of the pre-emption acts of January 22, 1845, and February 7, 1853, where the land officers issued a patent, it prima facie imported that no prior patent was issued. *Houston Oil Co. of Texas v. Wm. M. Rice Institute* (Civ. App.) 194 S. W. 413.

**Transfer.**—A bona fide purchaser of land, the patent to which had been obtained by a forged assignment of an unlocated certificate, held entitled to prevail against the heirs of the holder of the certificate. *Hennessy v. Blair* (Sup.) 173 S. W. 871, affirming judgment *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

Where a patent and certificate for an unlocated balance issued to the heirs of the deceased grantee, it inured to the assignee of the purchaser in administration of grantee's estate, who lost no rights by the issuance to him as assignee, but retained such rights as he could legally establish. *Baugh v. McLain* (Civ. App.) 173 S. W. 922.

#### Art. 5362. [4176] When patent to be issued.

Cited, *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

## CHAPTER EIGHT

### GENERAL PROVISIONS

<p>Art. 5391. Abstracts to be printed, etc.</p> <p>5393a. Validating of grants and allotments by towns or villages under authority of Spain or Mexico.</p>	<p>Art. 5393b. Same; incorporation of towns and villages validated.</p> <p>5397. Belong to public free school fund.</p> <p>5402. Lands—how sold and proceeds invested.</p>
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#### Article 5391. [4217] Abstracts to be printed, etc.

Cited, *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

**Art. 5393a. Validation of grants and allotments by towns or villages under authority of Spain or Mexico.**—That all sales actually made and all allotments in severalty of land actually made to individuals by any town or village in this State of lands granted by any officers acting as authorities of Spain or Mexico, or of any State of Mexico, and ratified and patented by the State of Texas to such towns or villages, or to the inhabitants thereof, be and the same are hereby validated in favor of the original purchasers or allottees from any such town or village, or their heirs, devisees, vendees, assigns, or successors in the claim of title which originated out of any such sale or allotment, and whether the sale or allotment was made without authority under the laws existing at the time the sale was made, or without complying with said existing laws, or by a valid or invalid corporation or re-incorporation under the General Laws of Texas, or without incorporation, or was invalid because the land sold or allotted lay outside of the corporate limits of any incorporation under the General Laws of Texas, or was invalid for other reasons, and whether or not such new incorporation was valid or invalid, or had jurisdiction to deal with the lands formerly granted to said town or not, and whether such town or village was incorporated or not; provided that when there exist two or more invalid sales or allotments made by any such town or village, the first in point of time only of said sales is hereby validated without prejudice to the rights of claimants under a subsequent sale to establish the validity of the sale or allotment under which they claim or to show that their titles under which they may hold, if invalid, may afford them under existing laws in establishing their titles under the statutes of limitations, but in all such cases the person or persons or corporations claiming under such junior sale or sales or attempted sale or allotment shall bring his suit to establish his title within one year from the time this Act takes effect, or he or they shall be forever barred from maintaining any suit to establish such junior title, and this whether there be adverse possession thereof or not; and provided, further, that in any case wherein the junior purchaser or purchasers may establish his or their title by judgment of court against such senior purchasers or allottees the said junior purchasers' or purchasers' title shall be held to be valid as against the State and said town or village. No claimant to the title of land shall be entitled to claim the benefit of the provisions of this Act unless such claimant shall have had actual, visible possession of such land so claimed by him, controlling the same under fence or actually cultivating the same for a period of one year next immediately preceding the assertion of such right; providing, that the provisions of this Act shall not apply to any grant of land made to any individual person or persons under or by authority of the Colonization Laws of the Republic of Mexico or any of the states thereof. [Act June 3, 1915, 1st C. S., ch. 12, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Art. 5393b. Same; incorporation of towns and villages validated.**—That the incorporation or attempted incorporation of such towns and villages to whom lands have been granted as aforesaid and which are at the time of the taking effect of this Act organized and acting as such corporations are hereby validated and are declared to be valid municipal corporations for the purpose of disposing of any lands granted to such towns or villages, whether incorporated or not, other than streets, alleys, parks and other public places in such towns and desaguas, and whether such lands are situated in corporate limits of such towns or not and whether they in fact have any charter or organization now in force or not; this validation of such towns or villages to apply only for the purpose of disposing of lands which such towns and villages may not have heretofore sold or allotted to others or attempted to sell or allot to others; and such towns or villages shall have power to sell or dispose of all such lands as to which they are validated, and which are not within the validating provisions of Section 1, of this Act, owing to there not having been any disposition made or attempted to be made thereof by said corporation, but said corporations are not by this Act validated for any other purposes other than with respect to such future sales or dispositions of such lands, their validity or invalidity is not to be affected by this Act otherwise than for the limited purpose of disposing of lands which they have not disposed of or attempted to dispose of prior to the passage of this law. And in cases wherein former incorporations of such towns and villages have been repealed or abolished by vote of the voters therein without having sold or attempted to sell such lands as were granted to them as aforesaid the inhabitants thereof may organize a corporation under the laws now in force as to the incorporation of towns and villages, which corporations when thus organized shall have power to sell any lands granted and patented as aforesaid, whether the land be situated within the boundaries of such corporation or not except as some prior corporation or town or village organization may have sold or attempted to sell, and except said public streets, alleys, parks, desaguas, and other public places. [Id., § 2.]

**Art. 5397. [4275] Belong to public free school fund.**

**Report of surveyor as evidence.**—Under arts. 3694, 5397, and the article providing that books, papers, etc., required to be kept in any executive department shall constitute a part of the archives thereof, report of state surveyor of survey made by him held admissible in trespass to try title between private parties. *Denton v. English* (Civ. App.) 171 S. W. 248.

Where a document containing a report of the acts of the state surveyor concerning a survey also contained argument and opinions, they were not admissible in trespass to try title. *Id.*

**Art. 5402. [4271] Land, how sold and proceeds invested.**—Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the Commissioners Court of such county, and the proceeds of any such sale shall be invested in bonds of the United States, the State of Texas, the bonds of the counties of the State, and the independent or common school districts, road precinct, drainage, irrigation, navigation and levee districts of said State, and the bonds of incorporated cities and towns, and the bonds of road precincts of any county of Texas, and the bonds of drainage, irrigation, navigation and levee districts of any county or counties of Texas; “And held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually.” [Acts 1889, p. 104; Act March 30, 1915, ch. 136, § 1.]

**Explanatory.**—Became a law March 30, 1915. The act amends art. 5402, Rev. Civ. St., 1911.

**Powers of county judges.**—The powers of county judges holding land as trustees for school purposes under the provisions therefor of Rev. St. 1879, arts. 3711, 3771, 3777, are

restricted to those conferred by such sections. *McLeod v. McCall* (Civ. App.) 180 S. W. 293.

**Employment of agents and payment of commissions.**—Const. art. 7, § 6, authorizing sale of school lands by the commissioners' court of the county, did not authorize delegation of such power to commissioners. *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170.

Order of commissioners' court, authorizing commissioners to sell county school lands, held to provide for legal payment of the commissioners' commissions and expenses out of the county's general fund, and not out of the proceeds of the sale. *Id.*

As the commissioners' court is the trustee of school land owned by the county, it cannot delegate to others the authority to sell the land. *Brazoria County v. Rothe* (Civ. App.) 168 S. W. 70.

— **Ratification of sale.**—Whether sale of county school lands, made by commissioners unauthorizedly appointed by the commissioners' court, was subject to ratification, depended on whether the conveyance was one which the commissioners' court itself could have legally made. *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170.

A sale of county school land made by an unauthorized agent held ratified by the commissioners' court, preventing the county from thereafter questioning the sale. *Brazoria County v. Rothe* (Civ. App.) 168 S. W. 70.

Under art. 1365, the commissioners' court may ratify a sale of school land which it might originally have made. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200.

**Surveys and boundaries.**—The commissioners' court of a county has implied power to fix the boundaries of such county's school lands. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

A joint survey of school lands by the representatives of several counties, made and adopted with knowledge of the facts by the commissioners' court of each county, and acted upon by the attorneys of two of the counties in a suit, held not a definite settlement of the location of such lands by agreement. *Id.*

Rev. St. 1895, art. 4269 (Acts 18th Leg. c. 40), does not mean that in ascertaining the boundaries of county school lands such construction will be given to field notes as to give the county the benefit of those calls most favorable to the county; and the word "survey," in the expression "the land included in the lines of the survey" does not mean the diagram or map required by Rev. St. 1911, art. 5336, but is used synonymously with "field notes." *Cross v. Wilkinson* (Civ. App.) 187 S. W. 345.

Rev. St. 1895, art. 4269 (Acts 18th Leg. c. 40), by its express terms is applicable only to surveys which had been patented at the time it was passed. *Id.*

Where a county selling land to which it has good title by patent from the state conveys by the same description as in the patent, it is not liable to purchaser on account of differences or difficulties in ascertaining the boundaries of the tract conveyed. *Id.*

**Amount for which sold.**—A sale of school land will not be set aside because of a mere inadequacy of price. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200.

In a suit to set aside a sale of school lands, evidence held to warrant a finding that a better price could not have been obtained, and that the price charged was not inadequate. *Id.*

Though the commissioners' court in selling school land, fraudulently intended to favor the purchaser, that fact does not warrant a vacation of the sale, where the county received full value and was in no way injured. *Id.*

**Warranty of title.**—Where county officers executed a warranty deed to land conveyed to the county for school purposes thereby giving effect to a conditional limitation in the deed to the county, they acted officially and were not personally liable on the warranty. *Stewart v. Blain* (Civ. App.) 159 S. W. 928.

**Investment of school funds.**—Under Const. art. 7, § 6, providing for the investment of proceeds on a sale of county school lands, the commissioners' court of a county, in investing proceeds, acts in a judicial or quasi judicial capacity, and the county is responsible for such investments. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

Under Const. art. 7, § 6, making a county responsible for all investments of proceeds of a sale of its school lands, a county is responsible for the proceeds, regardless of the form or legality of the investment, attempted to be made by the commissioners' court. *Id.*

**Diversion of funds.**—Knowledge of a prospective purchaser of school lands from a county that it was not intended to devote the proceeds to school purposes, as required by Const. art. 7, § 6, did not deprive the commissioners' court of its power to sell or invalidate the sale. *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170.

The proceeds of a sale of school land of a county, required by Const. art. 7, § 6, to be invested in specified classes of bonds, may not be diverted to the general purposes of the county, and bonds issued by the county therefor, and bonds so issued are invalid. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

A county which has wrongfully diverted and appropriated proceeds of a sale of school lands of the county is liable for the misappropriation. *Id.*

A county diverting the proceeds on a sale of its school lands is properly chargeable with interest on the misappropriated fund. *Id.*

## CHAPTER NINE

## SALE AND LEASE OF PUBLIC FREE SCHOOL AND ASYLUM LANDS

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| <p>Art.<br/>5405. Sale and lease of public lands provided for.</p> <p>5406. Duties of commissioner of general land office.</p> <p>5407. Classification and valuation.</p> <p>5408. Advertisement of land.</p> <p>5409. Sales by commissioner, how made.</p> <p>5409a. Extension of time of payment of certain sales.</p> <p>5410. Actual settlers, application.</p> <p>5416. Award and settlement.</p> <p>5416b. Validation of sales in cases where purchaser failed to file affidavit or make settlement within required time.</p> <p>5416c. Validation of sales to persons prevented from making settlement by being called into military service.</p> <p>5416d. Validation of sales where settlement has been made but affidavit has not been filed within time required.</p> <p>5416e. Validation of sales where supported by proof of settlement and residence.</p> <p>5418. Eight section counties—Complement.</p> <p>5419. Settlement and residence.</p> <p>5420. Limitations as to purchases.</p> <p>5420a. Public lands how sold.</p> <p>5420b. Two section counties; actual settlement required.</p> <p>5420c. Eight section counties; terms of sale; person who has made improvements under water-bond may purchase; notice.</p> <p>5420d. Quantity which may be sold to one person in other counties; settlement.</p> <p>5420e. Lands which must be sold for cash and without condition as to settlement.</p> <p>5420f. Lands extending into more than one county.</p> <p>5420g. Applications for purchase, when opened; advertisement of land not sold.</p> <p>5421. Right of lessees.</p> <p>5422. Sales without settlement.</p> <p>5423. Forfeiture of purchase by non-payment of interest, etc.</p> <p>5423a. Purchasers after January 1, 1907, and before January 1, 1913, who have forfeited for non-payment of interest, may repurchase, when.</p> <p>5423c. Board of appraisers, how constituted, etc.</p> <p>5423f. Compensation of board of appraisers, appropriation; payment.</p> <p>5424. Permanent improvements to be erected by purchaser; forfeiture.</p> <p>5425. Forfeiture for failure to settle on land, etc.</p> | <p>Art.<br/>5425a. Validation of re-sales made before entry of forfeiture of former sale for non-payment of interest or failure to reside on land.</p> <p>5426. Forfeiture of home tract works forfeiture of other land, when.</p> <p>5428a. Lien in favor of state for unpaid purchase money.</p> <p>5428b. Consent of purchaser to payment by third person or federal farm loan bank; transfer of claim of state; admission as to ownership.</p> <p>5428c. Occupancy of land for required period.</p> <p>5428d. Subrogation to rights of state.</p> <p>5430. Timber lands defined; regulations for sale of.</p> <p>5432. Unsurveyed or scrap land.</p> <p>5433. Minerals, gayule and lechuguilla reserved.</p> <p>5435. Transfers.</p> <p>5435a. Transfers other than personal; accounts with transferees, etc.</p> <p>5435d. Provisions applicable to transfers other than personal.</p> <p>5435f. Validation of sales not followed by residence in favor of purchasers in good faith.</p> <p>5435g. Validation of sales made before expiration of one year from date of award.</p> <p>5435h. Transfers before completion of occupancy validated.</p> <p>5436. Lands patented, when.</p> <p>5436a. Transfers by purchasers of irrigable lands in certain counties; subdividing sections.</p> <p>5436b. Same; transfers not to impair value of remaining land.</p> <p>5437. Lands patented, when.</p> <p>5439. Application of railroad to buy, to contain what.</p> <p>5440. Land, how sold and patent issued.</p> <p>5441. Limitations as to purchases.</p> <p>5444. Regulations as to occupancy.</p> <p>5449. Accounts, etc., with purchasers to be kept.</p> <p>5449c. Certain other sales validated.</p> |
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## LEASES

5450. Commissioner may withhold agricultural lands from lease, when.
5452. Leases, how and when made.
5453. Regulations as to leases in absolute lease districts.
5454. Expired leases, regulations as to.
5455. Where lessee secures permanent water.
5458. One year to assert right to leased or sold land.
5459. Same.

**Article 5405. [4218b] Sale and lease of public lands provided for.**

Repeal.—Acts 24th Leg. c. 47, revising generally all laws relating to the disposition of school land and the incorporating therein sections of earlier laws without making any change in them, impliedly repealed all earlier statutes on the subject. *State v. Houston Oil Co. of Texas* (Civ. App.) 194 S. W. 422.

What statute governs sale.—In determining the validity of the sale of state lands, the law in force at the time of the sale governs. *State v. Houston Oil Co. of Texas* (Civ. App.) 194 S. W. 422.

**Art. 5406. [4218c] Duties of commissioner of the general land office.**

**Effect of unauthorized forfeiture.**—Under arts. 5406, 5424, 5426, an unauthorized forfeiture of additional school land by the land commissioner for alleged nonoccupancy of the purchaser's home section held not to constitute a forfeiture, nor place the land again on the market. *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715.

**Art. 5407. Classification and valuation.**

Cited, *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

**Art. 5408. Advertisement of land.**

**Reclassification and reappraisalment.**—Where land, to be sold after the failure of buyer to exercise repurchase privilege, had been previously classified and appraised, a reclassification and reappraisalment with notice thereof to clerk and the setting of date of sale at not less than 90 days thereafter, on analogy to the provisions of this article as to cancellation of leases, was unnecessary. *Curry v. Marshall* (Civ. App.) 180 S. W. 892.

**Time for resale.**—It is the duty of the Land Commissioner, on fixing day for resale of school land upon failure of defaulting buyers, under arts. 5423 and 5423a, giving such privilege, to fix such day at not less than 90 days after the expiration of the repurchase period, by analogy to requirements of art. 5408 as to leases. *Curry v. Marshall* (Civ. App.) 180 S. W. 892.

**Art. 5409. [4218g] Sales by commissioner, how made.**

**Effect of filing application.**—In view of arts. 5409, 5410, and 5416, etc., in relation to competitive bidding for state lands, rights of applicants are fixed by filing of their applications, and are not affected by reasons of land commissioner for rejecting bids. *Marshall v. Robison* (Sup.) 191 S. W. 1136.

**Statement of price in application.**—In view of arts. 5410 and 5416, where in an application for state land price per acre stated was in conflict with total price offered and for which applicant executed obligation, less one-fortieth of "aggregate purchase money," transmitted as required by article 5409, discrepancy in stating price per acre was immaterial, and would not invalidate bid, but would yield to aggregate bid as tested by cash transmitted and obligation filed. *Marshall v. Robison* (Sup.) 191 S. W. 1136.

**Art. 5409a. Extension of time of payment on certain sales.**—The time for the payment of principal due on sales heretofore made of the land belonging to the public free school fund, the University fund, and the several asylum funds, under the Acts of 1874, 1879, 1881 and 1883, is hereby extended for a period of twenty years from the date such principal matured by the terms of the Act under which it was purchased and which has matured under former Acts extending the time for the payment of the principal of the sales under the Acts of 1874, 1879 and 1881. Failure to pay any installment of interest when due shall mature the principal. [Act June 3, 1915, 1st C. S., ch. 13, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Art. 5410. Actual settlers, applications.**

See art. 5420g, as to time of opening applications for purchase.

Cited, *Patrick v. Barnes* (Civ. App.) 163 S. W. 408; *Atchison v. Hanna* (Sup.) 174 S. W. 279.

**Rights of applicants in general.**—Under arts. 5410 and 5416, held, that provisions of article 5416, are mandatory, entitling highest bidder for state land who has complied with law in making his application to an award of land, in enforcement of which right courts will aid him. *Marshall v. Robison* (Sup.) 191 S. W. 1136.

In view of arts. 5409, 5410, and 5416, etc., in relation to competitive bidding for state lands, rights of applicants are fixed by filing of their applications, and are not affected by reasons of land commissioner for rejecting bids. *Id.*

**Necessity and sufficiency of application in general.**—A purchase of school lands while Rev. St. 1895, art. 4218j, prescribing the requisites of an application to purchase, was in force is not invalidated by any mere inaccuracy in describing the classification of the land, as the law then in force did not require any statement of classification; and Acts 30th Leg. (1st Ex. Sess.) c. 20, § 6f, [Vernon's Sayles' Civ. St. 1914, art. 5433], requiring the reservation of mineral rights, does not apply to the purchase. *Camp v. Smith* (Civ. App.) 166 S. W. 22.

**Statement of price in application.**—See *Marshall v. Robison* (Sup.) 191 S. W. 1136; note under art. 5409.

**Trust in favor of person paying price.**—Where plaintiff, under Rev. St. 1895, arts. 4218j, 4218k, made application to purchase public land, oath that he was not purchasing

for any other person, and entered into obligation for deferred payments, and received a patent reciting purchase and full payment, no trust would arise in favor of one who paid the purchase price. *Houston Oil Co. of Texas v. Votaw* (Civ. App.) 184 S. W. 647.

#### Art. 5416. Award and settlement.

**Acceptance and rejection.**—In view of arts. 5409, 5410, and 5416, etc., in relation to competitive bidding for state lands, rights of applicants are fixed by filing of their applications, and are not affected by reasons of land commissioner for rejecting bids. *Marshall v. Robison* (Sup.) 191 S. W. 1136.

**Right of highest bidder to award.**—Under arts. 5410 and 5416, held, that provisions of article 5416 are mandatory, entitling highest bidder for state land who has complied with law in making his application to an award of land, in enforcement of which right courts will aid him. *Marshall v. Robison* (Sup.) 191 S. W. 1136.

**Statement of price in application.**—See *Marshall v. Robison* (Sup.) 191 S. W. 1136; note under art. 5409.

**Affidavit.**—Failure to file affidavit of settlement held not to authorize forfeiture of school lands purchased from the state under Acts 29th Leg. c. 103, § 5 [Vernon's Sayles' Civ. St. 1914, art. 5421]. *Atchison v. Hanna* (Sup.) 174 S. W. 279, affirming judgment *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

The rights of an entryman on public land held not forfeited by a conveyance before filing of affidavit of settlement required by Acts 29th Leg. c. 103, because the notary with whom he had left the deed to the property without authority recorded it. *Cox v. Payne* (Sup.) 174 S. W. 817, affirming judgment *Payne v. Cox* (Civ. App.) 143 S. W. 336.

The law requires an applicant for the purchase of free school lands to file his affidavit of settlement within 30 days of the 90 days from the date of purchase. *Anthony v. Ball* (Sup.) 183 S. W. 1142.

**Purchase of additional lands—Settlement on and title to home tract.**—That lots on which stood a house of a purchaser of school lands as additional to private land was not private land such as to authorize such purchase under Sayles' Ann. Civ. St. 1897, art. 4218fff, or that there was an irregularity in his three years' occupancy upon the lots, were mere irregularities which would not avoid such sale by the commissioner in good faith. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

**Art. 5416b. Validation of sales in cases where purchaser failed to file affidavit or make settlement within required time.**—In all cases where public school land has been purchased from the State on condition of settlement and residence and the purchaser made settlement within the time required by law, but failed to file his affidavit of settlement in the General Land Office within the time required by law, but has filed such affidavit, and in all cases where the purchaser failed to settle within the time required by law but did settle before the expiration of one hundred twenty days from date of award and filed his affidavit of settlement within the time required by law, the title under such purchase is hereby validated. [Act Feb. 13, 1917, ch. 18, § 2.]

Sec. 1 of the act is set forth post as art. 5435g. Became a law Feb. 13, 1917.

**Art. 5416c. Validation of sales to persons prevented from making settlement by being called into military service.**—In all cases where public school land has been purchased from the State on condition of settlement by a member of the National Guard and such purchaser has been prevented from making settlement by being called into military service, the title under such purchase is hereby validated. [Id., § 3.]

See note under art. 5416b.

**Art. 5416d. Validation of sales where settlement has been made but affidavit has not been filed within time required.**—In any case where school land has been purchased from the State on condition of settlement and residence and where settlement thereon has been made by the purchaser who has failed to file his affidavit of settlement in the General Land Office within the time required by law, but has since filed such affidavit in said office, such purchase is hereby validated. [Act May 17, 1917, 1st C. S., ch. 13, § 1.]

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

**Art. 5416e. Validation of sales where supported by proof of settlement and residence.**—In any case where school land has been or shall

be purchased on condition of settlement and residence and satisfactory proof showing the occupancy thereof as required by law for three years from the date of award, or from the date of award to the death of the purchaser, as the case may be, has been or shall be filed in the General Land Office and approved by the Commissioner, same is hereby validated and he shall issue to the purchaser, his heirs or assigns, a certificate showing that fact. [Id., § 2.]

**Art. 5418. Eight section counties; complement of land.**

See arts. 5420a-5420g, changing the law as to the quantity of land that may be purchased by one person.

**Art. 5419. Settlement and residence.**

See arts. 5420a-5420g.

**Art. 5420. Limitations as to purchases.**

This section is in part superseded by Act April 5, 1915, set forth post as arts. 5420a-5420g.

Cited, *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

**Art. 5420a. Public lands how sold.**—On the first day of September, 1915, and on the first day of each January, May and September of each year thereafter, the surveyed lands and portions of surveyed and unsurveyed land shall be sold under the terms, conditions, limitations and regulations as is now provided by law, except as changed herein. [Act April 5, 1915, ch. 150, § 1.]

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

**Art. 5420b. Two section counties; actual settlement required.**—

Land that is situated in the counties of Andrews, Brooks, Crane, Cameron, Duval, Ector, Gaines, Hidalgo, Jim Hogg, Jim Wells, Kinney, Kleberg, La Salle, Loving, Maverick, McMullen, Midland, Starr, Sutton, Travis, Terry, Upton, Uvalde, Ward, Webb, Willacy, Winkler, Yoakum and Zapata may be sold in quantities not to exceed two sections of 640 acres each, more or less, to one person, and in 80-acre tracts, or multiples thereof, and on condition of actual settlement of some portion of the land so purchased and continuous residence thereupon for three consecutive years, as now provided by law. [Id., § 2.]

**Art. 5420c. Eight section counties; terms of sale; person who has made improvements under water-bond may purchase; notice.**—Land that is situated in the counties of Brewster, Bandera, Culberson, Crockett, Edwards, El Paso, Jeff Davis, Kerr, Kimble, Menard, Pecos, Presidio, Real, Terrell and Val Verde may be sold in quantities not to exceed eight sections of 640 acres each, more or less, to one person, and in whole tracts only, and without condition of settlement and residence. When one applies to purchase land in the counties named in this section not less than one-tenth the price offered therefor shall accompany the application for each tract applied for, and also the note or obligation of the applicant in a sum equal to the amount of the unpaid balance bearing interest at the rate of five per cent per annum, and otherwise conditioned as now provided by law. Where immovable improvements of the value of one thousand dollars have been placed on any land situated in a county named in this section under water-bond under Article 5455 of the Revised Civil Statutes of 1911, the lessee or assignee of an entire lease made under said Article 5455, may, within thirty days after the next sale date after the expiration of his lease, buy out of the lands theretofore leased to him, not exceeding one complement of land at its reasonable market value to be fixed by the Commissioner of the General Land Office without reference to the value of his immovable im-



provements; but such lessee or assignee shall first give written notice to the Commissioner of the General Land Office and specify the land he wants to buy not less than sixty days prior to said sale dates; provided, the lands so improved under such water-bond shall not be sold prior to September 1, 1915. [Id., § 3.]

**Art. 5420d. Quantity which may be sold to one person in other counties; settlement.**—Land that is situated in any county other than those named in this Act may be sold in quantities not to exceed one-quarter of a section and on the basis of 160 acres, more or less, to one person, and in tracts of 80 acres, or multiples thereof; provided, a tract which contains less than 240 acres may be purchased by one person. All purchases of tracts of 80 acres or more in the counties included in this section shall be on condition of actual settlement on some portion of the land so purchased and continuous residence thereon for three consecutive years, as now provided by law. [Id., § 4.]

**Art. 5420e. Lands which must be sold for cash and without condition as to settlement.**—All tracts of land in whatsoever county, and whether surveyed or unsurveyed, which contain less than 80 acres, and also all unsurveyed tracts which are less than 80 acres, and also all unsurveyed tracts which are less than 400 varas wide at any point, and of whatever acreage, shall be sold for cash and without condition of settlement and residence. [Id., § 5.]

**Art. 5420f. Lands extending into more than one county.**—Such tracts of land as may be part within a settlement county and part within a non-settlement county, shall be sold without condition of settlement, and such tracts as may be part within a two-section county and part within a quarter-section county shall be sold as if in the two-section county. [Id., § 6.]

**Art. 5420g. Applications for purchase, when opened; advertisement of land not sold.**—Applications to purchase shall be opened at 10 o'clock a. m. on the 2nd day of September, 1915, and at the same hour and day of the following January, May and September of each year thereafter, and should said 2nd day of January, May and September fall on Sunday or legal holiday, then the next day thereafter. When all applications have been acted upon, the land remaining unsold shall be again advertised as now provided by law. [Id., § 7.]

**Art. 5421. Right of lessees.**

See *Atchison v. Hanna* (Sup.) 174 S. W. 279, affirming judgment *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

**Title to fences.**—Where fences of the value of \$500 were placed on school lands by a lessee, and defendant acquired the lease, and then purchased the lands from the state and held possession from 1906 until 1912, he acquired title to the fences, both by purchase and limitation. *Elza v. State* (Civ. App.) 169 S. W. 633.

**Art. 5422. Sales without settlement.**

See arts. 5420a-5420g.

**Art. 5423. [42187] Forfeiture of purchase by non-payment of interest, etc.**

Cited, *Chambers v. Rawls* (Civ. App.) 158 S. W. 208; *City of Laredo v. Salinas* (Civ. App.) 191 S. W. 190.

**Resale after forfeiture.**—It is the duty of the Land Commissioner, on fixing day for resale of school land upon failure of defaulting buyers, under arts. 5423 and 5423a, giving such privilege, to fix such day at not less than 90 days after the expiration of the repurchase period, by analogy to requirements of art. 5408 as to leases. *Curry v. Marshall* (Civ. App.) 180 S. W. 892.

School land forfeited for nonpayment of interest as provided by this article, and after failure upon notice by buyer to repurchase under provision therefor of *Vernon's Sayles'*

Ann. Civ. St. 1914, arts. 5423a-5423f, does not come on market for resale at end of repurchase period. *Id.*

**Forfeiture for nonpayment of interest.**—Forfeiture of purchase of land from state for nonpayment of interest held to extinguish title under such purchase and restore the land to the public domain. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

In trespass to try title by plaintiff claiming that land was forfeited and awarded to him by general land office, plaintiff must show, not only that award was made, but that requirements of this article had been substantially complied with by general land office prior to award. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

**Indorsement of forfeiture.**—Under art. 5423, held, it is insufficient for forfeiture of public school lands sold, for default in interest, to indorse, "Land forfeited," on the purchaser's obligation, without an entry on his account. *Chambers v. Robison* (Sup.) 179 S. W. 123. See art. 5425a, validating resales after forfeiture without entry.

By this article, unless entry of forfeiture is made, both on application of grantee and in account kept with purchaser, no legal forfeiture results. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

**Reinstatement.**—The right under Acts 33d Leg. c. 160, to repurchase forfeited school lands, is cumulative of his right to reinstatement of the sale after forfeiture under this article. *Judkins v. Robison* (Sup.) 160 S. W. 955.

The election by the owner of public school lands forfeited for nonpayment of interest to repurchase upon a reappraisal, by giving notice to the Commissioner of the General Land Office, under Acts 33d Leg. c. 160, precluded him from having the original sale reinstated under this article, though the remedies were cumulative. *Id.*

Where land purchased from the state was forfeited, and the right to reinstate the purchase had never been exercised, the naked right to reinstate did not amount to a title. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

**Art. 5423a. Purchasers after January 1, 1907, and before January 1, 1913, who have forfeited for non-payment of interest, may repurchase, when.**

**Constitutionality.**—Acts 33d Leg. c. 160, giving right to repurchase forfeited school land at the reappraised value, does not violate Const. art. 7, § 4, prohibiting the Legislature from granting any relief to purchasers of public free school land. *Judkins v. Robison* (Sup.) 160 S. W. 955.

**Fixing time for resale.**—See *Curry v. Marshall* (Civ. App.) 180 S. W. 892; notes under art. 5423.

**Repurchase or reinstatement.**—The election by the owner of public school lands forfeited for nonpayment of interest to repurchase upon a reappraisal, by giving notice to the Commissioner of the General Land Office, under Acts 33d Leg. c. 160, precluded him from having the original sale reinstated under art. 5423, though the remedies were cumulative. *Judkins v. Robison* (Sup.) 160 S. W. 955.

**Art. 5423c. Board of appraisers, how constituted, etc.**

See *Curry v. Marshall* (Civ. App.) 180 S. W. 892; notes under arts. 5408, 5423.

**Art. 5423f. Compensation of board of appraisers; appropriation; payment.**—Each member of the Board of Appraisers provided for by this Act, except the Commissioner of the General Land Office, shall receive as compensation for his services the sum of ten dollars per day for each day actually employed in the performance of his duties as a member of said board, not to exceed one hundred and fifty days, and in addition thereto each of the three members shall receive his necessary traveling expenses. The number of days of actual service for which said board receives compensation, as well as expenses incurred by said board, in the performance of its duties, shall be stated under oath in writing by said board or by some member thereof, and which, when approved by the Governor, shall be filed with the Comptroller. There is hereby appropriated the sum of ten thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this Act. Upon proper requisition approved by the Governor, there may be advanced from the State Treasury, upon warrant from the Comptroller, a sufficient sum to meet the current expenses of the board in advance of entering upon its duties. [Acts 1913, p. 336, § 6; Act March 22, 1915, ch. 89, § 1.]

**Explanatory.**—The emergency clause declares that there are now 203,209 acres of school land still subject to the act. The amendatory act became a law March 22, 1915. The act amends sec. 6, ch. 160, of Act approved April 18, 1913.

**Art. 5424. Permanent improvements to be erected by purchaser; forfeiture.**

**Effect of forfeiture.**—Under arts. 5406, 5424, 5426, an unauthorized forfeiture of additional school land by the land commissioner for alleged nonoccupancy of the purchaser's home section held not to constitute a forfeiture, nor place the land again on the market. *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715.

After an actual forfeiture of school land for nonoccupancy, an entry thereof by the land commissioner is necessary to again place the land on the market. *Id.*

The act of the Commissioner of the General Land Office in forfeiting purchased lands for nonoccupancy held not quasi judicial so as to preclude review as to the fact of occupancy. *Id.*

The land commissioner's inadvertent and unauthorized forfeiture of a school land purchase for nonoccupancy did not place the land on the market under this article, nor prevent the commissioner from canceling the entry of forfeiture. *Id.*

The action of the Commissioner of the General Land Office in forfeiting a purchase of public lands is *ex parte* and dependent upon the actual existence of the facts constituting a lawful ground of forfeiture and authorizing him to declare it, since he is not invested with judicial powers. *Nations v. Miller* (Sup.) 183 S. W. 153.

**Value of improvements.**—A purchaser of school land, which had been under lease, held entitled to have counted, in determining the value of the improvements placed on the land by him during his three years' succeeding residence, the value of fences erected on the land by the lessee and passed to the purchaser by purchase and limitation. *Elza v. State* (Civ. App.) 169 S. W. 633.

**Forfeiture for nonoccupancy or abandonment.**—Mere absence by a purchaser of public free school lands for eight or nine months does not as a matter of law necessarily constitute an abandonment of the property as the purchaser's permanent place of abode. *Anthony v. Ball* (Sup.) 183 S. W. 1142.

A purchaser of public free school lands, who settled thereon two or three weeks, and then left for eight or nine months to engage in business elsewhere, returning meanwhile for only a few days, forfeited his right by abandonment. *Id.*

**Art. 5425. Forfeiture for failure to settle on land, etc.**

Cited, in dissenting opinion *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011.

**Art. 5425a. Validation of re-sales made before entry of forfeiture of former sale for non-payment of interest or failure to reside on land.**—All sales of public free school land, University land and asylum land which were made after a former sale had been forfeited for non-payment of interest and before the entry of such forfeiture had been entered on the account kept with the owner, and all sales of said land which were made upon purchase applications filed before a former sale had been cancelled for the failure of the owner to reside upon the land are hereby validated and shall hereafter be deemed valid so far as the State is concerned; provided, no rights of third persons shall be affected. [Act March 29, 1917, ch. 138, § 1.]

A preamble to the act recites the decisions of the Supreme Court in *Chambers v. Robison*, 179 S. W. 123, and *Adams v. Terrell*, 107 S. W. 537, and the injurious effect of those decisions on bona fide purchasers. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 5426. [4218ff] Forfeiture of home tract works forfeiture of other land, when.**

See *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715; note under art. 5424.

**Art. 5428a. Lien in favor of state for unpaid purchase money.**—For the purpose of securing the payment of all principal and interest now due and that which may hereafter become due upon any former sale or upon any sale that may hereafter be made by the State of any public free school land, University land and the several asylums land, the State shall have an express lien for the use and benefit of the fund to which the land belongs in addition to any right and remedy that it now has for the enforcement of the payment of any principal or interest that may become due and be unpaid. [Act Oct. 16, 1917, ch. 29, § 1.]

**Art. 5428b. Consent of purchaser to payment by third person or federal farm loan bank; transfer of claim of state; admission as to ownership.**—If the owner of any land mentioned in this Act should consent

for any person, firm or corporation or the Federal Farm Loan Bank to pay to the State the principal and interest due upon any obligation given for any land included in this Act, and such person, firm or corporation or the Federal Farm Loan Bank should make such payment, the Commissioner of the General Land Office shall be authorized upon the written request of such owner duly acknowledged in the manner required for the conveyance of real estate coupled with an affidavit of ownership to execute, acknowledge and deliver a written transfer of the indebtedness held by the State to such person, firm or corporation or the Federal Farm Loan Bank as may be authorized to receive to transfer; provided, if the land claimed by the one representing himself to be the owner, should be held under such evidence of title as the law or rules of the General Land Office will not authorize or permit to be filed in said Land Office, then and in that event, the said Commissioner may, for the purpose of executing the assignment or transfer herein provided for admit the owner to be such person as the person, firm or corporation or the Federal Farm Loan Bank paying the indebtedness shall admit to be the owner, and upon such admission the instrument of transfer shall be executed; provided further, that nothing herein shall be construed to change in any particular whatever, the law or rules that obtain in the General Land Office relative to titles to land and the issuance of patents thereon. [Id., § 2.]

**Art. 5428c. Occupancy of land for required period.**—Provided that no transfer of the State's Lien or debt be made until the land, which is security for said lien or debt, has been occupied for the full period of time, and in the manner as provided by law. [Id., § 2a.]

**Art. 5428d. Subrogation to rights of state.**—Any person, firm or corporation or the Federal Farm Loan Bank that shall pay to the State the balance due upon any land included in this Act at the request of the owner as provided herein, shall be subrogated to all the rights, liens and remedies held by the State to secure and enforce the payment of the amount of principal and interest so paid to the State. [Id., § 3.]

**Art. 5430. Timber lands defined; regulations for sale of.**

**Purchase of timber withdraws land from sale.**—Under Rev. St. 1895, art. 4218q, held, that the purchaser of timber on school lands had a contractual right to purchase the land pursuant to the provisions of such article. *Houston Oil Co. of Texas v. McGrew* (Sup.) 176 S. W. 45, affirming judgment (Civ. App.) 143 S. W. 191.

Where the purchaser of timber on school lands within five years made due application to purchase the land and paid the purchase money, he became invested with a right to the land without any award by the commissioner. *Id.*

That the state treasurer's receipt for the money paid by a purchaser of school land was dated July 13th did not controvert positive evidence afforded by an entry on the treasurer's account that the payment was made on June 28th. *Id.*

**Corporation may purchase land.**—Where the owner of timber conveyed the same to a corporation and then bought the land itself conveying it to a corporation, the state cannot, the transaction being authorized by statute, forfeit the title to the land on the ground that the corporation was exceeding its charter powers by its acquisition; it appearing that the purchaser acted as agent for the corporation and transferred the land to it. *State v. Houston Oil Co. of Texas* (Civ. App.) 194 S. W. 422.

**Purchaser need not be actual settler.**—Under Acts 24th Leg. c. 47, §§ 1-11, 16, and Acts 26th Leg. c. 137, as amending section 16, held that, in view of prior construction, a title of a purchaser of timber who bought the land on which it stood was not subject to attack because he was not an actual settler, etc. *State v. Houston Oil Co. of Texas* (Civ. App.) 194 S. W. 422.

**Art. 5432. Unsurveyed or scrap lands.**

**Where title is in dispute.**—This article does not authorize the Commissioner to place upon the market or sell lands claimed adversely to the state and to the school fund in good faith under Spanish or Mexican grants until the controversy between the state and the claimants has been adjudicated in favor of the state. *Southern Pine Lumber Co. v. Consolidated Louisiana Lumber Co.*, 217 Fed. 719, 133 C. C. A. 479.

**Vacancies between surveys.**—Where the limits of a survey of public lands can be certainly known by its own description, any excess in acreage embraced within its limits, unless considerable, is not a vacancy subject to resale. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

#### Art. 5433. Minerals, gayule and lechuguilla reserved.

**Application.**—A purchase of school lands while Rev. St. 1895, art. 4218j, prescribing the requisites of an application to purchase, was in force is not invalidated by any mere inaccuracy in describing the classification of the land, as the law then in force did not require any statement of classification; and Acts 30th Leg. (1st Ex. Sess.) c. 20, § 6f, requiring the reservation of mineral rights, does not apply to the purchase. *Camp v. Smith* (Civ. App.) 166 S. W. 22.

#### Art. 5435. Transfers.

**Right to transfer in general.**—An occupant of public land, who has no title thereto, can convey no title to another. *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011.

Where the right to complete the purchase of state school land stood on the books of the land office in the purchaser from the state, while the equitable right to the land was in fact in one claiming under him, the latter did not have a clear and perfect title to the property. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

Contract embodied in bond for title by one whose vendor had held possession of state school land for more than a year held valid against defendant, who had assumed the obligation to convey upon the obligor's conveyance to him. *Holman v. Pinkard* (Civ. App.) 176 S. W. 791.

Public land awarded to a purchaser in accordance with the statute is the subject of sale. *Hollis v. Myers* (Civ. App.) 179 S. W. 57.

**Contracts for purchase.**—Where a contract for the sale of public school land required vendor to furnish an abstract showing clear and perfect title, the abstract should show the price for which the state sold the land, that the principal and annual interest have been paid to the state, and that the sum due the state was not greater than the amount the purchaser agreed to assume. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

Time was necessarily of the essence of a contract to purchase on a certain date a section of the public free school land, the required three years occupancy of which had not been completed by two years, in view of the somewhat onerous conditions of occupancy imposed by law. *Sears v. Ainsworth* (Civ. App.) 166 S. W. 60.

Where plaintiff agreed to convey a section of public free school land on March 1st, the purchaser's failure to tender performance until July was an unreasonable delay, though he was ill up to about May 1st, in the absence of other circumstances excusing his failure to perform after recovery. *Id.*

A purchaser of school lands who gave vendor's lien notes in payment cannot, by permitting a forfeiture for failure to pay the interest and then securing a reaward of the lands, defeat the rights of his vendor. *Anderson v. Farmer* (Civ. App.) 189 S. W. 508.

Where plaintiff was induced to purchase tract of state school land by fraud, and such land was not forfeited to state for failure to pay interest until after institution of plaintiff's suit for rescission wherein a reconveyance was tendered defendants, forfeiture by state was no defense to action. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

**Time of transfer.**—It is not necessary to the validity of a substitution of a purchaser's interest in school land that it be effected after the maturity of occupation. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

The rights of an entryman on public land held not forfeited by a conveyance before filing of affidavit of settlement required by Acts 29th Leg. c. 103 [Vernon's Sayles' Civ. St. 1914, art. 5416], because the notary with whom he had left the deed to the property without authority recorded it. *Cox v. Payne* (Sup.) 174 S. W. 817, affirming judgment *Payne v. Cox* (Civ. App.) 143 S. W. 336.

That the purchaser of public school lands from the state conveyed the land before obtaining a certificate of occupancy would not affect the title of his grantee, or others holding under him, especially where the sale was not made till after the three years' occupancy required of him. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

**Title and rights acquired by transferee.**—The death of a transferee of school land entry dispensed with further occupancy. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

Grantee of original settler on public land, who purchased with knowledge of former conveyance, held to acquire no greater right by obtaining a patent than the settler would have obtained. *Hollis v. Myers* (Civ. App.) 179 S. W. 57.

#### Art. 5435a. Transfers other than personal; accounts with transferees, etc.

**Limitations.**—See *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502.

#### Art. 5435d. Provisions applicable to transfers other than personal.

**Limitation of actions.**—See *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502.

**Art. 5435f. Validation of sales not followed by residence in favor of purchasers in good faith.**—In all sales of public free school lands by the state on condition of settlement and residence, June 12, 1901, on which

land the purchaser actually settled and resided according to law until he sold same to another, who was substituted on the records of the General Land Office as an actual settler, but who, in fact, did not settle on the land, but did afterwards sell the same to another for full value, who had no knowledge of the lack of such residence, but who has in good faith continued to have the land improved and cultivated, such sales are hereby validated, and when fully paid out, together with all fees, shall be patented. Proof of the facts necessary to bring such sales within the provisions of this Act shall be filed in the General Land Office before patent shall be issued; provided, this Act shall not apply to nor validate sales of tracts of more than 160 acres to any one individual. [Act March 20, 1915, ch. 62, § 1.]

Took effect 90 days after March 20, 1915, the date of adjournment of the Legislature.

**Art. 5435g. Validation of sales made before expiration of one year from date of award.**—In all cases where public school land has been purchased from the State on condition of settlement and residence and the purchaser complied with the law in making settlement thereon and filed his affidavit of settlement in the General Land Office, but before the expiration of one year from the date of award transferred the land to another qualified purchaser who became a settler thereon at the date of transfer to himself and who has continued to reside thereon in good faith making the same his home, the title under such purchase is hereby validated. [Act Feb. 13, 1917, ch. 18, § 1.]

Secs. 2 and 3 of this act are set forth post as arts. 5416b and 5416c. Became a law Feb. 13, 1917.

**Art. 5435h. Transfers before completion of occupancy validated.**—In all cases where public school land has been purchased from the State on condition of settlement and residence and the purchaser made settlement thereon, as required by law, and before the expiration of three years from date of award transferred the land but completed the occupancy and obtained a certificate of occupancy, and in all cases where lands bought as additional have been transferred before the occupancy of the home tract has been completed either by the original purchaser or his assignee and proof thereof filed in the Land Office, the title under such purchase is hereby validated. [Act March 26, 1917, ch. 95, § 1.]

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

**Art. 5436. [4218k] Lands patented, when.**

**Title, rights, and liabilities of substitute purchaser.**—Where a purchaser of school land conveyed his rights to C., and both complied with the law relative to occupancy, the land commissioner's refusal to accept the affidavit of transfer and C.'s purchase money obligations did not affect his rights nor authorize a forfeiture of the purchase and an award of the land to another. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

Where the land commissioner refused to file transfer papers on a transfer of a school land entry, the transferee was not required to take steps to compel the transfer; the right of substitution not being dependent on the filing and retention by the commissioner of the documents. *Id.*

Failure to file conveyance by purchaser of public land in General Land Office held not to affect grantee's title, and if original purchaser obtains a patent, the legal title inures to the benefit of his grantee. *Hollis v. Myers* (Civ. App.) 179 S. W. 57.

Plaintiff having completed occupancy and perfected title, except securing patent, under this article, held entitled to assert title against defendant to whom patent had issued, regardless of his derivation from a settler of the right to apply with knowledge of defendant's claim. *Perry v. Martin* (Civ. App.) 180 S. W. 1148.

Failure of substituted purchaser of public free school lands to deposit with proper officer his obligation to pay in lieu of his vendor's, as required by statute, does not operate ipso facto as forfeiture of title. *Schauer v. Schauer* (Civ. App.) 185 S. W. 653.

**Settlement upon land.**—Under this article, where necessary residence was uncompleted when substituted purchaser acquired the land, it was necessary that he become an actual and bona fide settler thereon, and that he continue to be such until completion of the three-year period. *Eriksen v. McWhorter* (Sup.) 194 S. W. 588.

The words "actual settlement" in this article do not require the purchaser's continuous and unbroken personal presence upon the land, but merely mean that the set-

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tlement must be by the purchaser, and not his agent or proxy, and that it must be actual, and not constructive or virtual. *Id.*

The court cannot say as matter of law that substituted purchaser of school lands did not make sufficient settlement thereon under this article, where he did not personally go on land for two months and did not reside there continuously thereafter, but his wife did reside continuously thereon, and the jury's finding is conclusive. *Id.*

**Adverse possession.**—In view of Acts 1895, § 10, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 5435a, 5435b, 5435d, and Rev. St. 1911, art. 5436, the ten-year statute of limitation is not applicable in favor of an adverse occupant of school land, and cannot be invoked against a purchaser from the state before patent, where the amount of land is not a multiple of 40 acres and the adverse claimant claims under transfer by a judgment against the purchaser. *Whitaker v. McCarty (Civ. App.) 188 S. W. 502.*

**Trust in favor of person paying price.**—Where plaintiff, under Rev. St. 1895, arts. 4218j, 4218k, made application to purchase public land, oath that he was not purchasing for any other person, and entered into obligation for deferred payments, and received a patent reciting purchase and full payment, no trust would arise in favor of one who paid the purchase price. *Houston Oil Co. of Texas v. Votaw (Civ. App.) 184 S. W. 647.*

**Art. 5436a. Transfers by purchasers of irrigable lands in certain counties; subdividing sections.**—Where land has been sold in whole sections in the counties of Loving, Brewster, Jeff Davis, Irion, Schleicher, Presidio, Tom Green, Sterling, Culberson, Pecos, Reeves and Ward, and which sections are of uniform quality and topography and water has been, or may be, developed either by wells, ditches, canals or reservoirs so as to irrigate such sections or to render such sections capable of being irrigated, the owners of such sections may sell the same in forty-acre tracts, or multiples thereof, and the assignees may file their deeds and obligations in the General Land Office and have the portion so purchased divided from the parent account upon the same terms, conditions, limitations and regulations as are provided in Article 5436, Revised Civil Statutes of 1911, except as further limited by this Act. [Act March 22, 1915, ch. 93, § 1.]

Became a law March 22, 1915.

**Art. 5436b. Same; transfers not to impair value of remaining land.**—Before such subdivisions as are provided for in the preceding section shall be made upon the records of the General Land Office, the Commissioner of the General Land Office shall determine whether or not the sections so sought to be subdivided are of such uniform quality and topography that, if such subdivision, or subdivisions, were made and a portion should thereafter be forfeited for non-payment of interest, or other cause, the public free school fund would not suffer any loss by reason of that portion which might be forfeited being of less value than the portion not so forfeited. In the event the Commissioner should be of the opinion that the school fund would suffer loss by reason of such subdivision, he shall not accept transfers, but shall decline to permit the filing of the papers and shall not recognize such subdivision, and the parties shall have no right to enforce the recognition of such subdivision. [*Id.*, § 2.]

**Art. 5437. Lands patented, when.**

Cited, *Whitaker v. McCarty (Civ. App.) 188 S. W. 502.*

**Art. 5439. Application of railroad to buy, to contain what.**

**Power of railroad company to acquire land.**—Any incapacity of a railroad company to take land for a certain purpose is not ground for demurrer to its petition for specific performance, not showing the land was not for a use authorized by arts. 5439-5441, 6537-6539. *Wooten v. Dermott Town-Site Co. (Civ. App.) 178 S. W. 598.*

Under arts. 5439-5441, 6537, 6538, railroad company may validly contract to construct sidings, depot, etc., in return for conveyance of lands, though it did not intend to use lands for townsite. *Dermott Townsite Co. v. Wooten (Civ. App.) 193 S. W. 214.*

**Art. 5440. Land, how sold and patent issued.**

Cited, *Wooten v. Dermott Town-Site Co. (Civ. App.) 178 S. W. 598; Dermott Town-site Co. v. Wooten (Civ. App.) 193 S. W. 214.*

**Art. 5441. Limitations as to purchase.**

Cited, *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598; *Dermott Town-site Co. v. Wooten* (Civ. App.) 193 S. W. 214.

**Art. 5444. [4218j] Regulations as to occupancy.**

**Certificate of occupancy—In general.**—A certificate of proof of occupancy of public school land does not establish a clear and perfect title which it is beyond the power of the state to cancel. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

— **Conclusiveness.**—The certificate of proof of occupancy cannot be gone back of to show collusion, nonsettlement, or lack of intention to settle. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

A certificate of purchase of school lands by the Commissioner of the Land Office, if given before an intervening application, is conclusive, but if given after such application is rebuttable if it has any probative force, and, if given after the Commissioner is deprived of power to determine the question of settlement, the question is for the courts. *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

Where, before an applicant to purchase school lands filed his proof of occupancy, another application was filed by a person in possession, the commissioner had no power to adjudicate the rights of the parties, and the certificate of occupancy did not preclude the party in possession from showing in the courts that the earlier applicant was not an actual settler. *Id.*

Defendant in possession of school lands, who made application after plaintiff's application but before his proof of occupancy and the issuance of his certificate of purchase, held to overcome plaintiff's prima facie case and defeat a recovery by showing that plaintiff was not an actual settler, without showing equitable title in himself. *Id.*

The issuance of a certificate of occupancy to one purchasing school lands precludes inquiry into any question of collusion. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

**Proof of occupancy.**—Proof of occupancy by applicant to purchase school lands, filed after another applicant had applied to purchase the same lands, held ex parte and not evidence of occupancy, in an action of trespass to try title. *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

**Art. 5449. [4218p] Accounts, etc., with purchasers to be kept.**

Cited, *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

**Art. 5449c. Certain other sales validated.**—All sales of public free school lands which were purchased from the State and fully paid for and for which patents were signed by Governor J. S. Hogg on the twenty-second and twenty-third days of October, 1894, and on the thirtieth day of November, 1894, are hereby validated and all rights and claim in and to the land embraced in said patents is hereby relinquished to the owners thereof. [Act Feb. 17, 1917, ch. 28, § 1.]

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

## LEASES

**Art. 5450. [4218y] Commissioner may withhold agricultural lands from lease, when.**

Cited, *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715.

**Art. 5452. Leases, how and when made.**

Cited, *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

**Art. 5453. Regulations as to leases in absolute lease districts.**

**Conflicting leases.**—Under Const. art. 7, § 4, and Rev. St. 1911, arts. 5453, 5454, a lease of school lands, given before expiration of a prior lease, is void when made. *Pruett v. Robison* (Sup.) 192 S. W. 537.

**Art. 5454. Expired leases; regulations as to.**

**Conflicting leases.**—See *Pruett v. Robison* (Sup.) 192 S. W. 537; note under art. 5453.

**Art. 5455. [4218t] Where lessees secure permanent water, rights of.**

See art. 5420c, ante.

**Art. 5458. One year to assert right to leased or sold land.**

Cited, *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

**Limitation of actions in general.**—Defendants having fully complied with the law under which their purchase of school land as additional land was made, the land commis-



sioner's inadvertent forfeiture of the purchase did not put in motion, as against defendants, the one-year statute of limitations. *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715.

Under arts. 5458, 5459, plaintiff, who perfected his occupancy of school lands, held entitled to claim against defendant, though he held a patent illegally issued, but had failed to sue within the time prescribed by the statute. *Perry v. Martin* (Civ. App.) 180 S. W. 1148.

In trespass to try title by purchaser of land from Commissioner of Land Office after forfeiture against original buyer, suit being against purchaser from latter, defendant could show that the forfeiture was void, while if forfeiture was good, arts. 5458, 5459, cut off defendant's right to attack plaintiff's purchase. *Schauer v. Schauer* (Civ. App.) 185 S. W. 653.

Acts 29th Leg. c. 29, barring actions against lessees of school lands, is not merely a statute of limitations for benefit of lessee, but inures to benefit of state for protection of its own rights, and under it a void lease of school lands which has not been questioned within one year becomes valid against every one but the state. *Pruett v. Robison* (Sup.) 192 S. W. 537.

— **When statute does not apply.**—Under arts. 5458, 5459, the defense of one to whom public free school land was sold to an action by purchasers after forfeiture declared against him, that the forfeiture was illegal, leaving his right to the land unaffected, was not precluded because of his failure to bring suit for the land within a year from the date of the award after the forfeiture against him. *Nations v. Miller* (Sup.) 183 S. W. 153.

Suit in trespass to try title by purchaser of public free school lands, who complied with the provisions of law relative to occupancy and improvement, brought against party to whom the land commissioner awarded the lands after illegal forfeiture more than a year after the award, held not barred by arts. 5458, 5459. *Henderson v. Haley* (Civ. App.) 185 S. W. 324.

A title interposed to divest from an adversary is not a claim, or right to purchase free public school land, nor a suit by one claiming the right to purchase land, within arts. 5458, 5459. *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502.

— **What constitutes bringing suit.**—Filing of mandamus proceedings to compel cancellation of a resale of land sold previously to plaintiff under Acts 29th Leg. c. 103, § 5, held a sufficient institution of suit to render a succeeding action of trespass to try title not barred by limitation under this article. *Atchison v. Hanna* (Sup.) 174 S. W. 279, affirming judgment *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

#### Art. 5459. Same.

See *Perry v. Martin* (Civ. App.) 180 S. W. 1148; *Nations v. Miller* (Sup.) 183 S. W. 153; *Henderson v. Haley* (Civ. App.) 185 S. W. 324; *Schauer v. Schauer* (Civ. App.) 185 S. W. 653; *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502; notes under art. 5458.

## CHAPTER TEN

### SUITS TO RECOVER PUBLIC LANDS, RENTS AND DAMAGES

Art.	Art.
5467. Suits to recover lands illegally occupied.	5468. The attorney general to bring suits for lands.

#### Article 5467. [4218x] Suits to recover lands illegally occupied.

Cited, *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

#### Art. 5468. The attorney general to bring suits for lands.

**Jurisdiction and venue.**—Where school land had been sold by the state on credit and the contract was a subsisting one, the state, through the Attorney General, was not authorized by this article, to bring a suit to establish boundaries in Travis county; the land being located in another county. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

Any district court has jurisdiction of the subject-matter of a suit to cancel patents to public lands. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

**Grounds of action.**—The state may maintain a suit to cancel patents to public lands on the ground that they were issued by mistake or obtained by fraud. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

**Parties.**—In a suit by the state to cancel defendant's patents on the ground that they conflicted with an earlier patent, the owners of the earlier patent were not necessary parties. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

## TITLE 80

## LANDLORD AND TENANT

Art.		Art.	
5475.	Landlord shall have preference lien; contracts under which lien shall not attach; certain contracts void; recovery of excessive payments of rent; penalty.	5478a.	Removal not a waiver, etc.
5476.	Tenant not to remove property, subject.	5479.	Distress warrant.
5477.	Duration of lien; goods stored in warehouse; exemptions.	5480.	Oath and bond.
		5485.	Perishable property sold.
		5488.	Rights of tenant.
		5489.	Tenant shall not sub-let without consent, etc.
		5490.	Owners of buildings have preference lien, etc.

**Article 5475. [3235] Landlord shall have preference lien; contracts under which lien shall not attach; certain contracts void; recovery of excessive payments of rent; penalty.**—All persons leasing or renting lands or tenements at will or for a term of years shall have a preference lien upon the property of the tenant, as hereinafter indicated, upon such premises, for any rent that may become due and for all money and the value of all animals; tools, provisions and supplies furnished by the landlord to the tenant to make a crop on such premises, and together secure, house and put the same in condition for marketing, the money, animals and tools and provisions and supplies so furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products or other property; and this lien shall apply only to animals, tools and other property furnished by the landlord to the tenant, and to the crop raised on such premises; provided, however, this Article shall not apply in any way nor in any case where any person leases or rents lands or tenements at will or for a term of years for agricultural purposes where the same is cultivated by the tenant who furnishes everything except the land, and where the landlord charges a rental of more than one-third of the value of the grain and more than one-fourth of the value of the cotton raised on said land; nor where the landlord furnishes everything except the labor and the tenant furnishes the labor and the landlord directly or indirectly charges a rental of more than one-half of the value of the grain and more than one-half of the value of the cotton raised on said land, and any contract for the leasing or renting of land or tenements at will or for a term of years for agricultural purposes stipulating or fixing a higher or greater rental than that herein provided for, shall be null and void, and shall not be enforceable in any court in this state by an action either at law or in equity and no lien of any kind, either contractual or statutory, shall attach in favor of the landlord, his estate or assigns, upon any of the property named, nor for the purpose mentioned in this Article; and provided, further, that if any landlord or any person for him shall violate or attempt to evade any of the provisions of this Article by collecting or receiving a greater amount of rent for such land than herein provided, shall be collected or received by him upon any contract, either written or verbal, the tenant or person paying the same, or the legal representatives thereof, may, by an action of debt instituted in any court of this State, having jurisdiction thereof, in the county of the defendant's residence or in the county where such rents or money may have been received or collected, or where said contract may have been entered into, or where the party or parties paying the same resided when such contract was made, within two years after such payment, recover from the person, firm or corpora-

tion receiving the same, double the full amount of such rent or money so received or collected. All laws and parts of laws in conflict with this Article are hereby expressly repealed. [Act April 4, 1874, p. 55; P. D. 7418c; Act March 5, 1915, ch. 38, § 1.]

Cited, Ferrell-Michael Abstract & Title Co. v. McCormac (Civ. App.) 184 S. W. 1081.

**Creation and existence of lien.**—Whether plaintiff furnished supplies on the credit of the landlord entitling him to a landlord's lien under this article, held for the jury. *Senters v. First State Bank of Weatherford* (Civ. App.) 176 S. W. 878.

Evidence held to warrant a finding that a landlord furnished his tenant with necessary supplies for himself and teams so as to make a crop creating a lien therefor in favor of the landlord. *Red River Nat. Bank v. Sproles* (Civ. App.) 180 S. W. 660.

A landlord buying a note under agreement that, if the owner of mules would sell them to the landlord's tenant and take the tenant's note, he would buy it, has no landlord's lien on the mules; they not being "furnished" by him within this article. *Garden Valley Mercantile Co. v. Falkner* (Civ. App.) 189 S. W. 300.

A landlord allowing his tenant to keep corn due as rent, instead of delivering it to him, that the tenant might use it during the next year for seed, was not entitled to a lien for such corn; it not being "furnished" within this article, *Vernon's Sayles' Ann. Civ. St. 1914. Id.*

**Subject matter to which lien attaches.**—That landlord had no lien on proceeds of sale of wheat raised by tenant in hands of buyer should not prevent determination, in garnishment proceedings against buyer, of question whether landlord had lien on wheat itself and was entitled to judgment for rents against buyer. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

Landlord's lien on tenant's crop of wheat to secure rent did not extend to proceeds of sale, and landlord could have foreclosed lien on wheat in hands of purchaser from tenant, if found. *Id.*

**Priorities.**—The prior registration of a crop mortgage will not defeat the landlord's lien upon the crop conferred by arts. 5475-5477. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

In view of this article, held, that a landlord's lien, operative before the tenant's crop was planted, was superior to the lien of a previously executed chattel mortgage. *Ivy v. Pugh* (Civ. App.) 161 S. W. 939.

Where a tenant on October 7th mortgaged 10 bales of cotton of the crop of 1910 then being picked in a certain county, a showing by the landlord that he purchased 12 bales of the tenant after October 13th held not to support a judgment in favor of the mortgagee against the landlord for the excess over the landlord's lien. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

A landlord being preferred, his lien for supplies furnished a tenant to enable the latter to make a crop takes precedence over a crop mortgage. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

The possession of a tenant being notice of the landlord's right, a mortgagee of the tenant's crop cannot take in preference to the landlord's lien for rent and advances as an innocent lienholder. *Id.*

A landlord's lien upon crops grown, being by statute and existing without any instrument in writing, need not be recorded. *Caswell v. Lensing & Bennett* (Civ. App.) 183 S. W. 75.

The lien provided by art. 5009, for water furnished land for irrigation purposes, is enforceable against crops of tenant for water furnished tenant under contract, and is superior to lien of landlord for unpaid rent. *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

**Conversion of property subject to lien.**—Under this article, where cotton was levied upon by a constable and sold under execution against a tenant farmer to whom his landlord had made advances, and the buyer at the sale or his agent seized part of the crop sold, there was a conversion for which the constable and his sureties were liable. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

### Art. 5476. [3236] Tenant not to remove property, subject.

**Rights and liabilities of purchaser of property.**—The statute giving landlord a lien is itself notice to all persons dealing with a tenant, and the landlord is not bound by information not obtained from him or one authorized to speak in his behalf. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

If a lease provided that the landlord should receive as rent one-fourth of the cotton raised, then title to such part when gathered vested in him, making liable to him one buying such part of the tenant, unless the tenant had an unrevoked agency to sell such share. But if the lease gave the landlord as rent, not one-fourth of the cotton raised, but one-fourth of the proceeds thereof, neither the landlord nor M., who, during the life of the lease, bought the land, has any claim against one buying the cotton of the tenant. *Mason v. Ward* (Civ. App.) 166 S. W. 456.

An action by a landlord, having a lien for rent and advances, against the tenant's purchaser, is one for impairment of his security, and the recovery is measured by the extent of the damages. *Adams v. A. A. Paton & Co.* (Civ. App.) 173 S. W. 546.

A landlord, having a lien for rent and advances, may sue a tenant's purchaser of the crop without first returning the part of the proceeds appropriated for rent. *Id.*

Where a tenant, an ignorant negro, who was authorized by the landlord to sell cotton to one who had made him advances on condition that the landlord's lien was satisfied, ob-

jected to the purchaser's retention of the cotton without satisfying the lien, there was no sale. *Caswell v. Lensing & Bennett* (Civ. App.) 183 S. W. 75.

A purchaser of crops from one who secured them from the tenant is charged with notice that they may be subject to a landlord's lien. *Id.*

A purchaser from company which acquired cotton from a tenant, but refused to settle landlord's lien as demanded by the tenant, held not entitled to priority over such lien, where the company had no authority to hold itself out as authorized to sell the cotton free from the lien. *Id.*

Where a landlord allowed his tenant to dispose of cotton raised on the demised premises on condition that his landlord's lien was discharged, the landlord did not ratify the purchaser's refusal to satisfy the lien by cashing a check for the rent only given the tenant by the purchaser. *Id.*

Landlord might foreclose lien on tenant's crop of wheat, if found, or, where value of wheat exceeded rent due, he could recover judgment against purchaser of crop from tenant. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

**Conversion.**—Where it appeared from the contract and from the letters of the landlord that the tenant was authorized to sell the cotton purchased by third parties, they were not guilty of a conversion when they bought and used it. *Harris v. McGuffey* (Civ. App.) 185 S. W. 1024.

**Art. 5477. Duration of lien; goods stored in warehouse; exemptions.**—Such preference lien shall continue as to such agricultural products and as to animals, tools and other property furnished to the tenant, as aforesaid, so long as they remain on such rented or leased premises, and for one month thereafter; and such lien as to agricultural products, if stored in public or bonded warehouses controlled or regulated by the laws of the State within thirty days after the removal of said products from said rented premises, shall continue so long as they remain in such warehouses; and such lien, as to agricultural products and as to animals and tools furnished as aforesaid, shall be superior to all laws exempting such property from forced sale. [Act April 4, 1874, p. 55; P. D. 7418c; Act Oct. 9, 1914, 2d C. S., ch. 6, § 1.]

See *Neblett v. Barron* (Civ. App.) 160 S. W. 1167; note under art. 5477.

Cited, *Provine v. First Nat. Bank of Honey Grove* (Civ. App.) 180 S. W. 1107.

**Expires after one month.**—Act 33d Leg., 2d Called Sess., c. 5, § 42, post, art. 7827ss, continuing a landlord's lien on cotton stored, held applicable to cotton stored before the act took effect, where the lien on such cotton had not expired by the terms of this article. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

Under this article, landlord's lien on cotton of a subtenant held lost where he stored the cotton for more than a month on other than the rented premises. *Id.*

Under this article, failure of a landlord to foreclose his lien on crops removed from the premises, within one month after the removal, waived the lien. *Horton v. Lee* (Civ. App.) 180 S. W. 1169.

**Conversion.**—Where part of crop, raised on rented premises, belonging to landlord, or on which he has landlord's lien, is purchased without his consent or authority within 30 days of removal, there is conversion, for which purchaser is liable to extent of value of crop converted, or less, if rent due is less. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

### Art. 5478a. [3239] Removal not a waiver, etc.

**Waiver, loss, or discharge of lien.**—Claimant of a landlord's lien on property of a tenant levied on under execution could not enforce his lien in a statutory proceeding for the trial of a right of property, where the claimant was not in possession at the time of the levy. *Goins v. Zanderson* (Civ. App.) 164 S. W. 918.

The law will not imply a waiver by a landlord of his lien for rent and advances against his actual intent, in the absence of any ground for estoppel, in favor of a purchaser of the tenant. *Adams v. A. A. Paton & Co.* (Civ. App.) 173 S. W. 546.

A waiver of a landlord's lien is not inferred from the mere sale of the crop by the tenant. *Id.*

A landlord using the proceeds of a sale of the crop by his tenant, depositing the same in a bank to the landlord's credit, held not estopped from suing the purchaser for damages. *Id.*

Under this article, and other statutes, where, after cotton was ginned and placed in warehouse, tickets were delivered to chattel mortgagee, landlord held to have lost lien as against garnishment. *Childress v. Harmon* (Civ. App.) 176 S. W. 154.

Under this article, storing cotton when ginned and baled for future sale is not a removal for the purpose of "preparation for market." *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

In a suit to enforce a chattel mortgage on a stock of drugs, a written instrument executed by the landlord of premises where stock was housed, tendered to the last purchaser, who asserted the right to rescind for misrepresentations as to liens made by his immediate seller, held inadmissible to show the landlord, having intervened to secure his rent, had no lien. *Denman v. James* (Civ. App.) 180 S. W. 1157.

**Art. 5479. [3240] Distress warrant.**

**Wrongful distress.**—A tenant held not entitled to recover attorney's fees incurred by reason of the landlord unlawfully suing out a distress warrant and procuring a levy thereunder. *Tyler v. Sowders* (Civ. App.) 173 S. W. 640.

If properly alleged together with a charge of malice, mental worry, and trouble, and damage to reputation and credit are proper elements to be considered in estimating exemplary damages for the wrongful issuance and levy of a distress warrant by the landlord upon the tenant's goods. *Streetman v. Lasater* (Civ. App.) 185 S. W. 930.

In the absence of a contract to pay them, neither party can recover attorney's fees expended in prosecuting or defending an action by the landlord where he has unlawfully sued out a distress warrant. *Id.*

Exemplary damages for the wrongful suing out of a distress warrant are allowed as a punishment, and are largely in the discretion of the jury. *Id.*

**Art. 5480. [3241] Oath and bond.**

**Liability on bond.**—The sureties on a distress warrant bond are not liable for exemplary damages. *Streetman v. Lasater* (Civ. App.) 185 S. W. 930.

While sureties on a distress warrant bond are not, by reason of being on the bond, responsible for all the costs of the suit, they are liable for costs incurred by them or on account of their appeal. *Id.*

**Art. 5485. [3246] Perishable property sold.**

**Liability of sureties on bond.**—Where condition of a bond filed to procure an order directing a sale of distrained property as perishable was that principal and sureties would pay damages sustained if sale was illegally and unjustly applied for, or illegally and unjustly made, but property was not sold under order, owner of property had no right of action against sureties for conversion of property by principal, although order for sale of property was illegally and unjustly applied for. *Dupree v. Massey* (Civ. App.) 192 S. W. 790.

**Art. 5488. [3249] Rights of tenant.**

**Rights of tenant against purchaser of land.**—Under this article, a purchaser of land is charged with notice of the rights of a tenant in possession. *Rumbold v. Adcock* (Civ. App.) 193 S. W. 415.

**Art. 5489. [3250] Tenants shall not sub-let without consent, etc.**

**Right to assign or sublet in general.**—Evidence in action by a guardian for rent held to justify a finding that no agreement was made permitting defendants to sublet. *Rogers v. Harris* (Civ. App.) 171 S. W. 809.

Where lessee copartnership, with right to sublet on the lessor's written consent, afterwards incorporated in the same name without notice of the assignment of the lease to the corporation, there was no such privity to the lease as entitled the corporation to sue for damages for the lessor's refusal to permit a subletting. *A. Harris & Co. v. Campbell* (Civ. App.) 187 S. W. 365.

In lessee's action for damages from lessor's refusal to consent to a subletting, evidence held to sustain a finding that lessor did wrongfully, arbitrarily, and without cause refuse to consent to the occupancy of the premises by the subtenant, either as assignee of the lease or as subtenant. *Id.*

Under this article, a tenant has no right to sublet premises without the consent of his landlord. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Effect of unauthorized subletting.**—That the execution of a sublease without the landlord's consent was in violation of statute did not render the lessee and sublessees joint tort-feasors as to damages by the sublessees' stock, so as to preclude the lessee from compelling the sublessees to reimburse him for a sum which he paid the landlord on account thereof. *Huffstutler & Howell v. McKenzie* (Civ. App.) 163 S. W. 652.

In a lessee's action against his sublessee for damages to his crop by the sublessee's stock, in violation of the sublease, and also for redress for damages done to the crops of his cotenants which he had been compelled to pay, it was no defense that the sublease was invalid under this article. *Id.*

On facts stated, held that this article, would not be read into the original lease and a forfeiture declared for breach of such implied covenant not to sublease. *Johnson v. Ft. Worth Driving Club* (Civ. App.) 164 S. W. 875.

A provision in a lease against assignment without the landlord's consent in writing, being for his benefit, could be waived by him. *Jackson v. Knight* (Civ. App.) 194 S. W. 844.

**Assignment or sublease and construction and operation thereof.**—An assignee of a lease held to ratify a sublease of space for a fruit stand on the sidewalk, by acceptance of rent though the lease contained a provision for inside space if the city compelled the vacation of the stand. *Wicks v. Comves* (Civ. App.) 171 S. W. 774.

Under an order of court in sequestration proceedings, providing that the surrender of the premises by a sublessee should be without prejudice, the surrender could not defeat the sublessee's right to future profit in an action on the sublease. *Id.*

Where a lease terminable at the end of any quarter was assigned, the assignees could terminate the lease at the end of any quarter, though unable by the act of the landlord to remove their property. *Martin v. Stires* (Civ. App.) 171 S. W. 836.

As between plaintiff and defendant, a contract held not an assignment of plaintiff's lease, but a subletting. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

A lessee who sublet held to have a landlord's lien for the benefit of himself and the original lessor. *Id.*

Sublessee, occupying for more than a month, could not limit its occupancy to four months; the contract giving it an option to hold for a month or for one year. *Postal Telegraph Cable Co. of Texas v. De Krecko* (Civ. App.) 179 S. W. 525.

In action for rent, evidence held to show that defendant made a contract to subrent for a month, with option to extend the contract to cover term of plaintiff's lease. *Id.*

A subtenant is liable to the original lessor for the value of crops converted to the extent of the rent due the original lessor, though the subtenant has paid the rent due from him to his immediate landlord. *Horton v. Lee* (Civ. App.) 180 S. W. 1169.

A subtenant is liable to the original landlord for the value of crops converted to the extent of rent owing to such landlord, though the latter consented to the sublease. *Id.*

A contract that R., having land leased for a year, leases it to T. at the same price R. paid N. for it, is not ambiguous as to term, which is said year. *Tom v. Roberson* (Civ. App.) 182 S. W. 698.

In action against assignee for liability on lease, evidence held to show that landlord consented to assignment by accepting rents and by correspondence. *Jackson v. Knight* (Civ. App.) 194 S. W. 844.

Where lessee contracted to transfer café business and lease to defendant and made delivery, it was sufficient assignment of lease. *Id.*

That purchaser of a café business paid rents under lease and attempted to transfer it to another was evidence that he considered entire lease as his property, although no formal assignment was made. *Id.*

### Art. 5490. [3251] Owners of buildings to have preference lien, etc.

Cited, *Frith v. Wright* (Civ. App.) 173 S. W. 453.

**Priorities.**—This article divides a lease contract for a series of years into a series of yearly contracts, so far as landlord's lien is concerned, and, where a conditional vendor did not record the contract until after the landlord's lien had attached, but recorded it prior to the commencement of the second year of the lease, its lien was prior to the landlord's lien for the second year. *Low v. Troy Laundry Machinery Co.* (Civ. App.) 160 S. W. 136.

Under arts. 5490, 5654, landlord whose lien attached before registration of contract of conditional sale held to be a creditor entitled to protection under art. 5654, and his lien, therefore, was superior to the vendor's lien. *Id.*

**Exemption from forced sale.**—Under this article, a landlord had no lien on property of the tenant which was exempt from forced sale. *Harris v. Townley* (Civ. App.) 161 S. W. 5.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**1. Creation and existence of relation of landlord and tenant.**—A contract for the letting of land, a pumping plant and canal, having been modified to satisfy defendant, he was under no obligation to accept a rescission offered him by plaintiff on the ground that his failure to do so would constitute a ratification of the contract and preclude his enforcement of rights conferred by the modification. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

Where land was rented verbally, and, after entry by the tenant, the landlord stated that as long as the tenant paid her rent she could have the place, the contract was not unilateral. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

A lease of irrigated land providing, "in case lessees take more than 20 acres within six months, the parties to enter into a supplemental contract to evidence same," construed to be an offer to lease, and not effective as a contract until accepted. *Donada v. Power* (Civ. App.) 184 S. W. 793.

Taking possession of land by the lessee after an offer to lease it to him is an acceptance of the offer as binding on him as an express verbal acceptance. *Id.*

Plaintiff, who was about to rent his land for a term at a certain sum, but whose prospective lessee, after talking to defendant, declined to rent, held not entitled to recover against defendant the rental value for such term, having later rented to another for the same term at the same rental. *Graham v. Jackson* (Civ. App.) 189 S. W. 551.

**2. Tenancy at will.**—A tenancy at will or a periodical tenancy may arise when the tenant holds over with permission of a lessor or with his tacit consent. *Street-Whittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

**6. Requisites and validity of leases.**—Where defendants refused to execute a lease of premises to be used as a saloon without the insertion of a defeasance clause, which plaintiffs' agent promised to insert, and subsequently obtained defendants' signature by falsely representing that he had inserted it, defendants were not negligent in failing to reread the instrument before signing, but were entitled to urge the fraud as ground for relieving them from liability on the happening of the condition. *Taber v. Eyer* (Civ. App.) 162 S. W. 490.

A lease of premises to be occupied as a bawdyhouse, executed by the lessor with knowledge of the lessee's purpose, is illegal, and neither party can demand relief therefrom or thereunder, notwithstanding Pen. Code 1911, arts. 496, 500, 501, defining a bawdyhouse, and punishing the keeper and owner unless the owner proceeds to prevent the keeping by giving information to the prosecuting attorney. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

A lease of premises, described as a strip out of a designated survey lying west of and adjoining a survey named containing 115 acres, does not describe the land. *Ratliff v. Wakefield Iron & Coal Land Improvement Co.* (Civ. App.) 172 S. W. 198.

In an action on a rent note, evidence held to warrant a finding that the lessee was induced by the lessor's misrepresentations to lease the property. *Robey v. Craig* (Civ. App.) 172 S. W. 203.

Where a lessor fraudulently misrepresented the character of the land leased, the lessee may rescind, though he did not rely wholly on the lessor's statements. *Id.*

One leasing real property is entitled to rely upon the representations of the lessor as to the character of the land. *Id.*

**8. Liability for breach of contract.**—Where a lessee abandoned the premises, the refusal of the lessor to accept a new tenant on condition of a lease for a period beyond the unexpired term for the same rental was not a failure to exercise ordinary diligence to relet the premises, and he could recover from the lessee the loss sustained. *Robinson Seed & Plant Co. v. Hexter & Kramer* (Civ. App.) 167 S. W. 749.

Conceding that a landlord consented to subletting, his collection of additional rent from the subtenant, who was not disturbed before the end of the term, was not a breach of the covenant for quiet enjoyment, constituting a defense to his suit against his tenant for nonpayment of taxes. *De Grazier v. Longinotti* (Civ. App.) 171 S. W. 506.

A tenant is not damaged by his landlord's collection of additional rent from a subtenant. *Id.*

The measure of damages for a landlord's breach of an agreement authorizing a tenant to harvest hay produced on the land, but in which he had no rights, held, in the absence of custom as part of the contract, to be the value of services rendered, plus the value of services to be rendered, less the amount the tenant might have earned at other employment. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

In an action by tenants for damages occasioned by the presence of obnoxious grasses on lands represented to be free therefrom, the measure of damages held to be the difference between the value of the crops the tenants would have raised, less additional expenses necessary to obtain such value, and the value of the crops raised. *Poutra v. Sapp* (Civ. App.) 181 S. W. 792.

**9. Estoppel of tenant.**—A tenant in possession may lawfully attorn to a third party who has purchased the landlord's title at execution sale. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

Where a lessor fraudulently misrepresented the character of the land, the lessee, who relied upon his statements, is not estopped to rescind because the lease recited that he had inspected the land and was satisfied with it. *Robey v. Craig* (Civ. App.) 172 S. W. 203.

A landlord who had no title can recover the property from one to whom his tenant attorned, and who himself had no title, under the doctrine of estoppel of tenant to question his landlord's title. *Richardson v. Houston Oil Co. of Texas* (Civ. App.) 176 S. W. 628.

A tenant of one who has no title may acquire the superior title, and rely thereon in defense to trespass to try title, brought against him by his lessor. *Id.*

A tenant cannot dispute title of his landlord and attorn to another without surrendering possession. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

Rule that tenant cannot dispute landlord's title applies where tenant seeks to acquire title by virtue of possession obtained by lease, but not where he acquires an outstanding superior title. *City of Laredo v. Salinas* (Civ. App.) 191 S. W. 190.

**15. Liability of landlord for debts incurred by tenant.**—Under a lease containing an option to renew and authorizing lessee to put plant in running condition at lessor's expense, lessor held liable for expense of putting plant in running condition for the renewal term. *Sweetwater Cotton Oil Co. v. Birge-Forbes & Co.* (Civ. App.) 160 S. W. 1125.

**21. Rights of action against third persons.**—Plaintiff lessee of farm, the pasture of which was in one inclosure with that of defendant, an adjoining landowner, held without cause of action against defendant because third party, to whom plaintiff had rented pasturage, had controversy with defendant as to number of cattle he could pasture in common inclosure and decided to give up lease, to which plaintiff agreed. *Graham v. Jackson* (Civ. App.) 189 S. W. 551.

**24. Disturbance of possession of tenant.**—In the absence of a provision so allowing, a landlord has no right of entry upon the leased premises even to make needed repairs, and a tenant may recover all damages proximately resulting from such entry, even though the rent has not been paid and the tenant is only there by sufferance. *Higby v. Kirksey* (Civ. App.) 163 S. W. 315.

**25. Mode and purposes of use of premises in general.**—The lessee was not bound, at all events, to prevent the sale of intoxicating liquors, but was only bound to exercise reasonable diligence to ascertain and prevent such sales. *Johnson v. Ft. Worth Driving Club* (Civ. App.) 164 S. W. 875.

Right of owner to agree with tenants as to use of leased premises is incident to ownership of property, and is only restricted to forbid any agreement to use the property for an unlawful purpose. *Celli & Del Papa v. Galveston Brewing Co.* (Civ. App.) 186 S. W. 278.

A brewery leasing premises for saloon use may stipulate tenants shall not buy beer of its competitor. *Id.*

**30. Liability for rent—Injury to premises.**—The lessee of a freehold is liable for the rent, even after the improvements are destroyed by fire, unless the lease expressly relieves him from such liability or the lessor has covenanted to rebuild in case of fire. *Japhet v. Polemanakos* (Civ. App.) 160 S. W. 416.

**31. — Surrender or abandonment.**—Where a lessor of certain land, pumping station, and canal agreed to rescind the contract and deliver up the rent notes if the water

became sufficiently salt to injure the crops, and such event occurred in 1910, such fact released defendant from liability for a balance due on the rent for 1909 and also on the notes not due at the time the salt water appeared in 1910. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

**43. Transfer of reversion.**—Covenants in a lease that no gambling and no selling of liquors should be permitted on the premises during the lease, and that upon breach thereof the lessor might forfeit the lease and take possession, held covenants running with the land for breach of which the lessor's grantee and assignee might forfeit the lease. *Johnson v. Ft. Worth Driving Club* (Civ. App.) 164 S. W. 875.

Where farm land leased for five years under a contract providing that a sale should make the lease immediately void was sold during the last year, held that, while the sale avoided the lease contract, the tenant was entitled upon payment of the rent reserved to hold for that year. *Phelps v. Johnson* (Civ. App.) 181 S. W. 862.

**50. Duty to make repairs in general.**—If a tenant, renting for a certain term and agreeing to pay for certain repairs, after the repairs are made is compelled to remove because of landlord's wrongful breach of the rental contract, this does not entitle the landlord to apply on such repairs the rent already paid. *Holtzclaw v. Moore* (Civ. App.) 192 S. W. 582.

**51. Injuries from defective condition of premises.**—A landlord repairing the roof of the building pursuant to the tenant's requests held liable for negligence in leaving the roof in a defective condition without notifying the tenant. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

Evidence held to justify a finding that a landlord repairing the roof of the building negligently left the roof in a defective condition and was liable for damages to the tenant's property by rain. *Id.*

Tenant of office building, who secured the janitor's permission to use the back stairs to reach a river in the rear for bathing purposes, and was injured by falling down the stairs when returning after his bath, could not recover from the building owner, being a licensee. *Book v. Heath* (Civ. App.) 181 S. W. 491.

**53. Injuries to premises.**—A lessee having removed portions of a windmill on the premises to prevent one of his employes using it, and an effort of some one to use it in that condition causing it to break, the lessee is liable to the lessors for the cost of repairing it. *Henson v. Baxter* (Civ. App.) 166 S. W. 460.

Tenant held to have no right to use land so as to injure the freehold or to confer such right upon any one else, and instruction that there could be no recovery for pasturing cattle on land with tenant's consent, but that the landlord's remedy was against the tenant, was erroneous. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

Evidence held to show that a tenant using a building with the permission of the landlord entered into a special contract to indemnify the landlord for loss in case of fire. *Seligmann v. Sonka* (Civ. App.) 183 S. W. 73.

Clause of lease held to mean that, if any of houses on premises was completely destroyed by fire, landlord could elect whether or not to rebuild. *Land v. Johnson* (Civ. App.) 189 S. W. 337.

**57. Renewal of lease in general.**—A clause, providing that the tenant at the end of the term shall have the refusal of the property for 12 months longer, gives an option for a renewal on the same terms. It gives an option for a renewal of the lease, not a mere extension thereof. *Street-Wittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

**58. Extension or renewal by holding over.**—A holding over by a tenant, who has an option for a renewal of the lease, is not conclusive evidence of his election to exercise his option. A holding over for half a month after the expiration of the term held not an election to take a renewal of the lease under the option. *Street-Whittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

Where a tenant held over after notice of intention to vacate, and the landlord attempted to collect rent at a greater rate, there was no implied renewal. And landlord whose conduct induced a tenant to believe she consented to his holding over cannot thereafter claim an implied contract by reason of such holding over. *Id.*

Where a tenant under a lease for eight months held over after the expiration of the term, the implied lease will not be for a full year, but only for eight months additional. *Id.*

**60. Duration and termination of lease.**—Where a lessee, abandoning the premises, was only able to secure third persons who would take the premises for the unexpired term at the same rental on condition that the lessor would extend the period at the same rental, refusal of the lessor to lease the premises beyond the unexpired term was not an acceptance of a surrender. *Robinson Seed & Plant Co. v. Hexter & Kramer* (Civ. App.) 167 S. W. 749.

Where a lease authorized the lessor in case of abandonment to resume possession and relet for the unexpired term, the act of the lessor in reletting for the unexpired term on the lessee abandoning the premises was not an acceptance of a surrender, but was for the benefit of the lessee by reducing his liability. *Id.*

A lease of a building for the sale of liquor, stipulating that the lessee could cancel if unable to procure a license, held not to require the lessee to sue to enforce his right to a license. *Fleming & Roberson v. Fred Miller Brewing Co.* (Civ. App.) 171 S. W. 1064.

Leaving land and growing crop by tenant to move out of state, but with contract with third person to gather and dispose of crop, was not abandonment giving landlord right of possession of land and crop. *Rainey v. Old* (Civ. App.) 180 S. W. 923.

A tenant who disavows his landlord's title and asserts title in himself forfeits his rights as a tenant and becomes a mere trespasser. *Rice v. Schertz* (Civ. App.) 187 S. W. 245.



In landlord's suit against tenant, evidence held not to justify finding that plaintiff acted fraudulently in electing to terminate the lease after a fire, and merely pretended to deem the premises unfit for occupancy. *Land v. Johnson* (Civ. App.) 189 S. W. 337.

Where tenant paid rent monthly in advance, agreeing to surrender premises on demand, this was a periodic monthly tenancy, and landlord could not demand premises until expiration of the month. *McKibbin v. Pierce* (Civ. App.) 190 S. W. 1149.

Where the children of the record owner's lessee continued to live upon the land until date of suit, they continued to hold under the lease, although the original lessee had died. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

**62. Renting on shares.**—Where a lease of land for farm purposes was in the ordinary form, except that in addition the landlord agreed to purchase the tenant's share of corn raised, and the parties performed all the conditions except as to the purchase of the corn, the contract was severable, and the stipulation as to the purchase of corn was not dependent upon the lease proper. *Stanley v. Sumrell* (Civ. App.) 163 S. W. 697.

Where land is rented for a share of the crop to be raised, the parties are not partners. *Texas Produce Exchange v. Sorrell* (Civ. App.) 168 S. W. 74.

Where lessor of land conveyed it, his grantee as assignee of lease contract was entitled to recover crops or value thereof, which belonged to lessor under terms of contract. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

**65. — Rights and liabilities as to crops.**—Where a farm lease on shares required the tenant to plant specified crops, and provided that, as soon as the crop was gathered, the land should revert to the possession of the landlord, the tenant is not, where the specified crop failed, entitled to the same share of a substitute crop. *Jackson v. Taylor* (Civ. App.) 166 S. W. 413.

**68. — Breach of contract by landlord in general.**—That a tenant on shares vacated the premises before the end of the term, when ordered by the landlord, did not defeat his right to damages for the landlord's breach of the lease. *Bost v. McCrea* (Civ. App.) 172 S. W. 561.

**69. — Eviction.**—The measure of damages to a tenant on shares, resulting from his eviction by the landlord, is the value of the crops he could probably have raised, less the expense of raising them and less his reasonable earnings after the eviction. *Bost v. McCrea* (Civ. App.) 172 S. W. 561.

**70. — Conversion.**—Landlord's entry on premises with tenant's consent on condition that she thresh only grain due for rent does not prevent her from applying proceeds of the grain threshed to other debts which lease provided should be paid from crop. *McDowell v. Rathbun* (Civ. App.) 193 S. W. 428.

One employed by tenant to supervise threshing of grain has no authority to set apart share of grain due landlord, and his act in setting apart such share is not payment of rent. *Id.*

**71. — Breach of contract to deliver share.**—In an action to recover the value of one-fourth of the crops raised on two farms which the owner had agreed to share, the recovery held not to be reduced by the amount plaintiff might have earned elsewhere after leaving the employment after the crops were matured. *Meads v. Meads* (Civ. App.) 178 S. W. 781.

In an action for breach of a contract to share crops raised on two farms, the provision of the contract requiring plaintiff to act as foreman held not material, or so considered by parties, failure to perform which would preclude recovery. *Id.*

Where by virtue of a special custom a tenant was entitled to a portion of the Colorado grass hay produced on the premises, the lessor, who wrongfully took the hay, cannot offset as against the tenant the amount she expended after breach in order to harvest it. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

## TITLE 81

## LAWS

Chap.

1. Common law.
2. Special laws.

Chap.

3. Construction of laws.

## CHAPTER ONE

## COMMON LAW

**Article 5492. [3258] Common law of England adopted.**

Cited, *Harle v. Harle* (Civ. App.) 166 S. W. 674; *Loving v. Hazelwood* (Civ. App.) 184 S. W. 355; *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

**Construction and operation.**—The common law of England, referred to by this article, means the common law as declared by the courts of the different states of the United States. *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

Under this article, the rule in *Shelley's Case*, held an integral part of the law of the state. *Hunting v. Jones* (Civ. App.) 133 S. W. 858.

Under the common-law rule which by virtue of this article, prevailed in Texas prior to Acts 34th Leg. (1st Called Sess.) c. 7, ante, art. 5011t, the proprietor of land improving the same may lawfully repel surface water and turn the flow back on other lands without liability. *Walenta v. Wolter* (Civ. App.) 186 S. W. 873.

The law merchant is part of the common law adopted by the state of Texas. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

## CHAPTER TWO

## SPECIAL LAWS

**Article 5494. [3260] Notice of intention to apply for special law.**

**Constitutionality of statutes.**—A local option law, though adopted in some parts of the state, and rejected in others, is not for that reason unconstitutional as lacking in uniformity, provided it is submitted in the same way to all divisions of the state. *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147.

A local option law held not unconstitutional as a local or special law. *Id.*

Const. art. 3, § 56, forbidding the Legislature to pass any local or special law in reference to certain matters, was annulled, in so far as it related to the maintenance of public highways and roads, by the amendment to article 8, § 9. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

If the authority to legislate by special act upon a certain subject is given by constitutional provision other than article 3, § 56, forbidding special acts regulating certain matters, such authority carries with it the right to enact all provisions which would be legitimately embraced in the bill if section 56 was not a part of the Constitution. *Id.*

In view of Const. art. 3, § 56, regarding local and special laws, and article 16, § 23, allowing regulation of live stock, *Tick Eradication Law* (Acts 33d Leg. c. 169) § 8, post, art. 7314e, providing for submission of tick eradication law to vote of county, etc., held constitutional. *McGee v. State* (Cr. App.) 194 S. W. 951.

## CHAPTER THREE

## CONSTRUCTION OF LAWS

Art.

5502. General rules of construction.

Art.

5504. Meaning of certain words.

**Article 5502. [3268] General rules of construction.**

Cited, *Harris v. Todd* (Civ. App.) 158 S. W. 1189.

**1. Construction of statutes in general.**—See *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

This article applies and is of binding force in criminal prosecutions. *Bradfield v. State*, 166 S. W. 734, 73 Cr. R. 353.

2. — **Constitution.**—A state Constitution should be liberally construed in contradistinction to a strict construction of the federal Constitution. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

3. **Intention of Legislature.**—See *Sparks v. Kaufman County* (Civ. App.) 194 S. W. 605.

In construing a statute the general intent must be kept in view. *Thomas v. Taylor* (Civ. App.) 163 S. W. 129.

This article and a city charter provision, held to require publication of penal ordinances. *Texas Traction Co. v. Scoggins* (Civ. App.) 175 S. W. 1128.

The argument of inconvenience results where the language of the law is not clear, either express or implied, and extends to constitutions and statutes. *Davis v. Payne* (Civ. App.) 179 S. W. 60.

Controlling consideration in construing statute is ascertainment of intention of Legislature, which must be given effect when not inconsistent with organic law. *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

The intent of the Legislature is the essence of the law, but the intent is to be derived from the words of the statute itself. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

4. — **Intent in construing Constitution.**—A Constitution should not receive a technical construction like a statute, but a construction which carries out the apparent intention of the people. *San Antonio Independent School Dist. v. State* (Civ. App.) 173 S. W. 525.

5. **Spirit or letter.**—Only where it is perfectly plain that the literal sense of a statute works an absurdity or manifest injustice are the courts warranted in departing from a literal construction. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

6. **Policy and purpose.**—A statute cannot be given a construction that would render it futile and purposeless if it can be otherwise construed. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

7. — **Terms of Constitution.**—The spirit, purpose, and scope of a constitutional provision are to be consulted to determine the meaning of its terms. *Aransas County v. Coleman-Fulton Pasture Co.* (Sup.) 191 S. W. 553.

8. **Implications.**—That which is implied in a statute is as much a part of it as that which is expressed. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

10. **Meaning of language—In general.**—It is a cardinal rule of construction, incorporated into the statute law of the state, that the language of a statute must be given its usual import, unless other language used by the same Legislature indicates that different meaning was intended. *State v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 166 S. W. 83.

In construing a statute, the legislative intent, rather than the literal meaning of the language used, or of isolated provisions, must govern. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, and subs. 1, 6, of this article and Const. art. 1, § 3, held that laborers drilling an oil well with the machinery of an oil company had no lien upon such machinery. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

12. **Plain and unambiguous language.**—Intention of Legislature as to law is to be determined primarily from plain and ordinary import of language used. *Harris County v. Smith* (Civ. App.) 187 S. W. 701.

Where a law is constitutional, the courts cannot change the plain and unambiguous meaning of the language by writing therein a rule at variance with the law itself. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

13. — **Words of Constitution.**—It is a general rule of interpretation that words in a Constitution are to be understood in their usual and best-known signification. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

14. **General and specific words.**—General words following words of a specific meaning are not to be construed in their widest extent, but as applying only to the same kind or class as those specially mentioned. *San Antonio Independent School Dist. v. State* (Civ. App.) 173 S. W. 525.

Where there are words in a statute expressing a general intention and others expressing a particular intention incompatible with it, the particular must be taken as an exception to the general. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

16. **Singular and plural number.**—In view of the provisions of this article, that the singular and plural number shall each include the other, and article 5504, providing that the word "effects" includes all personal property, the word "effects" as used in arts. 273 and 274 would include live stock in the hands of a bailee. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

18. **Statute as a whole.**—All the language of a statute must be given effect, if it is possible to do so. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849; *Spence v. Fenchler* (Civ. App.) 180 S. W. 597; *Dobie v. Scott* (Civ. App.) 188 S. W. 286.

All the parts of a statute are to be considered together in construing it, and one part may control another, though, if possible, they are to be reconciled. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

Subject-matter and entire context of statute are to be considered in construing it. *Dobie v. Scott* (Civ. App.) 188 S. W. 286.

The sense in which a term is used in other provisions of a Constitution is not conclusive of its meaning in a particular provision. *Aransas County v. Coleman-Fulton Pasture Co.* (Sup.) 191 S. W. 553.

19. **Conflicting provisions.**—Where two provisions of the same law are in conflict the last one controls. *Stevens v. State*, 70 Cr. R. 565, 159 S. W. 505.

Where a statute expresses a general intention and also a particular intention incompatible with it, the particular intention may be deemed an exception to the general one. *Helm v. Wells Fargo & Co. Express (Civ. App.)* 177 S. W. 134.

23. **Title and caption.**—In construing a statute it is permissible to refer to the caption for explanation, and it is equally permissible in the construction of the caption to refer to the body of the act. *Commonwealth Ins. Co. of New York v. Finegold (Civ. App.)* 183 S. W. 833.

24. **History and surrounding circumstances.**—While the necessary operation of a statute may be considered in determining its validity, the court should not look beyond the face of the statute in determining its effect. *Judkins v. Robison (Sup.)* 160 S. W. 955.

The interpretation placed by one Legislature upon a statute enacted by another cannot be given controlling effect by the court in construing the statute. *Fielder v. Houston Oil Co. of Texas (Civ. App.)* 165 S. W. 48.

The construction of a statute may be aided by reference to the legislative journals. *Red River Nat. Bank v. Ferguson (Civ. App.)* 192 S. W. 1038.

25. — **Terms of Constitution.**—Where ambiguity exists in language of constitutional provision, not removable by reference to other provisions, the prior state of the law, the evil to be remedied, and the contemporaneous circumstances are to be resorted to. *San Antonio Independent School Dist. v. State (Civ. App.)* 173 S. W. 525.

The court, in case of ambiguity in the language of the Constitution, may consider the prior state of the law, the subject-matter and purpose sought to be accomplished, and the proceedings of the constitutional convention and attending circumstances. *Williams v. Carroll (Civ. App.)* 182 S. W. 29.

When it is necessary to resort to extrinsic sources to aid in construing the Constitution, the courts will resort to the history of the time and the conditions leading to the enactment of the provision in question to ascertain its purpose, and thereafter it will be construed to further such purpose. *Id.*

26. **Contemporaneous construction.**—Contemporaneous and practical construction of constitutional provisions by the Legislature in the enactment of laws has great weight, and will be followed by the courts, if possible, without doing violence to the fair meaning of words used in the Constitution. *Williams v. Carroll (Civ. App.)* 182 S. W. 29; *Houston Oil Co. of Texas v. Griggs (Civ. App.)* 181 S. W. 833.

27. **Executive construction.**—When a statute is ambiguous and the construction placed upon it by the department of government charged with its execution does not result in serious injustice or hardship, such construction, particularly when long continued, will be adopted and upheld by the courts. *State v. Houston Oil Co. of Texas (Civ. App.)* 194 S. W. 422; *Fielder v. Houston Oil Co. of Texas (Civ. App.)* 165 S. W. 48; *Cain v. Garvey (Civ. App.)* 187 S. W. 1111. The courts are not bound to accept such construction when the act is clear and unambiguous. *Brown v. City of Amarillo (Civ. App.)* 180 S. W. 654.

28. **Presumptions to aid construction.**—The presumption against absurd consequences of legislation is no more than the presumption that the legislators were gifted with ordinary common sense, and applies only where there is room for construction by reason of the obscurity or ambiguity of a law. *Davis v. Payne (Civ. App.)* 179 S. W. 60.

29. **Statutes relating to same subject.**—Courts may look to other legislation in *pari materia* in determining legislative intent in enacting a particular statute. *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589; *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147.

In construing language of inheritance tax law (Rev. St. 1911, art. 7487), it must be presumed to have been used in the same sense which it bears in laws on kindred subjects, as construed by decisions made before the law was enacted. *State v. Yturria (Civ. App.)* 189 S. W. 291.

30. **Statutes adopted at same session.**—Laws enacted at a special session of Legislature amending those enacted at the regular session are not so material to the enactment at the regular session that such enactment would not have been made without the amendment, and one may be valid while the other is invalid. *Cathey v. Weaver (Civ. App.)* 193 S. W. 490.

33. **Re-enactment of or reference to former statute and adoption of provisions previously construed—Constitutional provisions.**—The judicial interpretation of constitutional provisions is so forcible that, where a new Constitution is adopted without change of rule laid down by courts, such construction is adopted by new Constitution and becomes a part of it. *Lyle v. State (Cr. App.)* 193 S. W. 680.

35. **Statutes adopted from another state or country.**—Where a foreign statute which has already been construed by the courts of that country, is adopted, the construction is also adopted, and only where the most cogent reason exists should the courts depart from that construction. *Collier v. Smith (Civ. App.)* 169 S. W. 1108.

36. **Mandatory or directory.**—Ordinarily the word "may," as used in legislative enactments, denotes permission, and will not be construed as having a mandatory effect, though it will be given such meaning if such appears to have been intention of Legislature. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles (Civ. App.)* 192 S. W. 611.

37. **Provisos, exceptions and saving clauses.**—Under an ordinance granting to an electric company the right to manufacture and vend electricity, held, under this article,

not a condition that the company manufacture its own electricity. *City of Terrell v. Terrell Electric Light Co.* (Civ. App.) 187 S. W. 966.

A statute which ingrafts an exception on a general statute must be strictly construed and will not be extended by judicial construction. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

39. **Remedial statutes.**—Where the Legislature has established a mandatory procedure, there is no room left for discretion, and it is the duty of the courts to enforce the law as written. *International & G. N. R. Co. v. Parke* (Civ. App.) 169 S. W. 397.

40. **Statutes in derogation of sovereignty.**—Where a power is expressly given by the Constitution and the mode of exercise is prescribed, such mode is exclusive. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

42. **Penal statutes.**—A statutory penalty cannot be recovered unless it is clearly authorized by statute. *Helm v. Wells Fargo & Co. Express* (Civ. App.) 177 S. W. 134.

A penal statute must be strictly construed. *State v. International & G. N. Ry. Co.* (Sup.) 179 S. W. 867.

45. **Retroactive operation.**—It must appear, by fair implication from the language of the statute, that it was intended to have a retroactive operation. *Blakely v. Commercial Union Assur. Co.* (Civ. App.) 160 S. W. 443.

While a statute relating to procedure only is presumed to apply to actions which have accrued or are pending, as well as the future actions, the steps of procedure already taken will be permitted to stand, unless the statute plainly shows a contrary intention. *Id.*

Laws authorizing taxes are not retrospective, so far as the year in which they are authorized is concerned. *Cadena v. State* (Civ. App.) 185 S. W. 367.

Even when not forbidden by state Constitution, statutes should not be given a construction that will affect existing rights, unless it is plain that Legislature so intended. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 189 S. W. 1006.

A statute will be given only a prospective operation unless the legislative intent to give it retroactive effect be clearly apparent. *Slate v. City of Ft. Worth* (Civ. App.) 193 S. W. 1143.

47. **Construction in favor of constitutionality.**—It is the duty of the court to ascertain the intention of the Legislature in enacting a statute whose constitutionality is in question, and to sustain the law if it can be done by fair construction. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833.

### Art. 5504. [3270] Meaning of certain words.

**Words judicially defined.**—"Effects." *McClung v. Watson* (Civ. App.) 165 S. W. 532. "Person." *Allison v. Richardson* (Civ. App.) 171 S. W. 1021; *State v. Country Club* (Civ. App.) 173 S. W. 570.

"Property." *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 43 L. R. A. (N. S.) 994; *Guarantee Life Ins. Co. of Houston v. City of Austin* (Civ. App.) 165 S. W. 53; *City of Texarkana v. Lawson* (Civ. App.) 168 S. W. 867; *Dibrell v. City of Coleman* (Civ. App.) 172 S. W. 550; *McAdams v. State*, 76 Cr. R. 63, 172 S. W. 792; *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836; *Western Union Telegraph Co. v. City of Houston* (Civ. App.) 192 S. W. 577.

### DECISIONS RELATING TO SUBJECT IN GENERAL

**Enactment in general.**—The chief distinction between a "resolution" and a law is that a resolution is used whenever the Legislature wishes to merely express an opinion which is to have only a temporary effect, while a law is intended to permanently direct and control matters applying to persons or things in general. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

Where an act has been passed by the Legislature and approved by the Governor, and is duly filed, it constitutes a record which is conclusive of the passage of the act as enrolled, and cannot be impeached by journals of either house of the Legislature, or by the original bill. *Teem v. State* (Cr. App.) 183 S. W. 1144.

**Subjects and titles of acts.**—Const. art. 3, § 35, is mandatory, but should be liberally construed. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671; *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833; *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

Const. art. 3, § 35, held intended to prevent clauses from being inserted in bills of which the title gave no intimation, and to reasonably apprise the Legislature of the contents of bills. *Holman v. Cowden & Sutherland* (Civ. App.) 158 S. W. 571.

Acts 33d Leg. c. 179, providing an elaborate scheme for compensation for employes, etc., is valid; the subject of the act being expressed in its title. *Middleton v. Texas Power & Light Co.* (Sup.) 185 S. W. 556.

Acts 33d Leg. c. 105, arts. 4874a, 4874b, to prevent fire insurance companies from avoiding liability from loss under technical and immaterial provisions, when the breach has not contributed to the loss, is not violative of the constitutional provision that, no bill shall contain more than one subject, which shall be expressed in its title. *McPherson v. Camden Fire Ins. Co.* (Civ. App.) 185 S. W. 1055.

Charter of San Antonio, including section 123, is not violative of Const. art. 3, § 35, since Const. art. 11, § 5, in 1903, permits "cities having more than 10,000 inhabitants to have their charters granted or amended by special act." *City of San Antonio v. Johnson* (Civ. App.) 186 S. W. 866.

Where the court has a serious doubt whether the Legislature exceeded its power by embracing more than one subject in a bill, such doubt must be resolved in favor of the validity of the law. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

Const. art. 3, § 35, is violated by an act whose caption does not direct attention to subject-matter, or which embraces only a part of the subject-matter. *Providence Washington Ins. Co. v. Levy & Rosen* (Civ. App.) 189 S. W. 1035.

A statute is to be construed most liberally to make it wholly constitutional, where the part objected to as infringing Const. art. 3 § 35, can be considered as appropriately connected with, or subsidiary to, main object of act as expressed in title. *Id.*

*Vernon's Sayles' Ann. Civ. St. 1914, art. 1076a*, is constitutional; the act of which it is a part not containing more than one object which is mentioned in caption of act. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

**Amendment of acts.**—Though the Constitution provides that no law shall be revised or amended by reference to its title, but in amending laws the section amended shall be re-enacted, the Legislature may by a general law provide that no punishment shall be assessed on the jury finding that it is accused's first offense, and thereby make the provision applicable to the statutes punishing offenses. *Baker v. State*, 70 Cr. R. 618, 158 S. W. 998.

**Repeal—Implied repeal in general.**—Repeals of a statute by implication are not favored. *McFarlane v. Westley* (Civ. App.) 186 S. W. 261; *Robertson v. State*, 70 Cr. R. 307, 159 S. W. 713.

When a later act is silent as to an older one, the presumption is that the continued operation of the older statute was intended, unless there is such a contradiction that the purpose to repeal is manifest. *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

Where there is an irreconcilable conflict between two acts passed at the same session, the later act will prevail. *Ex parte Nitsche*, 75 Cr. R. 131, 170 S. W. 1101.

An implied repeal exists only where the conflict between the statutes is so clear that both cannot remain the law. *Canode v. Sewell* (Civ. App.) 172 S. W. 142.

— **By act relating to same subject-matter.**—Where a new law covers the whole subject-matter of an old and prescribes a different penalty the old law is repealed by implication. *Robertson v. State*, 70 Cr. R. 307, 159 S. W. 713.

— **Of special by general act.**—Where two statutes seem to be repugnant, a construction will be sought to harmonize them, if it is possible fairly to reconcile them, especially where the older law is particular and expressed in negative terms, and the later statute is general. *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**Suspension of act.**—Arts. 6695, 6696, authorizing the Railroad Commission to require two or more railroad companies whose lines reach the same town to construct union depots when practicable, held not invalid as authorizing the Commission to waive or enforce the statute at their pleasure. *Gulf, C. & S. F. R. Co. v. State* (Civ. App.) 167 S. W. 192.

*Pen. Code 1911, art. 496*, defining as a disorderly house a place in prohibition territory where nonintoxicating malt liquors, requiring a United States retail malt liquor dealer's license, are sold or kept for sale, construed in connection with *Rev. St. 1911, arts. 7476, 7477*, held not objectionable as delegating to Congress the power to determine whether or not the business of selling nonintoxicants shall be lawful, and conferring on another jurisdiction power to suspend the laws of the state. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

An ordinance of a city attempting to except bawdyhouses from the operation of a general statute is void, since the Legislature cannot delegate its power to except a class from the operation of a general statute. *Coman v. Baker* (Civ. App.) 179 S. W. 937.

Under Const. art. 1, § 28, declaring that laws shall not be suspended save by the Legislature, and in view of *Pen. Code 1911, art. 500*, the proviso in *Rev. St. 1911, arts. 4689, 4690*, authorizing enjoining the maintenance of bawdyhouses, that the statute should not apply where the municipality, acting under its own charter, has confined them in a designated locality, is void. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

The pool hall law, giving the voters of a county precinct, etc., the option of prohibiting pool rooms in their territory, held not to violate Const. art. 1, § 28, restricting the power to suspend laws to the Legislature. *Ex parte Mode* (Cr. App.) 180 S. W. 708.

**Constitution as limitation of power.**—A Legislature has plenary powers subject only to constitutional limitations. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

The authority to legislate on any subject not expressly or by necessary implication denied by Constitution is lodged with the Legislature. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831; *Lyle v. State* (Cr. App.) 193 S. W. 680. And an act will not be declared unconstitutional unless the Legislature has clearly exceeded such powers. *Lyle v. State* (Cr. App.) 193 S. W. 680.

**Laws violating state or federal Constitution.**—As *Acts 33d Leg. c. 35, § 7*, creating the Clifton independent school district, does not conflict with any provision of the Constitution, it is not invalid, though its passage was procured by fraud, and it is unfair. *Glass v. Pool*, 106 Tex. 266, 166 S. W. 375.

Classification for the purpose of a law is a legislative function, and the classification will be sustained, unless without any reasonable basis. *Middleton v. Texas Power & Light Co.* (Sup.) 185 S. W. 556.

It is not the province of the court to declare a law invalid because it is unwise or unjust, or because opposed to public policy or the spirit of the Constitution, but it must violate some express provision of the Constitution. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

The Legislature may provide in regard to the validity, effect, and consequences of contracts within constitutional limits and may provide that certain liabilities shall fol-

low from making or entering into certain kinds of contracts. *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574.

Under Const. art. 1, § 3, and Const. U. S. Amend. 14, legislation may be enacted granting certain rights and privileges to one class of individuals to the exclusion of another class, providing such classification is reasonable. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

The Legislature may not enact retroactive laws which affect citizen's rights of any character; but it may change, modify, abolish, and establish new remedies for existing rights, where remedy is not entirely taken away or unreasonably incumbered; and, in enacting statutes of limitation, the Legislature cannot destroy a right which one person is entitled to enforce against another which exists in consequence of given facts, but a right cannot be considered as vested unless it has become a title legal or equitable to enjoyment of exemption from another's demands. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

**Effect of partial invalidity.**—Partial unconstitutionality of act 1909 (Loc. & Sp. Acts, 31st Leg. c. 84), as amended by Act March 26, 1913 (Loc. & Sp. Acts 33d Leg. c. 93) § 2, held not to render entire statute void, since remainder was separable and provided for elections of members of school boards conforming to the general purposes of the act. *San Antonio Independent School Dist. v. State* (Civ. App.) 173 S. W. 525.

Where the penalty provision of a statute is severable and no penalties are inflicted, the invalidity of the penalty provision does not render invalid the other provisions. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

An act will not be held void in its entirety because one section is unconstitutional, unless the void section is so necessary that it cannot be presumed the act would have been passed without incorporating it therein. *Strickland v. Lakeside Irr. Co.* (Civ. App.) 175 S. W. 740.

The courts cannot hold one provision of a law valid and another invalid, where it is uncertain whether either would have been passed without the other. *Coman v. Baker* (Civ. App.) 179 S. W. 937.

The court is not warranted in declaring a whole statute void if its valid provisions are perfectly distinctive and separable from those that are invalid. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

**Determination of constitutional questions.**—To justify the courts in holding that a statute is an unwarranted invasion of the fundamental rights of the citizen and therefore beyond the state's police power, the objection must appear from the face of the act itself, or from facts of which the court must take judicial notice. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

**Persons entitled to raise constitutional questions.**—Only one whose rights are invoked by a statute impairing an obligation of his contract can invoke the invalidity of the statute. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Delegation of legislative or judicial powers.**—In a suit to foreclose vendor's lien notes on land, where there were several who claimed the surplus, if any, after foreclosure sale, it was improper for the court to direct a sheriff to pay the surplus proceeds to such person as he might conclude was the equitable owner of the land; that question being a judicial one, and the court having no right to delegate its authority. *Brown v. Bay City Bank & Trust Co.* (Civ. App.) 161 S. W. 23.

The Legislature could confer authority on the city council to pass an ordinance regulating the removal of garbage and night soil; it being the policy of the American system of government to subdivide the country and allow such subdivisions to regulate their internal affairs. *Ex parte London*, 73 Cr. R. 208, 163 S. W. 968.

While the power of the Legislature, under Const. art. 10, § 2, to correct abuses by railroads, may be delegated to the Railroad Commission, the declaration of what is an abuse must be by an act of the Legislature. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

Arts. 6695, 6696, held a valid law and not a delegation of legislative power, being in effect a declaration that railroads shall, under certain conditions, construct union depots, leaving to the Railroad Commission merely the determination, in the first instance, whether those conditions exist. *Gulf, C. & S. F. R. Co. v. State* (Civ. App.) 167 S. W. 192.

Acts 33d Leg. c. 169, post, art. 7314b, authorizing the Governor and sanitary commission to fix quarantine lines to prevent the spread of Texas fever, etc., is not a delegation of legislative authority which renders it invalid. *Smith v. State*, 168 S. W. 522, 74 Cr. R. 232.

The Legislature may properly leave to the discretion of the Railroad Commission the manner in which railroad companies shall perform their duties to furnish adequate transportation facilities. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

As the duty to discover and place on the assessment roll omitted personal property is not placed upon any officer, such duties are not governmental functions, and may be performed by individuals. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

*Vernon's Sayles' Ann. Civ. St.* 1914, arts. 6319a-6319n held unconstitutional as a delegation by the Legislature of its own proper power. *Ex parte Mitchell* (Sup.) 177 S. W. 953.

*Employers' Liability Act* held to delegate legislative functions to the employer in violation of the federal Constitution and of the provision of the Texas Constitution, vesting in the Legislature the exclusive power to make laws. *Middleton v. Texas Power & Light Co.* (Civ. App.) 178 S. W. 956.

The pool hall law, giving the voters of a county or precinct, etc., the option of an election to prohibit the operation of pool halls held not unconstitutional as a delegation of legislative power. *Ex parte Mode* (Cr. App.) 180 S. W. 708.

**Distribution of governmental powers in general.**—One branch of the government cannot interfere with another, and all attempts to do so are void. *Ex parte Rice* (Cr. App.) 162 S. W. 891.

When discretion is confined to any one branch of the government, a decision upon that particular point cannot be questioned or revised. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

**Judicial powers and functions—Political questions.**—Where the mode of making nominations is prescribed by statute, the question whether a given nomination is proper is a judicial, and not a political, one. *Gilmore v. Waples* (Sup.) 188 S. W. 1037. But if nomination after primaries to fill vacancy caused by incumbent's death were expressly forbidden to be made by the party executive committee, that the action of the committee, or of the court, might have a political effect would not make the legal question involved political instead of judicial. *Waples v. Gilmore* (Civ. App.) 189 S. W. 122.

— **Encroachment on Legislature.**—With the policy or wisdom of an enactment the judicial department has no concern; that belonging exclusively to the legislative department. *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147; *Gay v. State* (Cr. App.) 184 S. W. 200; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Smith v. State* (Cr. App.) 164 S. W. 838; *Ex parte Mode* (Cr. App.) 180 S. W. 708.

If a statute enacted by the Legislature is a completed law, enacted pursuant to Const. art. 3, § 1, it can be reviewed by the courts only to determine whether it violates the Constitution. *Roper & Gilley v. Lumpkins* (Civ. App.) 163 S. W. 110.

The Legislature is not the ultimate arbiter of the constitutionality of its acts, but such authority is lodged in the judicial branch of the government. *Woods v. Ball* (Civ. App.) 166 S. W. 4.

Under arts. 6616, 6617, judgment requiring railroad company to grant facilities to express company on terms substantially similar to those accorded another express company held not an invasion of the province of the Legislature or railroad commission. *Trinity & B. V. Ry. Co. v. Empire Express Co.* (Civ. App.) 173 S. W. 217.

The power to regulate and reasonably govern the operation of railroads in the public interest and convenience is legislative, and the courts will not interfere. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

It is settled beyond recall that the courts, state and federal, have the power to pass upon the constitutionality of statutes and the authority to ultimately destroy or enforce laws passed by the legislative branch of the government. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

The reasonableness of statutes enacted under the police power is primarily a question for the Legislature, and will be reviewed by the courts only in clear cases of abuse. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

— **Encroachment on executive.**—The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute. *Watson v. Cochran* (Civ. App.) 171 S. W. 1067.



## TITLE 82

## LEGISLATURE

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Special session—Submission of subjects by Governor.**—The Governor's authorization to the Legislature to create an additional criminal district court for Dallas county authorized it to define the court's jurisdiction. *Howard v. State* (Cr. App.) 178 S. W. 506.

## TITLE 83

## LEVEES, IMPROVEMENT DISTRICTS AND SEAWALLS

## CHAPTER TWO

## IMPROVEMENT DISTRICTS

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| <p><b>Art.</b><br/>5530. Commissioners' courts to establish improvement districts; powers of districts.<br/>5531. [Repealed.]<br/>5532. Petition to establishment of district; notice; fees of clerk; filing in vacation with county judge.<br/>5532a. Deposit for expenses.<br/>5532b. Notice to and attendance of state reclamation engineer.<br/>5533. Objection to creation of district; jurisdiction of commissioners' court.<br/>5534. Order establishing district; dismissal of petition.<br/>5534a. Construction of improvement without issuance of bonds; supervision of work by state reclamation engineer; records and reports.<br/>5534b. Procedure in case of issuance of bonds; expenses, how paid.<br/>5535-5540. [Repealed.]<br/>5541. Order for election; form of ballot.<br/>5541a. Deposit for expenses of election for issuance of bonds; reimbursement from bond issue; unexpended balance; additional deposit.<br/>5542. Notice of election; contents.<br/>5542a. Election, how conducted; who entitled to vote; polling places; election of officers; ballot.<br/>5543. Oath of voters.<br/>5544. Returns of election; canvass and declaration of result; form of order.<br/>5545. Supervisors appointed; compensation; report; tenure; successors.<br/>5546. Oath of supervisors.<br/>5547. Bond of supervisors.<br/>5548. Organization of board of supervisors.<br/>5549. Employment of district engineer; salary; duties; co-operation with state reclamation engineer; maps and profiles.<br/>5550. Profiles and estimates; report; district engineer to supervise construction.</p> | <p><b>Art.</b><br/>5550a. Approval of report by state reclamation engineer.<br/>5550b. Objections to approval; proceedings in district court; appeal; judgment.<br/>5551. Bonds to be issued; amount; additional bonds; election; result.<br/>5552. Form, denomination, and terms of bonds.<br/>5553. Bonds to be submitted to attorney general.<br/>5554. To be registered by comptroller, not to be impeached.<br/>5555. Record of bonds; sinking fund; fees for recording.<br/>5556. Sale of bonds; disposition of proceeds.<br/>5557. County judge to give bond before selling bonds.<br/>5558. Expenses, how paid; fund.<br/>5559. [Repealed.]<br/>5560. Tax to be levied; sinking fund to be invested; redemption of bonds.<br/>5561. County assessor to assess property, compensation; failure to assess cause for removal.<br/>5562. Duties of tax collector; compensation; additional bond.<br/>5563. Delinquent taxes to be collected as other taxes.<br/>5564. County treasurer to keep account; disbursements.<br/>5565. Penalties; tax a lien; general law as to assessment and collection of taxes to apply.<br/>5566. Treasurer to give additional bond; compensation.<br/>5567. Power of eminent domain; condemnation proceedings; damages, how paid.<br/>5568. Supervisors may acquire right of way or other improvement.<br/>5568a. Supervisors and other officers not liable for trespass.<br/>5569. Duty of supervisors to make repairs.</p> |
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Art. 5569a.	Tax for upkeep of levees previously constructed.	Art. 5580.	Districts may acquire property, sue and be sued.
5570.	Contracts let to lowest bidder; separate sections or parts of work.	5581.	Prevention of obstruction of stream space; may lease land acquired.
5571.	Bids, how submitted.	5582.	May let use of levees, cost of maintenance of levee.
5572.	Contracts to be in writing and approved; filing.	5583.	Supervisors may sell material and equipment.
5573.	Contractor's bond.	5584.	May sell land acquired in fee.
5574.	District engineer to furnish profiles and supervise work; report to supervisors.	5584a.	Improvements not to be constructed without approval of state reclamation engineer; injunction.
5575.	Construction over railroad right of way.	5584b.	Laws not repealed.
5576.	Payment of warrants.	5584c.	Validation of bonds issued under former act.
5577.	Partial payments.	5584d.	Repeal.
5578.	Annual report of supervisors.		
5579.	May employ attorneys.		

**Article 5530. Commissioners' court to establish improvement districts; powers of districts.**—The commissioners courts of the several counties of this State may hereafter create, establish and define one or more levee improvement districts in their respective counties in the manner hereinafter provided, and may, or may not, include within the boundaries and limits of such districts, villages, towns and municipal corporations, or any portion thereof, but no land at the same time shall be included within the boundaries of more than one levee improvement district created under the provisions of this Act. Such districts, when so created, established and defined, may build and construct, or cause to be built and constructed and maintained, levees or other improvements on all rivers, creeks and streams within such district, or which may border on the same, to prevent overflows thereof, and may, or may not, issue bonds in payment thereof, and the maintenance thereof, and may levy and collect taxes for the payment of said bonds and interest thereon; and may levy and collect taxes for the maintenance and upkeep of the levees and other improvements in said district, as hereinafter provided; and may acquire by grant, condemnation or otherwise such levees or other improvements as may already have been constructed in such district. [Acts 1909, p. 140, § 1; Act April 1, 1915, ch. 146, § 1.]

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

Cited, Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

**Partial invalidity.**—Rev. St. 1911, tit. 83, c. 2, arts. 5530-5584, providing for improvement districts and construction of levees, is not wholly void because article 5569, providing that no county or district or taxpayers shall be held for damages, violates Const. art. 1, § 17, as to taking or damaging property without consent and compensation. Strickland v. Lakeside Irr. Co. (Civ. App.) 175 S. W. 740.

#### Art. 5531.

Repealed and substance carried into sec. 1 of Act April 1, 1915, ante, art. 5530.

**Art. 5532. Petition for establishment of district; notice; fees of clerk; filing in vacation with county judge.**—Upon the presentation to the commissioners court of any county in the State of a petition signed by the owners of a majority of the acreage in a proposed levee improvement district, acknowledged by the petitioners before some officer authorized to take acknowledgments, praying for the establishment of a levee improvement district, setting forth the necessity, feasibility and proposed boundaries thereof, designating a name therefor, which name shall include the name of the county in which it is situated, and accompanied by a deposit as hereinafter provided, the said commissioners court shall, if in session when said petition is presented, at said session of the court set said petition down for a hearing at some regular or special session of the court, not less than fifteen nor more than thirty days

from the date of the presentation of said petition, and shall order the clerk of said court to give notice of the filing of the said petition, and of the date and place of hearing, by posting written or printed notices thereof in five public places in said county, one of which shall be at the court house door of the said county, and four of which shall be within the limits of the proposed levee improvement district. Such notices shall be posted for ten days prior to the time set for such hearing. Said clerk may deputize some other person to perform such service, and the affidavit of such clerk or his deputy that such notices have been so posted shall be held conclusive thereof. Said clerk shall receive as compensation for such service one (\$1) dollar for each of such notices and five (5) cents per mile for each mile necessary to be traveled in posting same. Should said commissioners court not be in session at the time of the filing of said petition, it may be filed with the county judge of the county, who shall thereupon make and enter an order upon the minutes of said commissioners court, setting said petition for hearing at some regular or special term of said commissioners court, not less than fifteen nor more than thirty days from the filing of said petition, and shall order the clerk of the said commissioners court to give said notice as is herein provided for in this section, which notice shall be posted for the time and as is provided for in this section. [Acts 1909, p. 140, § 2; Act April 1, 1915, ch. 146, § 2.]

**Art. 5532a. Deposit for expenses.**—When the petition praying for the establishment of a levee improvement district is filed as herein provided, it shall be accompanied by fifty (\$50) dollars in cash, which shall be deposited with the clerk of the county commissioners court, and by him held until after the result of the hearing on said petition herein provided for has been declared and entered of record by the said commissioners court; and the said clerk shall pay out of the said sum of fifty dollars, upon vouchers signed by the county judge, all costs and expenses pertaining to the said hearing, and shall return the balance, if any, to the signers of said petition or their agent or attorney. [Act April 1, 1915, ch. 146, § 3.]

**Art. 5532b. Notice to and attendance of State Reclamation Engineer.**—When said petition is so set down for hearing, the clerk of said commissioners court shall immediately give written notice to the State Reclamation Engineer, setting forth the time, place and purpose of said hearing. The State Reclamation Engineer or his deputy shall thereupon examine the said proposed district and, prior to said hearing shall file with the clerk of said court a report showing the general character, approximate location and estimated cost of the improvement required, with an estimate of the cost of organizing the proposed district; and the said State Reclamation Engineer or his deputy shall be present at said hearing and shall furnish such supplemental information as may be required by said court. [Id., § 4.]

**Art. 5533. Objection to creation of district; jurisdiction of commissioners' court.**—At the time set down for the hearing of said petition any person who would be affected by the creation of said district may appear before the said court and contest or contend for the creation of said district, and may offer testimony to show that the said district is or is not necessary and would or would not be a public utility, and that the creation of said district would or would not be feasible or practicable. Said commissioners court shall have exclusive or final jurisdiction to hear and determine all contests and objections to the creation of such districts and all matters pertaining to the same, and said court shall have exclu-

sive jurisdiction over all subsequent proceedings of said district when organized, except as herein provided, and may adjourn hearings on any matter connected therewith from day to day; and all judgments, orders or decrees rendered by said court in relation thereto shall be final, except as hereinafter provided. [Acts 1909, p. 140, § 3; Act April 1, 1915, ch. 146, § 5.]

**Art. 5534. Order establishing district; dismissal of petition.**—If upon the hearing of said petition it shall appear to the court that the proposed improvements are feasible and practicable, and are needed, and would be conducive to public health, or would be a public benefit or a public utility, then the court shall so find and shall render judgment reciting such findings and create and establish such district, and by its order entered of record duly define its boundaries and declare and decree the said district a body corporate, with full authority to effect the reclamation, protection and improvement of the lands and other property authorized by this Act. But if the court should not so find, then the court shall dismiss the petition at the cost of the petitioners and enter such finding of record. [Acts 1909, p. 140, § 4; Act April 1, 1915, ch. 146, § 6.]

**Art. 5534a. Construction of improvement without issuance of bonds; supervision of work by State Reclamation Engineer; records and reports.**—If, after being declared a body corporate, as hereinbefore provided, any levee improvement district shall desire to accomplish the reclamation authorized by this Act, without the issuance of district bonds, it is hereby empowered to do so, and may employ all the necessary assistance, make all the necessary purchases, and do all things needful to effect such reclamation, and may provide the funds therefor in such manner as such district may deem best; and all expenses of whatsoever nature incurred in connection with such work shall be a liability against such district. Such district shall have all the rights, powers, privileges and obligations provided in this Act, and shall be subject to all the supervision, approval and control of the State Reclamation Engineer herein provided, and may procure from the State Reclamation Engineer all the information, assistance and advice herein made available to district engineers. Provided, that a suitable record of the names, residences, postoffice addresses and duties of the chief engineer and principal officers authorized to govern and represent the affairs of such district shall immediately be filed for public reference with the clerk of the commissioners court and with the State Reclamation Engineer; and all subsequent changes therein shall immediately be filed in like manner; provided, further, that in all things pertaining to engineering, surveying and other such work, such district shall be governed by the provisions of this Act which relate to districts that issue bonds, and shall make surveys, maps, profiles, estimates and reports, and file identical copies thereof with the clerk of the commissioners court, and with the State Reclamation Engineer for his approval or disapproval, as required of such districts. [Act April 1, 1915, ch. 146, § 7.]

**Art. 5534b. Procedure in case of issuance of bonds; expenses, how paid.**—But when a levee improvement district, organized as hereinbefore provided, shall propose to issue bonds for the construction of the improvements herein authorized, the commissioners court shall proceed as hereinafter set out. And if such bonds be issued, all the proper expenses incurred by such district from and after the order and decree of the commissioners court creating the district a body corporate shall be paid out of the proceeds of said bonds. But if the election hereinafter pro-

vided shall be against the issuance of bonds, then all the proper expenses incurred by such district from its creation shall be paid out of the deposit of five hundred (\$500) dollars hereinafter provided. [Id., § 8.]

**Arts. 5535-5540.**

Repealed by Act April 1, 1915, c. 146, set forth as art. 5530 et seq.

**Art. 5541. Order for election; form of ballot.**—The commissioners court, upon presentation of a petition signed by the owners of a majority of the acreage in the said district praying therefor, shall order an election to be held within such levee improvement district at the earliest possible time, which shall not be less than fifteen days nor more than thirty days, at which election there shall be submitted the following proposition and none other: "For the issuance of bonds and levy of taxes in payment thereof." "Against the issuance of bonds and levy of taxes in payment thereof." [Acts 1909, p. 140, § 11; Act April 1, 1915, ch. 146, § 9.]

**Art. 5541a. Deposit for expenses of election for issuance of bonds; reimbursement from bond issue; unexpended balance; additional deposit.**—When the petition praying for an election for the issuance of bonds is filed with the commissioners court, as provided herein, it shall be accompanied by five hundred (\$500) dollars in cash, which shall be deposited with the county treasurer, who shall open an account with said district; and out of such sum, upon vouchers approved by the county judge, shall be paid all the proper and necessary expenses of said district as they are incurred, including the expenses of such election. Should the result of such election be in favor of the issuance of bonds and levy of taxes, the said five hundred (\$500) dollars shall be returned by the said county treasurer to the said petitioners or their agent or attorney, out of the proceeds of said bonds, as elsewhere provided in this Act; but should the result of such election be against the issuance of bonds and levy of taxes, then the said treasurer shall return any unexpended balance of the said sum to the said petitioners or their agent or attorney. And if such sum of five hundred (\$500) dollars shall be found insufficient to meet all the proper and necessary expenses of such district up to the time of the sale of the district bonds hereinafter provided for, the said petitioners shall make such further deposits with the county treasurer as from time to time may be required to meet such expenses, and such additional deposits shall be handled in the same manner as the first. [Act April 1, 1915, ch. 146, § 10.]

**Art. 5542. Notice of election; contents.**—Notice of said election, stating the time and place or places of holding the same, shall be given by the clerk of the county commissioners court by posting written or printed notices thereof in five public places in such district, and one at the court house door of the county in which such district is situated. Such notices shall contain the propositions to be voted upon as set forth in Section 9 of this Act [Art. 5541], and shall also state the estimated cost of such improvements as reported by the State Reclamation Engineer, and also the amount of bonds proposed to be issued, together with the rate of interest the same shall bear, and that taxes are to be levied and collected to pay said bonds and the interest thereon. [Acts 1909, p. 140, §§ 12, 13; Act April 1, 1915, ch. 146, § 11.]

**Art. 5542a. Election, how conducted; who entitled to vote; polling places; election officers; ballot.**—The manner of conducting said election shall be governed by the election law of the State of Texas, ex-

cept as herein otherwise provided. None but resident property tax payers who are qualified voters of the said proposed district shall be entitled to vote at any election on any question submitted to the voters thereof by the county commissioners court at such election. The commissioners court shall name the polling place or places for such election within the proposed district, and shall also select and appoint judges and other necessary officers of the election, and shall provide one and one-half times as many ballots for said election as there are qualified resident tax paying voters within such district as shown by the tax rolls of the county. Such ballots shall have printed thereon these words and none others: "For the issuance of bonds and levy of taxes in payment therefor." "Against the issuance of bonds and levy of taxes in payment therefor." [Act April 1, 1915, ch. 146, § 12.]

**Art. 5543. Oath of voters.**—Every person who offers to vote in any election held under the provisions of this Act shall first take the following oath before the presiding judge of the polling place where he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of ..... County, and that I am a resident property tax payer of the ..... levee improvement district, and that I have not voted before at this election." [Acts 1909, p. 140, § 14; Act April 1, 1915, ch. 146, § 13.]

**Art. 5544. Returns of election; canvass and declaration of result; form of order.**—Immediately after the election the presiding judge at each polling place shall make returns of the result in the same manner as is provided for in elections for State and county officers, and return the ballot boxes to the clerk of the county commissioners court, who shall keep the same in a safe place and deliver them, together with the returns from the several polling places, to the commissioners court at its next regular or special session; and the county commissioners court shall at such session canvass the vote, and if it be found that two-thirds of all of the resident property tax payers voting thereon shall have voted in favor of the issuance of bonds and levy of taxes, then the court shall declare the result of the election to be in favor of the said bonds and taxes, and shall enter the same in the minutes of the said court as follows:

"The County Commissioners Court of ..... County, Texas, ..... term, A. D. .... in the matter of the petition of ..... and others, praying for the issuance of bonds and levy of taxes in payment thereof, by the levee improvement district fully described and designated in said petition by the name of ..... Levee Improvement District..... Be it known that an election held for said purposes in said district on the ..... day of ..... A. D. .... two-thirds of all of the resident property tax payers voting at said election voted in favor of the issuance of bonds and the levy of taxes." [Acts 1909, p. 140, § 15; Act April 1, 1915, ch. 146, § 14.]

**Art. 5545. Supervisors appointed; compensation; report; tenure; successors.**—If the result of such election shall be in favor of the issuance of bonds and levy of taxes, the commissioners court shall appoint three district supervisors by a majority vote of said court, whose duties shall be as hereinafter provided, who shall each receive for his services a sum of not more than three (\$3) dollars per day for the time actually engaged in the work of said district; provided, that the compensation, if any, shall have been definitely fixed in the order of the court making said appointment, and before any amount shall be paid to said super-

visors, or any of them, they shall make a detailed report to the commissioners court of the time actually engaged in the work for said district, and of the work done, and such report shall be audited and approved by the commissioners court. Said supervisors shall hold office for a term of two years, and until their successors shall be qualified, unless removed by a majority vote of the commissioners court for malfeasance, or for nonfeasance in office. Upon the expiration of the term of office of the said supervisors, or in case of the resignation, death or refusal to act of any such district supervisors, the commissioners court shall appoint their successors by a majority vote of said court. [Acts 1909, p. 140, § 16; Act April 1, 1915, ch. 146, § 15.]

**Art. 5546. Oath of supervisors.**—Before entering upon their duties, all district supervisors shall take and subscribe before the county judge an oath to faithfully discharge the duties of their office without favor or partiality, and to render a true account of their work to the court by which they are appointed, whenever required to do so, which oath shall be filed by the clerk of said commissioners court and preserved as a part of the records of said district. [Acts 1909, p. 140, § 17; Act April 1, 1915, ch. 146, § 16.]

**Art. 5547. Bond of supervisors.**—Before entering upon their duties, each of the said district supervisors shall make and enter into a good and sufficient bond in the sum of one thousand (\$1,000) dollars, payable to the county judge for the use and benefit of the said levee improvement district, conditioned upon the faithful performance of his duty. [Acts 1909, p. 140, § 18; Act April 1, 1915, ch. 146, § 17.]

**Art. 5548. Organization of board of supervisors.**—The district supervisors shall organize by electing one of their number chairman and one secretary, and two of whom shall constitute a quorum, and the concurrence of two shall be sufficient in all matters pertaining to the business of said district. [Acts 1909, p. 140, § 19; Act April 1, 1915, ch. 146, § 18.]

**Art. 5549. Employment of district engineer; salary; duties; cooperation with State Reclamation Engineer; maps and profiles.**—After the said district supervisors shall have completed their organization as prescribed in the foregoing section of this Act, they shall employ a competent civil engineer, to be known as the district engineer, upon a salary not to exceed the sum of ten dollars (\$10) per day for the time actually engaged in the work, whose term of office shall be at the will of the said supervisors; which district engineer shall confer with the State Reclamation Engineer upon all matters relating to the design and location of all improvement works pertaining to the district, and shall procure from the State Reclamation Engineer such information, assistance and advice pertaining thereto as may be or may become available. And the State Reclamation Engineer is hereby authorized and directed to furnish the same for the official use of the said district without pro rata cost or other charge.

When such information, assistance and advice are not available and cannot be made available, then the said district engineer shall proceed to make a map of such district, showing the boundary lines thereof, with the original surveys therein, and also make maps and profiles of the several levees or such other improvements located in, near by, or adjacent, or opposite such district, but a copy of the land map of the county as it applies to such district showing the name and number of surveys and showing the area or number of acres contained in such district, shall be a

sufficient compliance with such order insofar as making a map of the district is required, and any recognized map of any city or town which may be embraced within the boundaries of the district shall be sufficient as to such site of the city or town; unless the said land map of the county, as it applies to such district, or the said recognized map of any city or town, is inaccurate or inadequate in any essential particular; and in that event the said district engineer shall make supplemental surveys upon the ground and do all other work necessary to make all said maps accurate and adequate for all the purposes in hand; provided, however, that where boundary lines of such improvements or any of them cornered at original surveys, the map shall show how many acres of such original surveys are included within such district; and when necessary, the said district engineer shall also show upon the said map or profiles of the said district, or shall otherwise indicate in a suitable manner, any or all of the following information, to wit: The correct relative positions of the proposed levees or other improvements, with all other existing or proposed improvements near by, adjacent or opposite, or which in any manner may become materially affected by any or all of the proposed levees or other improvements when any or all of them shall be built; the distance from the said proposed levees or other improvements to the adjacent banks of the principal streams or rivers or other places of water which the proposed improvements are intended to control, regulate or otherwise affect; complete cross sectional determination at any or all localities where the position of the said proposed levees or other improvements most nearly approaches any adjacent or opposite levee or existing or proposed improvements, or hills or high ground, or wherever it is proposed to provide a restricted or other passageway, place or reservoir for water, or in stream channels, or elsewhere where cross sections are necessary; the accurate location and elevation of available, reliable or necessary high water marks of the greater or the lesser floods, or other high water marks, or any other marks or measurements necessary to determine the slopes or fall, if any, of the surface water, or to ascertain the velocity, if any, or volume or magnitude thereof, and the accurate elevation of the general ground surface underneath the said marks or measurements, and elsewhere if needed; the actual or anticipated discharge in second-feet through natural, actual or proposed passageways or places of the streams to be improved or regulated, or the suitable measurement of other existing or anticipated bodies of water; the necessary hydraulic or topographic grades, or other such necessary factors. And the said district engineer shall further do all things necessary for the proper working out of a suitable system of improvements for the said district, and he shall establish or re-establish upon the ground all land marks, bench marks, reference marks or other marks of a permanent or temporary character which may be necessary for the most convenient, permanent and accurate marking out of all of said improvements upon the ground, or the joining of same to any other existing or proposed improvements that may become affected thereby. [Acts 1909, p. 140, § 20; Act April 1, 1915, ch. 146, § 19.]

**Art. 5550. Profiles and estimates; report; district engineer to supervise construction.**—The map or profile of such levees and other improvements required by the provisions of this Act to be made shall show the relations that each levee or other improvement bears to each tract of land through which it passes, and the shape in which it divides each tract, and where the levees or other improvements cut off any tract of land less than twenty acres, then the map shall show the number of



acres so divided therefrom, and the number of acres in the whole tracts, and their relation to such levees or other improvements; and such profile map shall also show the number of cubic yards of earth necessary to be excavated to make each levee or other improvement located in such district, and give the estimated cost of each; and when said maps, profiles and estimates, and all necessary surveying and other necessary work of this nature shall have been completed by said district engineer, or shall have been procured as herein otherwise provided, the said district engineer shall thereupon design a complete system of levees or other improvements for said district. He shall then prepare and sign in his official capacity a suitable report, with maps, profiles, estimates and other necessary information relative to the system of levees and other improvements which he proposes, and shall file one complete copy thereof with the clerk of the commissioners court of the county in which the said district is located, and an identical copy with the State Reclamation Engineer for his approval or disapproval as hereinafter provided. It is hereby further made the duty of such district engineer to supervise the construction of any levee or other improvements made in said district. [Acts 1909, p. 140, § 21; Act April 1, 1915, ch. 146, § 20.]

**Art. 5550a. Approval of report by State Reclamation Engineer.**—Upon the receipt, in complete finished form, of the said district engineer's report, with maps, profiles, estimates and other necessary information, signed by the said district engineer, the State Reclamation Engineer shall examine the same, and within thirty days from the receipt thereof he shall approve or disapprove all or any part of the said plans for the proposed levees or other improvements, and shall then, in writing, immediately notify the clerk of the commissioners court of his approval or disapproval of the said plans; which written notice of his approval or disapproval shall be filed and recorded by the said clerk; provided, that in case corrections, surveys or other work shall be required by the State Reclamation Engineer for the proper consideration of the plans submitted, sixty days' additional time for the same may be allowed before he shall approve or disapprove the said plans. When the State Reclamation Engineer shall have approved the said plans he shall sign the same in his official capacity, and file them in his office. But if the State Reclamation Engineer shall disapprove any or all of the said plans for levees or other improvements, he shall return said plans to said clerk with written notice of such disapproval, which notice shall contain a brief statement of the reasons for his disapproval. [Act April 1, 1915, ch. 146, § 21.]

**Art. 5550b. Objections to approval; proceedings in district court; appeal; judgment.**—If the levee improvement district, or any person or corporation whose interests are affected thereby, be dissatisfied with the action of the State Reclamation Engineer in approving or finally disapproving the plans referred to in the preceding section, such district or such person or corporation may file a petition in the District Court of Travis County against the State Reclamation Engineer as defendant, but such petition must be filed within thirty days from the filing by the county clerk of the written notice of the State Reclamation Engineer approving or disapproving such plans, as provided in the preceding section. The petition shall set forth with particularity the cause or causes of the objection to such action of the State Reclamation Engineer, and show wherein the interests of the petitioner are affected by his action. If the petition complains of the action of said officer in approving the

plans, the levee improvement district shall be made a party defendant, and in any suit authorized by this section any party directly at interest may intervene. All such causes shall be tried and determined as other civil causes in said court. Any party to said action may appeal to the appellate court having jurisdiction of said cause; and said appeal shall be at once returnable to said appellate court at either of its terms. The plaintiff shall show that the action of the State Reclamation Engineer, in approving or disapproving said plans, is unjust or unreasonable. If, as the final result of such suit, it is adjudged that the plans, if disapproved by the State Reclamation Engineer, should have been approved, the judgment of the court shall have the same effect and serve the same purposes as the written notice of the State Reclamation Engineer approving such plans, if, as the final result of such suit, it is adjudged that such plans, if approved by the State Reclamation Engineer, should have been disapproved, the judgment of the court shall have the same effect and serve the same purposes as the written notice of the State Reclamation Engineer disapproving such plans; provided, the court may order the approval of such plans with such alterations or modifications as it may prescribe. [Id., § 22.]

**Art. 5551. Bonds to be issued; amount; additional bonds; election; result.**—After the establishment of any such levee improvement district, and after the making and filing of such maps, profiles and estimates as are herein provided for, and after the said election authorizing the issuance of bonds and levy of taxes, the commissioners court shall make an order directing the issuance of levee improvement bonds for such district sufficient to pay for the proposed improvements and the maintenance thereof for a period of not exceeding two years, which bonds shall state upon their face the purpose for which they were issued; that is, “for the purpose of the construction and maintenance of levees and other improvements in said district”; provided, however, that said bonds shall not exceed in amount one-fourth of the assessed value of the real property of such district, as shown by the last annual assessment thereof made for State and county taxation, and shall not exceed the estimate made by the State Reclamation Engineer before the election, and voted on at the election in this Act provided for; provided, however, that if after an election has been held authorizing the levy of a tax and the issuance of bonds it should become necessary for said district to make further improvements or alterations in the improvements already constructed, or to repair or maintain the improvements so created, and there shall be no sufficient funds in the construction and maintenance funds with which such improvements, alterations, repairs and maintenance may be made, then the district supervisors may apply to the commissioners court for an election to be ordered by said court to issue additional bonds, stating the necessity therefor and the amount of bonds necessary, and the character of such improvements, repairs and maintenance, and the estimated cost thereof as made by the district engineer, which shall accompany said application; and upon the filing of such application the commissioners court shall set same down for hearing at its next regular or special session, and cause the clerk of said court to give notice of such hearing, which notice shall state the character of such improvements, etc., together with the estimated cost thereof, the amount of such bonds and the rate of interest thereon. Said written or printed notices shall be posted in the same manner and places, and for the same length of time, as required by this Act for the original petition for the issuance of bonds. If, upon said hearing, the court

should find that the necessity for the issuance of such additional bonds exists, and that the taxable values of the real property of the said district, as shown by the last annual assessment rolls for State and county taxes, will admit of an additional bond issue, then the court shall order an election within said district for the purpose of voting on said proposed bond issue and the levy of taxes to pay said bonds and the interest thereon. The manner of holding such election and making returns, and the notices for said election, manner and time of giving notice thereof, and the qualifications of the persons entitled to vote therein, shall be the same as, and in all things governed by, the provisions of this Act for the election held for the issuance of bonds and levy of tax in the first instance, and the commissioners court shall meet and canvass the returns of such election as in the said first election, and if it be found that two-thirds of the resident property tax payers voting at said election vote in favor of the issuance of said additional bonds and the levy of said tax, then the said commissioners court shall enter an order reciting the result of said election, and ordering the issuance of said additional bonds and issuance and sale and registration of such additional bonds and levy of said tax; and the issuance and sale and registration of such additional bonds shall in all things be governed by the provisions of this Act in regard to the bonds first issued. [Acts 1909, p. 140, § 22; Act April 1, 1915, ch. 146, § 23.]

**Art. 5552. Form, denomination, and terms of bonds.**—All bonds issued under the provisions of this Act shall be issued in the name of the levee improvement district, shall be signed by the county judge, and attested by the clerk of the county commissioners court, with the seal of the county commissioners court affixed thereto; and such bonds shall be issued in denominations of not less than one hundred (\$100) dollars nor more than one thousand (\$1,000) dollars each, and shall bear interest at a rate not to exceed six per cent per annum, payable annually or semi-annually. Such bonds shall, by their terms, provide the time, place or places, manner and condition of their payment, and the rate of interest thereon, as may be determined and ordered by the commissioners court; but none of such bonds shall be made payable more than thirty years after the date thereof; and they shall be issued in serial installments as nearly equal in amount as practicable, the first installment of which shall become due not more than two years from the date that such bonds bear; and such issues of bonds shall conform to the general statutes of the State relating to bond issue authorized by recognized subdivisions of the State. [Acts 1909, p. 140, § 23; Act April 1, 1915, ch. 146, § 24.]

**Art. 5553. Bonds to be submitted to attorney general.**—Any levee improvement district in the State of Texas desiring to issue bonds in accordance with this Act shall, before such bonds are offered for sale, forward to the Attorney General of this State a certified record of the proceedings had in the organization of the district, together with a certified copy of the proceedings had with reference to the issuance of the bonds of the district, and including a certified statement made by the county treasurer of the total bonded indebtedness of such levee improvement district; and a certified statement made by the tax assessor of the county, of the taxable values of the district, real and personal, separately, taken from the last official assessment for State and county taxes; and a certified copy of the written notice of the State Reclamation Engineer approving the plans for the levees and other improvements of the said district, together with such other information as the Attorney General

may require. Provided, that no bond issue for such levees or other improvements shall be approved by the Attorney General unless a certified copy of the said notice of approval signed by the State Reclamation Engineer shall accompany and be part of said bond record. Whereupon, it shall be the duty of the Attorney General to carefully examine the said bonds in connection with the facts and the Constitution and laws of the State of Texas governing and controlling the execution of such bonds, and if, as a result of the examination, the Attorney General shall find that such bonds are issued in conformity with the Constitution and laws and that they are valid and binding obligations upon said levee improvement district in which they are issued, he shall so officially certify. [Acts 1909, p. 140, § 24; Act April 1, 1915, ch. 146, § 25.]

**Art. 5554. Bonds registered by Comptroller; not to be impeached.**—When such bonds have been examined by the Attorney General and his certificate has been attached thereto, they shall be registered by the State Comptroller in a book to be kept for that purpose, and the certificate of the Attorney General as to the validity of such bonds shall be preserved of record for use in the event of litigation. Such bonds, after receiving the certificate of the Attorney General and having been registered in the Comptroller's office, as herein provided, shall thereafter be held in every action, suit or proceeding in which their validity is or may be brought into question a prima facie, valid and complete obligation, and in every action brought to enforce the collection of such bonds, the certificate of the Attorney General, or a duly certified copy thereof, shall be admitted and received in evidence of the validity of such bonds, together with the interest coupons thereto attached; provided, that the only defense that can be offered against the validity of such bonds shall be forgery or fraud. But this article shall not be construed to give validity to any such bonds as may be issued in excess of the limits fixed by the Constitution, or contrary to its provisions, but all such bonds shall to the extent of such excess be void. [Acts 1909, p. 140, § 25; Act April 1, 1915, ch. 146, § 26.]

**Art. 5555. Record of bonds; sinking fund; fees for recording.**—Before issuing any bonds under the provisions of this Act, the county commissioners court shall first provide a well bound book in which a record shall be kept by the county treasurer of all bonds issued, with their number, amount, rate of interest and date of issuance, when due, where payable, amount received for the same, and the tax levy to pay the interest on said bonds; and said commissioners court shall provide a sinking fund for their payment, which shall be set forth in said book; and said book shall at all times be open to the inspection of all parties interested in said district, either as tax payers or as bond holders; and upon the payment of any bond an entry thereof shall be made in said book. The county treasurer shall receive for his services in recording all bonds and other instruments of the levee improvement district the same fees as are now provided by law for the county clerk for recording deeds. [Acts 1909, p. 140, § 26; Act April 1, 1915, ch. 146, § 27.]

**Art. 5556. Sale of bonds; disposition of proceeds.**—When such bonds have been registered as provided for in this Act, the county commissioners court may appoint the county judge or some other suitable person to sell said bonds on the best terms and for the best price possible; and as fast as said bonds are sold all money received therefrom shall be paid into the county treasurer and shall by him be placed to the credit of such levee improvement district. [Acts 1909, p. 140, § 27; Act April 1, 1915, ch. 146, § 28.]

**Art. 5557. County judge to give bond before selling bonds.**—Before the county judge or such other person as may be appointed by the commissioners court shall be authorized to sell any of said improvement bonds, the county judge or other person so appointed shall execute a good and sufficient bond, payable to the supervisors of such levee improvement district, to be approved by the commissioners court of said county, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duty, and the person selling said bonds shall be allowed one-half of one per cent of the amount received for the sale of the bonds sold by him in full payment for his services. [Acts 1909, p. 140, § 28; Act April 1, 1915, ch. 146, § 29.]

**Art. 5558. Expenses, how paid; fund.**—If the said district shall issue bonds as herein provided for the construction of the improvements authorized by this Act, all proper expenses incurred by said district from and after its creation shall be paid out of the construction and maintenance funds of said district, which funds shall consist of all moneys or property received by such district, whatsoever the source, except tax collections applied to sinking funds and the payment of interest on the district bonds. [Acts 1909, p. 140, § 29; Act April 1, 1915, ch. 146, § 30.]

**Art. 5559.**

Repealed. See arts. 5532a, 5541a, 5584d.

**Art. 5560. Tax to be levied; sinking fund to be invested; redemption of bonds.**—Whenever any such district bonds shall have been voted, the commissioners court shall levy and cause to be assessed and collected taxes upon all property within said improvement district, whether real, personal or mixed, or otherwise, and sufficient in amount to pay the interest on such bonds as it shall fall due, together with an additional amount to be placed annually in the sinking fund, sufficient to discharge and redeem said bonds at their maturity. If advisable, the sinking fund shall, from time to time, be invested in such county, municipal, district or other bonds as shall be approved by the Attorney General of the State. If any bonds shall be offered for payment and redemption before the date of their maturity, it shall be the duty of the county judge of the county, and the county treasurer, to pay and redeem same upon request of the district supervisors, if there be at the time a sufficient amount of money in said sinking fund for that purpose. [Acts 1909, p. 140, § 31; Act April 1, 1915, ch. 146, § 31.]

**Art. 5561. County assessor to assess property; compensation; failure to assess cause for removal.**—The county commissioners court shall provide all necessary additional books for the use of the assessor and collector of taxes, and the county treasurer, for such levee improvement district, and charge the cost of same to the said district. It shall be the duty of the county tax assessor, when ordered to do so by the commissioners court, to assess all property within such district and list the same for taxation in the books or rolls furnished by the said commissioners court for that purpose, and return said books or rolls at the same time when he returns the other books or rolls of the State and county taxes for correction and approval. If the said commissioners court shall find said books or rolls correct, they shall approve the same and order the county clerk to issue a warrant against the county treasurer in favor of said tax assessor, to be paid from the funds of said district. The tax assessor shall receive for his services such compensation as the said county commissioners court shall deem proper for the amount

of work done; provided, that the said county assessor shall in no event be allowed more than he is now allowed by law for like services. Should the tax assessor fail or refuse to comply with the orders of the commissioners court requiring him to assess and list for taxation all property in such improvement district as herein provided, he shall be suspended from the further discharge of his duty by the commissioners court of his county, and he shall be removed from office in the mode prescribed by law for the removal of county officers. [Acts 1909, p. 140, § 32; Act April 1, 1915, ch. 146, § 32.]

**Art. 5562. Duties of tax collector; compensation; additional bond.**—The tax collector of the county shall be charged by the county commissioners court with the assessment rolls of the levee improvement district, and he shall be allowed such compensation for the collection of such taxes as he is now allowed for the collection of other taxes. The county commissioners court shall require the tax collector of the county to give an additional bond of security in such sum as they may deem proper and safe, to secure the collection of said taxes; and should any collector of taxes fail or refuse to give such additional bond or surety as herein provided when required by the commissioners court within the time prescribed by law for such purposes, he shall be suspended from office by the commissioners court of his county, and immediately thereafter be removed from office in the mode prescribed by law. All bonds required by this Act to be given, except as herein otherwise specified, shall be made payable to the county judge for the benefit of the levee improvement district. [Acts 1909, p. 140, § 33; Act April 1, 1915, ch. 146, § 33.]

**Art. 5563. Delinquent taxes to be collected as other taxes.**—It shall be the duty of the tax collector to make a certified list of all delinquent property upon which the improvement taxes have not been paid, and return the same to the county commissioners court, and the said court shall proceed to have said taxes collected by sale by the collector, or by suit, in the same manner as now provided for the collection of delinquent State and county taxes; and at any sale of such property for such delinquent taxes the district supervisors may become the purchasers of the same for the benefit of the said district. [Acts 1909, p. 140, § 34; Act April 1, 1915, ch. 146, § 34.]

**Art. 5564. County treasurer to keep account; disbursements.**—It shall be the duty of the county treasurer to open an account with the levee improvement district, and to keep an accurate account of all moneys received by him belonging to such district, and all moneys paid out by him. He shall pay out no money except upon a voucher signed by two of the district supervisors and countersigned by the county judge, and he shall carefully preserve all orders for the payment of money; and as often as required by the said district supervisors or the commissioners court he shall render a correct account to them on all matters pertaining to the financial condition of such district. [Acts 1909, p. 140, § 35; Act April 1, 1915, ch. 146, § 35.]

**Art. 5565. Penalties; tax a lien; general law as to assessment and collection of taxes to apply.**—All taxes levied or authorized to be levied by this Act shall be payable and shall mature and become delinquent as is provided by the laws of this state, for state and county taxes, and upon the failure to pay such taxes when due, the same penalties shall accrue and be collected as are provided by the laws of the State of Texas for

the non-payment of state and county taxes. All taxes shall be a lien upon the property against which such taxes are assessed. In the assessment and collection of the taxes levied or authorized to be levied by this Act, the assessor and collector of taxes shall, respectively, have the same powers and shall be governed by the same rules and regulations as are provided by the laws of the state of Texas for the assessment and collection of state and county taxes, unless herein otherwise provided. [Acts 1909, p. 140, § 36; Act April 1, 1915, ch. 146, § 36.]

**Art. 5566. Treasurer to give additional bond; compensation.**—The county treasurer shall execute a good and sufficient bond payable to the district supervisors and their successors in office, and in the county where such district is located, in a sum equal to one and one-fourth the amount of the bonds issued, conditioned upon the faithful performance of his duty as treasurer of such district, which bond shall be approved by the district supervisors; and the treasurer shall be allowed as compensation for his services as such treasurer one-half of one per cent. Such treasurer may make said bond with any guaranty or surety company which may be approved by such district supervisors, and the premiums due such guaranty or surety company making said bond shall be paid out of the maintenance fund of the district, and shall not be a charge against the county treasurer. [Acts 1909, p. 140, § 37; Act April 1, 1915, ch. 146, § 37.]

**Art. 5567. Power of eminent domain; condemnation proceedings; damages, how paid.**—The right of eminent domain is hereby expressly conferred upon all levee improvement districts established under the provisions of this Act, for the purpose of enabling such districts to acquire the fee simple title, easement or right of way to, over and through any and all lands, waters, or lands under waters, private or public (except land and property used for cemetery purposes), within, bordering upon, adjacent or opposite to such districts, necessary for making, constructing and maintaining all levees and other improvements for the improvement of a river or rivers, creek or creeks, or streams, within or bordering upon such districts, to prevent overflows thereof. In the event of the condemnation, or the taking, damaging or destroying of any property for such purposes, the improvement district shall pay to the owner thereof adequate compensation for the property taken, damaged or destroyed. All condemnation proceedings or suits in the exercise of eminent domain under this Act shall be instituted under the direction of the district supervisors, and in the name of the levee improvement district, and all suits or other proceeds for such purposes and for the assessing of damages, and all procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with the statutes of this state for the condemning and acquiring of right of way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings, and all damages which may be done to the property of any person or corporation in the construction and maintenance of levees or other improvements under the provisions of this Act shall be paid out of any funds or properties of said levee improvement district, except taxes necessarily applied to the payment of the sinking fund and the interest on the district bonds. [Acts 1909, p. 140, §§ 38, 39; Act April 1, 1915, ch. 146, § 38.]

**Strict construction.**—All grants of the governing authority conferring the right of eminent domain are to be strictly construed. *Texas Midland R. R. v. Kaufman County Imp. Dist. No. 1* (Civ. App.) 175 S. W. 482.

**Property "damaged."**—Where the construction of a levee by a levee district organized under Rev. St. 1911, tit. 47, would seriously flood the waterworks plant of a city so as to damage the same, and deprive the inhabitants of water in times of ordinary flood, the city's property was "damaged" within Const. art. 1, § 17, so that the work could not be completed until compensation had been provided for the injury, but property is not "damaged" in the constitutional sense unless it sustains a peculiar injury not suffered in common with other property in the same community or section. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

**Condemnation of railroad right of way.**—Under this article held, that improvement district might condemn railroad right of way on showing that use thereof for levee would not destroy or injure its use as an integral part of railway or be detrimental to public. *Texas Midland R. R. v. Kaufman County Imp. Dist. No. 1* (Civ. App.) 175 S. W. 482.

Such improvement district held entitled to condemn railroad right of way as cheapest and most utilitarian method by which its purposes might be accomplished, without showing that accomplishment would otherwise be practically impossible. *Id.*

**Restraining construction of works.**—Since a levee district organized under Rev. Civ. St. 1911, tit. 47, cannot pay damages occasioned by the construction and maintenance of levees or other improvements, under the chapter, a property owner may enjoin the completion of the work where its effect will be to especially injure his property. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Injunction will lie to restrain a levee district from completing a levee, the effect of which will be to destroy a city's waterworks plant already dedicated to public use. *Id.*

**Art. 5568. Supervisors may acquire right of way or other improvement.**—The district supervisors of any district are hereby empowered to acquire the necessary right-of-way for all levees and other necessary improvements contemplated by this Act, by gift, grant, purchase or condemnation proceedings; and they may by the same methods acquire any levees or other improvements already constructed, and if acquired by gift, grant or purchase, such acquisition shall be subject to the approval of the County Commissioners Court. [Acts 1909, p. 140, § 41; Act April 1, 1915, ch. 146, § 39.]

**Note.**—Sec. 40 makes it an offense to injure any levee or other reclamation improvement, and is set forth in Vernon's Pen. Code 1916 as art. 1254. Sec. 41 makes it an offense to destroy any line, mark, etc., fixed in connection with the work, and is set forth in Vernon's Pen. Code 1916 as art. 1254a.

**Art. 5568a. Supervisors and other officers not liable for trespass.**—The district supervisors of any levee improvement district, and the district engineer and his assistants, from the time of their appointments, and the state reclamation engineer and his deputies, are hereby authorized to go upon any lands or waters for the purpose of examining the same and locating all levees and other improvements, making plans, surveys, maps and profiles, together with all necessary teams, help and instruments, without subjecting themselves to an act of trespass \* \* \*. [Act April 1, 1915, ch. 146, § 42.]

**Explanatory.**—The omitted part of the above article makes it an offense to obstruct the entry of the officers named on land in performance of their duties, and is set forth in Vernon's Pen. Code 1916 as art. 342.

**Art. 5569. Duty of supervisors to make repairs.**—It shall be the duty of the district supervisors, and they are hereby authorized, to keep the levees and other improvements made or acquired under the provisions of this Act in repair. [Acts 1909, p. 140, § 42; Act April 1, 1915, ch. 146, § 43.]

Cited, *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

**Partial invalidity of former act.**—Rev. St. 1911, tit. 83, c. 2, arts. 5530-5584, is not wholly void because this article violates Const. art. 1, § 17, as to taking or damaging property without consent and compensation. *Strickland v. Lakeside Irr. Co.* (Civ. App.) 175 S. W. 740.

**Art. 5569a. Tax for upkeep of levees previously constructed.**—In all such levee improvement districts heretofore created under any law of this state, or that may hereafter be created, the commissioners courts of the respective counties are hereby authorized to levy and cause to be as-



essed and collected, for the maintenance and upkeep of the levees and other improvements in such districts, an annual tax not to exceed fifty cents on the one hundred dollars valuation upon all the property, real, personal and mixed within the said district. [Act April 1, 1915, ch. 146, § 44.]

**Art. 5570. Contracts let to lowest bidder; separate sections or parts of work.**—Contracts for making and constructing levees and other improvements and all necessary work in connection with any levee improvement district, shall be let by the district supervisors to the lowest bidder, after giving notice by advertising the same in one or more newspapers of general circulation in the state of Texas once a week for four consecutive weeks, and by posting notices for at least thirty days in five public places in the county, one of which shall be at the courthouse door, and at least two of which shall be within said district; and the contract for such levees and other improvements may be let in separate sections or parcels, or all together; provided, that all the improvements included in the report of the district engineer and approved by the State Reclamation Engineer, as provided for in this Act, shall be constructed. [Acts 1909, p. 140, § 43; Act April 1, 1915, ch. 146, § 45.]

**Art. 5571. Bids, how submitted.**—Any person or corporation or firm desiring to bid on the construction of any work advertised as provided for in this Act, shall, upon application to the district supervisors, be furnished a copy of the engineer's report, showing location, profiles and estimates of such work, as is provided for in this Act, provided such person shall pay the district supervisors for making same; and all bids or offers to do any work shall be in writing, and shall be sealed and delivered to the chairman of the district supervisors, together with a certified check for at least two (2) per cent of the total amount bid, which shall be forfeited to the district in case the bidder refuses to enter into the proper contract if his bid is accepted, and any and all bids may be rejected by the said supervisors. [Acts 1909, p. 140, § 44; Act April 1, 1915, ch. 146, § 46.]

**Art. 5572. Contracts to be in writing and approved; filing.**—All contracts made by the district supervisors shall be reduced to writing and signed by the contractor and the supervisors, and approved by the county judge, and a copy of same shall be filed with the clerk of the County Commissioners Court for reference. [Acts 1909, p. 140, § 45; Act April 1, 1915, ch. 146, § 47.]

**Art. 5573. Contractor's bond.**—The party, firm or corporation to whom any such contract is let shall give bond, payable to the district supervisors for said district, and in the county where said district is located, in the amount of the contract price, conditioned that he, they or it will faithfully perform the obligations, agreements and covenants of their contracts, or in default thereof will pay to said district all damages sustained by reason thereof. Said bond shall be approved by the supervisors and the County Judge. [Acts 1909, p. 140, § 46; Act April 1, 1915, ch. 146, § 48.]

**Art. 5574. District engineer to furnish profiles and supervise work; report to supervisors.**—The district engineer shall furnish the contractor with a sectionized profile of the work contracted for, showing the height, width and slope, brim and location, of all levees, and the number of cubic yards of earth to be removed and other work to be done by the contractor, together with drawn plans and specifications for such work, and

such work shall be done by the contractor under the supervision of said district engineer and district supervisors, who shall indicate to the said contractor the beginning point and termination of all levees and other improvements called for by said contract, and when such work is completed according to the contract the district engineer shall make a detailed report of the same to the district supervisors, showing whether the contract has been fully complied with according to its terms, and if not, in what particulars it has not been complied with. [Acts 1909, p. 140, § 47; Act April 1, 1915, ch. 146, § 49.]

**Art. 5575. Construction over railroad right of way.**—The said district supervisors are hereby authorized and empowered to make all the necessary levees, bridges and other improvements across or under any railroad embankments, tracks or rights of way, or public or private roads or the rights of way thereof, or levees or other improvements of other districts, or other such improvements and the rights of way thereof, or to join such improvements thereto, for the purpose of enabling the said district supervisors to construct and maintain any or all of the improvements necessary for the said district; provided, however, that notice shall first be given by said district supervisors to the proper railroad authorities or other authorities or persons, relative to the additions or changes to result from the improvements contemplated by said supervisors, and the said railroad authorities or other authorities, or persons, shall be given thirty days in which to agree to the said work, or to refuse to agree thereto, or in which they, if they so desire, may at their own expense construct the said improvements in their own manner; provided, such design or manner of construction shall be satisfactory to the said district supervisors and approved by the State Reclamation Engineer or his deputy. But if the said authorities or persons shall refuse to permit the said improvements to be made by said district, or shall refuse to make them at their own expense, then the said district supervisors shall proceed by due process of law, as provided in this Act. [Acts 1909, p. 140, § 48; Act April 1, 1915, ch. 146, § 50.]

**Art. 5576. Payment of warrants.**—The said district supervisors shall have the right, and it is hereby made their duty, at all times during the progress of the work being done under contract, to inspect the same, and upon the completion of any contract to their satisfaction, and when they have accepted the improvements as completed according to contract, they shall draw a warrant on the County Treasurer for the amount of the contract price, or so much thereof as remains unpaid at that time, in favor of the contractor or his assigns, which warrant shall, when approved by the County Judge, be paid out of the improvement funds of said district. [Acts 1909, p. 140, § 49; Act April 1, 1915, ch. 146, § 51.]

**Art. 5577. Partial payments.**—If the said district supervisors shall deem it advisable, in order to obtain more favorable contracts, they may advertise and contract for work to be paid in partial payments as the work progresses; but such partial payments shall not exceed in the aggregate seventy-five per cent of the amount to be paid under the contract, the amount of work completed to be shown by a certified report of the district engineer, and no payment to be made for work not completed. [Acts 1909, p. 140, § 50; Act April 1, 1915, ch. 146, § 52.]

**Art. 5578. Annual report of supervisors.**—The district supervisors shall make an annual report of their acts as such supervisors, and file the same with the clerk of the County Commissioners Court on or before the first day of January of each year; which report shall show in detail

the kind, character and amount of work done in the district, the cost of the same, and other data necessary to show the condition of the improvements made under the provisions of this Act. [Acts 1909, p. 140, § 51; Act April 1, 1915, ch. 146, § 53.]

**Art. 5579. Employment of attorneys.**—The district supervisors are hereby empowered and authorized to employ counsel to represent such districts in the preparation of any contracts, or in the conduct of any proceedings in or out of court, and to be the legal advisers of such district supervisors upon such terms and for such fees as may be agreed upon by them and approved by the County Judge, and such supervisors may draw a warrant in payment of such legal services to be paid out of the funds of said district upon the approval by the County Judge. [Acts 1909, p. 140, § 52; Act April 1, 1915, ch. 146, § 54.]

**Note.**—Sec. 55 makes it an offense for the officers concerned in the work to be interested in any contract connected therewith, and is set forth in Vernon's Pen. Code 1916 as art. 378.

**Art. 5580. Districts may acquire property; may sue and be sued.**—Any levee improvement district established under this Act may acquire property, and through the district supervisors may sue and be sued in all the courts of this state in the name of such district, and all courts of this state shall take judicial notice of the existence of such districts. [Acts 1909, p. 140, § 54; Act April 1, 1915, ch. 146, § 56.]

**Art. 5581. Prevention of obstruction of stream space; may lease land acquired.**—The district supervisors, for the purpose of protecting any levees or other improvements constructed under the authority of this Act, shall be authorized to keep the space between any levees or other improvements, and the stream or streams the overflow of which is intended to be prevented, free and clear from all obstructions, and if any district should, by gift, purchase or condemnation, become the owner of any such land, or any other land not needed and used for the purposes of the district, the said district supervisors shall have authority to lease any such land for any purpose which shall not interfere with the work or use of such district, on such terms and for such rental as said district supervisors may see fit, and all moneys received therefrom shall be paid to the County Treasurer for the use of said district. [Acts 1909, p. 140, § 55; Act April 1, 1915, ch. 146, § 57.]

**Art. 5582. May let use of levees; cost of maintenance of levee.**—The district supervisors shall have the authority, with the consent of the County Judge, to let the use of any levee for a public highway, or street or railway, upon such terms as the district supervisors, the State Reclamation Engineer or his deputy and the County Judge shall deem proper; but provision shall be made in any such contract for the payment of an equitable portion of the cost and expense of thereafter maintaining such levee in good condition for the purposes for which such levee was constructed; and any money received for such rental use shall be paid to the County Treasurer for the use of such district. [Acts 1909, p. 140, § 56; Act April 1, 1915, ch. 146, § 58.]

**Art. 5583. Supervisors may sell material and equipment.**—The district supervisors shall have authority to sell any and all material or equipment acquired by the district and not needed for the construction or maintenance of the improvements authorized under the provisions of this Act pertaining to the district, and any money received from the same shall be paid to the County Treasurer for the use and benefit of the district. [Acts 1909, p. 140, § 57; Act April 1, 1915, ch. 146, § 59.]

**Art. 5584.** **May sell land acquired in fee.**—The district supervisors, with the consent of the Commissioners Court, shall have authority to sell and convey any land, the fee of which has been acquired by such district by purchase, gift or condemnation, upon such terms as the said district supervisors and the County Judge may deem best for the district, and the money received from any such sale shall be paid to the County Treasurer for the use of the district. The deed of conveyance of such land shall be executed by the chairman of such district supervisors in the name of the district. [Acts 1909, p. 140, § 58; Act April 1, 1915, ch. 146, § 60.]

**Art. 5584a.** **Improvements not to be constructed without approval of State Reclamation Engineer; injunction.**—From and after the taking effect of this Act it shall be unlawful for any levee improvement district, whether it proposes to construct its levees or other improvements with or without the issuance of bonds, to construct, to undertake to construct, or maintain any levee or other improvements, without first obtaining the approval by the State Reclamation Engineer, as provided in this Act, of the plans for such levees or other improvements; and in the event any such levee improvement district undertakes to construct, constructs or maintains any levee or other improvement without first obtaining the approval of the State Reclamation Engineer of the plans for the same, as provided in this Act, it shall be the duty of the Attorney General, on the request of the State Reclamation Engineer, to file suit in one of the district courts of Travis county, Texas, in which the venue of such suits is hereby fixed, to enjoin the construction or maintenance of such levee or other improvement. [Act April 1, 1915, ch. 146, § 61.]

**Note.**—Sec. 62 makes it an offense for private persons to construct levee improvements without the approval of the State Reclamation Engineer, and provides for injunction at instance of the Attorney General, and is set forth in Vernon's Pen. Code 1916 as art. 342a.

**Art. 5584b.** **Laws not repealed.**—This Act shall not be construed to repeal any of the provisions of Chapter 118, General Laws of the Thirty-second Legislature, Regular Session, entitled "Drainage Districts—Authorizing the Commissioners Courts of the Several Counties of the State to Establish Same," nor of Chapter 36, General Laws, Thirty-third Legislature, First Called Session, entitled, "Drainage Districts—Amending Sections 7, 8, 23, 29, 36 and 61, Chapter 118, General Laws, Regular Session, Thirty-second Legislature, Relating Thereto," nor any of the irrigation laws of this State. [Id., § 63.]

**Explanatory.**—Chapter 118, referred to, and the amendment thereto, is set forth in Vernon's Sayles' Civ. St. 1914 as arts. 2567-2625.

**Art. 5584c.** **Validation of bonds issued under former act.**—All bonds heretofore issued by any levee improvement district organized and created under Chapter 2, Title 83, Revised Civil Statutes of 1911, or other law, which have been approved by the Attorney General and registered by the Comptroller, are hereby in all things validated and declared to be valid and binding obligations of the districts by which such bonds were issued. [Id., § 64.]

**Art. 5584d.** **Repeal.**—Chapter 85, General Laws of the State of Texas, passed by the Thirty-first Legislature, Regular Session, entitled "An Act to authorize the Commissioners Court of the several counties in Texas to create and establish improvement districts to prevent overflows and to construct and maintain levees and other improvements on rivers, creeks and streams to prevent overflows, etc., etc., and declaring an emergency," is hereby expressly repealed, and all other laws and parts of laws in conflict with the provisions of this Act are also hereby expressly repealed. [Id., § 65.]

## TITLE 84

## LIBEL

<p>Art. 5595. Definition. 5596. Mitigation of damages. 5597. What matters deemed privileged.</p>	<p>Art. 5598. To be construed, how. 5598a. Not to affect pending suits or accrued causes of action.</p>
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**Article 5595. Definition.**

**What constitutes libel in general.**—Intent with which words claimed as actionable were spoken is immaterial in absence of any claim to exemplary damages. *Sisler v. Mistrot* (Civ. App.) 192 S. W. 565.

**Malice.**—Malice may be inferred from the reckless publication of libelous matter. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463; *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45; *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

Plaintiff libeled by the publication of an article libelous per se was entitled to recover actual damages, and was not required to prove malice, except as a basis for the recovery of exemplary damages. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

“Malice,” in an action for libel, means an act done with a bad or wicked intent and the specific intention to injure, or an act done with such wanton or gross indifference as to indicate an utter disregard of consequences. *Id.*

In an action of libel it is not necessary that malice be shown by proof of ill will, animosity, or hatred, etc., but it may be inferred from the fact that the publication was made with such utter recklessness as to indicate a disregard of the consequences. *Id.*

Actual malice as applied to slander includes an unlawful act done in reckless disregard of the rights of another. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

**Exposing person to hatred, contempt, or ridicule.**—A newspaper article, which refers to the county judge of a county as “Czar,” and which states that the newspaper will not submit to the tyranny and bulldozing methods of a self-constituted “Czar” without raising an objection, etc., is libelous within this article, defining a “libel” as a defamation tending to injure the reputation of one and thereby expose him to contempt or ridicule. *Blum v. Kusenberger* (Civ. App.) 158 S. W. 779.

A letter to plaintiff’s employer charging that plaintiff had assigned his wages to the writer when shown by innuendo to be one which would affect plaintiff’s financial reputation, and subject him to contempt and ridicule, is libelous per se under this article. *Texas Furniture Co. v. Meyers* (Civ. App.) 167 S. W. 766.

**Imputation of crime and immorality.**—An article wrongfully charging the commission of a capital crime is libelous per se. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

Publication in newspaper that defendant confessed to complicity in homicide which was generally considered to have been a murder held libelous per se. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 181 S. W. 554.

Publication of account of plaintiff’s unauthorized arrest and imprisonment on mere suspicion that he might be guilty of murder under investigation in another state, with picture of plaintiff and of the girl whose murder was being investigated, held libelous per se. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

Statements by the manager of a telephone company that the company did not allow girls to work for it who were not ladies, and that she and another had had men in their room at night, were slanders per se. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

Published charge that plaintiff assassinated another is libelous per se. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

The statement by the father of plaintiff’s husband, made to her father, that she was four months advanced in pregnancy when she had been married only about seven weeks, was slanderous per se, without any innuendo to show the defamatory character of the statement. *Davis v. Davis* (Civ. App.) 186 S. W. 775.

**Imputation of misconduct in office.**—The publication of a false charge that plaintiff, the chief of police of another city, had put his son on the pay roll of the city as his confidential clerk, contrary to law, held libelous per se. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

**Causing special damage.**—In an action for damages for words slanderous per se, it is not necessary to prove special damages. *Davis v. Davis* (Civ. App.) 186 S. W. 775; *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

**Construction of language.**—A charge that plaintiff stole hats stored in a trunk sold her is a charge of theft. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

**Certainty.**—A newspaper article, charging the slayers of one accused of murder with lynching, held a libel on plaintiff, though his name was not mentioned. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

**Repetition.**—Fact that defendant’s publication of false charge or statements against plaintiff purported to be only a repetition of a charge made by another held not to relieve

such publication of its libelous character. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

Where defendant wrote a letter to a bank, containing libelous statements concerning plaintiff, fact that the bank, and not defendant, published letter, is immaterial. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

**Persons entitled to sue.**—The president and majority stockholder of two corporations held not entitled to maintain action for personal libel against defendant, who had published newspaper statements that it had sued the corporations for infringing its patent; such statement, if libelous, giving action only in favor of the corporations. *Cummer Mfg. Co. of Texas v. Butcher* (Civ. App.) 176 S. W. 82.

Evidence, in an action for libel in publishing a statement during plaintiff's campaign for state senator, that he had not paid a certain note given by him to defendant held to sustain a finding that the debt evidenced by the note had been satisfied at the time, and that both plaintiff and defendant so considered it. *Autrey v. Collins* (Civ. App.) 161 S. W. 413.

**Damages in general.**—A verdict for \$3,250 damages for the publication of a libel in a newspaper of limited circulation held, under the evidence, excessive and reduced to \$1,500. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

In action for slander in charging defendant with selling an article infringing another's patent, plaintiff could not recover damages to his business without showing the loss of sales and the extent of injury thereby sustained. *Cummer Mfg. Co. of Texas v. Butcher* (Civ. App.) 176 S. W. 82.

Verdict of \$2,500 special and \$10,000 general damages for libelous publication that plaintiff, when chief of police of another city, had carried his son on the city pay roll in violation of law, was excessive, and would be reversed unless plaintiff filed a remittitur of \$5,000. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

In an action for publication of false and libelous charge of plaintiff's misconduct in his office as chief of police, plaintiff was entitled to recover general damages without proof other than the fact of the libel. *Id.*

Where words constitute slander per se, the damages are not limited to utterances by the defendant, repetition being the natural result of the original slander. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

Award of \$4,000 actual damages for publication of charge of assassination held not excessive. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

Under arts. 5595-5597, where defendant made untrue statements in a letter to a bank accusing plaintiff of an offense in procuring a draft on defendant from defendant's insane son, held, that plaintiff was entitled to recover actual compensatory damages alleged and proven. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

Where defendant wrote a letter, he being primarily responsible for its publication, is liable for the natural and probable consequence resulting therefrom, though he did not have them in mind at time. *Id.*

If defamatory words charge an actionable crime, and there be an entire absence of malice in fact, actual damages may nevertheless be recovered. *Id.*

**Exemplary damages.**—To recover exemplary damages for libel, it is necessary to prove actual or express malice. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 173 S. W. 467.

Where a statement was not privileged, implied malice from the wrongful act may be sufficient to support an award of punitive damages. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

On publication of letter charging plaintiff with assassinating father of writers, when newspaper had facts showing that killing was in self-defense, malice may be inferred authorizing exemplary damages. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

Where publication shows reckless disregard of rights of plaintiff, which amounts to gross negligence, jury may infer malice and award exemplary damages. *Id.*

In a libel case, where the libelous statements made by defendant concerning plaintiff, were natural result of an investigation made in good faith and in exercise of due care, imposition of exemplary damages was erroneous. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

### Art. 5596. Mitigation of damages.

**Justification and mitigation in general.**—In an action for slander, the character of the plaintiff and business transactions between him and the defendant and other parties affecting the rights of the defendant may be considered by the jury in mitigation of damages, even though they did not justify the accusation. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

**Retraction.**—A statement, coupled with a verbal charge of theft, held not a retraction. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

### Art. 5597. What matters deemed privileged.

**Privileged communications in general.**—In view of Const. art. 1, § 27, an application to the Governor for a pardon is absolutely privileged, and nothing therein stated, though the statement be made with malice, will expose one applying to the Governor for a pardon for an offender to an action for libel. *Connellee v. Blanton* (Civ. App.) 163 S. W. 404.

The publication and circulation of matter libelous per se as to the plaintiff entitled him to actual damages, even though a part of the publication was privileged. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

Communications not absolutely privileged may be conditionally or qualifiedly so and may be fair reports of proceedings of courts and legislative bodies, or a communication in good faith in performance of a duty, to another to whom defendant owes a duty, or communication by one having interest in subject to one having corresponding interest. To be privileged, the communication must be made upon a proper occasion, upon a proper motive, and must be based upon reasonable grounds, and, when so made, in good faith, no recovery can be had without proof of express malice, but the mere fact that a communication of libelous matter is made confidential does not make it a privileged communication. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

A "privileged communication" is one fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. *Id.*

**Judicial proceedings.**—Under the provision declaring accounts of proceedings in a court of justice, unless prohibited by court, and other official proceedings, privileged, held, that publication of libelous pleading, properly filed, before action thereon by court or any officer, was not privileged. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 173 S. W. 467.

Publication of plaintiff's unwarranted arrest and imprisonment on suspicion of his connection with a murder committed in another state held not privileged as the publication of a proceeding in the administration of the law. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

**Reports of official proceedings.**—A report by a grand jury, questioning the moral character of the sheriff, but not finding any indictment against him for crime, is not privileged. *Rich v. Eason* (Civ. App.) 180 S. W. 303.

**Discharge of duty to others.**—A letter from superintendent of railroad to superintendent of express company asking discharge, for stated reason of an express messenger, who also handled the railroad baggage, held a privileged communication. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

**Criticism and comment on public matters.**—Statements made in a church convention during a campaign for statewide prohibition against a minister of the church who was opposed to a constitutional amendment for that purpose are qualifiedly privileged, and actual malice must be shown. *Dickson v. Lights* (Civ. App.) 170 S. W. 834.

Under subdivisions 3 and 4, a publication as to disbarment proceedings, including a statement as to what the evidence would show, held not privileged. *Houston Chronicle Pub. Co. v. Tiernan* (Civ. App.) 171 S. W. 542.

**Existence and effect of malice.**—The existence of malice necessary in qualifiedly privileged statements may be evidenced by extraneous facts or intrinsically by the violence of the language used, etc. *Dickson v. Lights* (Civ. App.) 170 S. W. 834.

A publication is not privileged where actual malice is shown. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 173 S. W. 467.

To make a libel actionable in case of a privileged communication, express malice must be shown. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

While express malice, necessary in case of a privileged communication, cannot be inferred from the letter being false and injurious, it can be shown by circumstantial evidence. *Id.*

"Malice," as used in connection with privileged communications, does not import necessarily hatred, ill will, anger, wrath, or vindictiveness, but need be no more than the antithesis of good faith. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

**Art. 5598. To be construed, how.**—Nothing in this title shall be construed to amend or repeal any penal law on the subject of libel, nor to take away any now or at any time heretofore existing defense to a civil action for libel, either at common law or otherwise, but all such defenses are hereby expressly preserved. [Act 1901, p. 30, § 4; Act April 9, 1917, ch. 206, § 1.]

**Explanatory.**—The act amends art. 5598, ch. 1, tit. 84, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 5598a. Not to affect pending suits or accrued causes of action.**—That this Act shall not be construed to affect any suit now pending or that may be hereafter brought upon any cause of action arising prior to the taking effect of this Act. [Act April 9, 1917, ch. 206, § 2.]

## TITLE 86

## LIENS

Chap.

1. Judgment liens.
2. Mechanics, contractors, builders and material men.
- 2a. Liens on oil, gas, or water wells, mines, quarries, and pipe lines.
3. Liens of railroad laborers.

Chap.

4. Liens of accountants, bookkeepers, artisans, craftsmen, factory operatives, mill operatives, servants, mechanics, quarrymen, common laborers and farm hands.
7. Chattel mortgages.
8. Other liens.

## CHAPTER ONE

## JUDGMENT LIENS

Art.

5610. Clerk of county court shall keep judgment record.
5612. Abstract shall show what.
5613. Justice of peace shall deliver abstracts.

Art.

5614. Clerk of county court shall record and index abstracts.
5615. Index shall show, what.
5616. Lien of judgment, when.
5617. Lien exists, how long.

**Article 5610. [3283] Clerk of county court shall keep a judgment record.**

Cited, *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

**Art. 5612. [3285] Abstract shall show what.**

Cited, *Leonard v. Benford Lumber Co.* (Civ. App.) 181 S. W. 797.

**Abstract—Requisites and sufficiency in general.**—This article does not require an affirmative showing that original execution was issued within 12 months after judgment, in order to constitute notice. *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

— **Amount and credits.**—Where abstract failed to show correct amount due on judgment because no allowance was made for payment after judgment was rendered, registration of such abstract did not fix lien. *Ainsworth v. Dorsey* (Civ. App.) 191 S. W. 594.

**Art. 5613. [3286] Justice of the peace shall deliver abstracts.**

Cited, *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

**Art. 5614. [3287] Clerk of county court shall record and index abstracts.**

**Necessity of proper indexing.**—Indexing of an abstract of a judgment duly recorded is, under arts. 5614-5616, indispensable to the creation of a lien. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

To put a purchaser of land on notice, an excerpt from judgment recorded in land titles must be indexed as required by Paschal's Dig. arts. 5015, 5016. *Leonard v. Benford Lumber Co.* (Civ. App.) 181 S. W. 797.

**Art. 5615. [3288] Index shall show what.**

Cited, *Leonard v. Benford Lumber Co.* (Civ. App.) 181 S. W. 797.

**Art. 5616. [3289] Lien of judgment, when.**

Cited, *Leonard v. Benford Lumber Co.* (Civ. App.) 181 S. W. 797.

**Mode of acquiring lien in general.**—Judgment creditor may, notwithstanding unrecorded deed, acquire a lien by complying with arts. 5614-5616, or by levy of execution without notice under articles 6827, 6828, of a third person's ownership, and under article 6824, subject the land to his judgment. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

**Indexing as condition precedent to lien.**—See *Whitaker v. Hill* (Civ. App.) 179 S. W. 539; note under art. 5614.

**Land to which lien attaches—Estate or interest of judgment debtor.**—Lien of judgment recovered against grantor between execution of deed containing erroneous description and execution of correction deed held not to attach to the land, as the first deed passed title. *Gauss-Langenberg Hat Co. v. Allums* (Civ. App.) 184 S. W. 288.



Filing, recording, and indexing of an abstract of judgment, by virtue of this article, operates as a lien on all the judgment debtor's realty, but only on such interest or right as he actually owns. *Reyes v. Kingman Texas Implement Co.* (Civ. App.) 188 S. W. 450.

A judgment is not a lien upon the land of one not a party of record. *Johnson v. Morgan* (Civ. App.) 189 S. W. 324.

Where stockholder took title to land in his own name, as trustee for corporation, and on his death his heirs passed the title by their deed to the corporation, a creditor which obtained a default judgment against the heirs after such deed had been given acquired no title. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

**Priorities.**—The rule that an equitable vendor's lien attaching by virtue of a sale of realty will prevail against judgment lien, where notice is given before sale, does not apply to a contractual vendor's lien reserved in an unrecorded deed as against a judgment creditor of the grantor whose judgment is recorded before notice of the conveyance. *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

Where a tenant in possession of land had no notice of a conveyance by his landlord reserving a vendor's lien at the time an abstracted judgment was filed for record in the county where the land was situated, the tenant's possession was not notice of the deed to the judgment creditor so as to subordinate his lien to that secured by lien notes. *Id.*

The effect of the registration of a money judgment is, under this article, solely to make the judgment a lien on defendant's property, and is not notice thereof to one who takes from the judgment debtor an assignment of a judgment which he holds against his creditor. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

A judgment creditor has constructive notice of whatever rights prior purchasers from the debtor have, where the property is in possession of tenants who attorn to such purchasers. *Cox v. Kearby* (Civ. App.) 175 S. W. 731.

As against a judgment creditor, grantees in a deed from the debtor, absolute in form, but intended as a mortgage, who, at the instance and for the benefit of the grantor, conveyed the land prior to the attaching of the creditor's lien, divests the title out of the debtor. *Id.*

Under this article, a purchaser at an execution sale with notice that the execution debtor did not own the land held not entitled to protection under article 6824. *Hooker v. Eakin* (Civ. App.) 176 S. W. 80.

The owner of land and his immediate grantee, both having reserved liens and the last purchaser having assumed payment, held to have prior liens over that of the judgment creditor of the purchaser. *Johnson v. Morgan* (Civ. App.) 189 S. W. 324.

Under this article, and article 6824, creditor who fixed lien on land of judgment debtor without notice of unrecorded conveyance had a superior right to that claimant under such conveyance. *Hirt v. Werneburg* (Civ. App.) 191 S. W. 711.

**Foreclosure of lien.**—By filing, recording, and indexing an abstract of judgment, judgment creditor only acquired right to acquire the rights, if any, of his judgment debtor in land purchased by the latter under executory contract of sale, which right of the judgment creditor must be foreclosed and sold under a foreclosure judgment at public sale. *Reyes v. Kingman Texas Implement Co.* (Civ. App.) 188 S. W. 450.

**Mistake in amount of judgment.**—A mistake in the amount of a judgment does not render the lien ineffective, and a correction does not destroy the lien as of the date of entry of judgment. *First State Bank of Amarillo v. Jones* (Civ. App.) 171 S. W. 1057, judgment reversed (Sup.) 183 S. W. 874.

Fact that judgment was rendered in part on notes not due at time did not affect validity of registration in county clerk's office of abstract of judgment, and did not impair validity of lien fixed by registration on judgment debtor's property. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

### Art. 5617. [3290] Lien exists, how long.

**Duration of lien—Issuance of execution.**—In suit to foreclose a judgment lien where dormancy of judgment was pleaded because execution was not issued as required by this article, the plaintiff had the burden of proving the vitality of his judgment, and such burden was not met by the introduction of the alias execution reciting that the original was issued within 12 months after judgment, where no reason was given for not producing the original. *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

## CHAPTER TWO

### MECHANICS, CONTRACTORS, BUILDERS AND MATERIAL MEN

Art.	Art.
5621. In favor of whom.	5623d. Partial invalidity.
5622. When to be filed.	5628. Priority of lien.
5623. Written notice to owner; filing with county clerk; owner to file contract and bond of contractor; effect.	5629. When sold separately purchaser may remove.
5623a. Duty of owner to take bond; form and contents; suit on bond; change of plans not to discharge sureties.	5631. On homesteads, how fixed.
5623b. Cumulative of other remedies.	5632. Notice to owner of property.
5623c. Extent of liability of owner.	5635. Original contractor to defend suit by subcontractors, etc.
	5637. Liens upon equal footing.
	5638. Speedy enforcement of.

**Article 5621. [3294] In favor of whom.**—Any person or firm, lumber dealer or corporation, artisan, laborer, mechanic or subcontractor who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement or to repair any building or improvement whatever, or who may labor or furnish material, machinery, fixtures or tools for the construction or repair of levees or embankments to be erected for the reclamation of overflow lands along any river or creek in this State, or furnish any material for the construction or repair of any railroad within this State under or by virtue of a contract with the owner, owners, or his or their agent, trustee, receiver, contractor or contractors, upon complying with the provisions of this chapter, shall have a lien on such house, building, fixtures, improvements, land reclaimed from overflow or railroad, and all its properties, and shall have a lien on the lot or lots of land necessarily connected therewith, or reclaimed thereby, to secure payment for the labor done, lumber, material, machinery or fixtures and tools furnished for construction or repair. The word "improvement," as used herein, shall be construed so as to include clearing, grubbing, draining or fencing of land, and shall include wells, cisterns, tanks, reservoirs or artificial lakes or pools made for supplying or storing water and all pumps, siphons and wind mills or other machinery or apparatus used for raising water for stock, domestic use or for irrigation purposes. [Acts 1889, p. 110; Acts 1895, p. 194; Acts 1913, p. 252, § 1; Act March 31, 1917, ch. 171, § 1.]

**Explanatory.**—The act amends tit. 86, ch. 2, Rev. Civ. St. so that art. 5621 thereof shall read as above. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Norton v. Elliott* (Civ. App.) 184 S. W. 1096; *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

**Property subject to lien.**—Materialmen and laborers cannot fix a lien upon public works for money due them for materials and labor in the construction of such works. *General Bonding & Casualty Ins. Co. v. City of Dallas* (Civ. App.) 175 S. W. 1098.

A lien cannot be enforced against a public school building. *Rice Common School Dist. No. 2 v. Oil City Iron Works* (Civ. App.) 180 S. W. 1121.

**Right to lien—Constitution as origin.**—Const. Tex. art. 16, § 37, providing that mechanics, artisans, and materialmen of every class shall have a lien on the buildings and articles made or repaired by them for the value of their labor done thereon or materials furnished therefor, and the Legislature shall provide by law for the speedy and efficient enforcement of such liens, gives a lien to the classes of persons therein named, which exists independent of statute, so that, though the statutes of the state may provide for liens in addition to those provided for by the Constitution, they cannot impair or detract from the rights to liens conferred by the constitutional provision. *Hutting Sash & Door Co. v. Stitt*, 218 Fed. 1, 133 C. C. A. 641.

Under Const. art. 16, § 37, providing that materialmen shall have a lien for materials furnished, where plaintiff furnished materials to the owner, a lien accrued unimpaired by *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 5621-5639, as to mechanics' liens in general. *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

Under Const. art. 16, § 37, giving mechanics' liens to certain persons and directing Legislature to provide for their enforcement, which was done by *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 5621-5639, compliance with statute is unnecessary as between owner and claimants, but must be observed as to third parties without actual notice that material or labor was furnished. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

A constitutional provision creating involuntary liens is not entitled to liberal construction, and claimant must bring himself within its clear intent. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

— **Nature of claim.**—An aerial tramway for the transportation of ore over a river to a point in Texas where it might be hauled to smelters is an improvement within this article. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

Upon finding that defendant was indebted to plaintiff for a well dug on defendant's land, the law gave an implied lien on the land for security for the debt. *Gillett v. Holligan* (Civ. App.) 162 S. W. 367.

Const. art. 16, § 37, giving materialmen liens upon buildings and articles made or repaired by them, or for material furnished, is inapplicable to one furnishing material to a contractor. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

— **Contract with or consent of owner.**—A purchaser of the land under a verbal executory contract, which was subsequently carried out by the giving of a deed, was the owner. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

A purchaser of land under an executory contract, who subsequently fails to comply with his contract and receive a deed, is not the "owner" within this article. *Id.*

Under this article, a contract with the owner is essential to fix the lien. *Id.*

Even though a deed by a corporation did not take effect as a conveyance because its corporate seal was not attached, it was evidence of a contract to convey which could be specifically enforced, and the grantee, who under a previous verbal contract to convey had erected improvements, was the "owner" within this article. *Id.*

Where a deed to a corporation was made before its charter was issued, the title vested in the incorporators, and as each tenant in common is the owner except as to his co-owners, a contract with one, to which no objection was made, was a contract with the owner within this article. *Id.*

One merely in possession under a contract to purchase or under an unexecuted parol gift is not the owner of the land and cannot create a mechanic's lien on it. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Only the owner or his agent, trustee, or contractor may make contracts fixing liens on lands and buildings. *Id.*

Const. art. 16, § 37, does not give a mechanic's lien to those who furnish labor and materials to the principal contractor, without privity of contract between them and the owner. *First Baptist Church of Tyler v. Carlton Lumber Co.* (Civ. App.) 173 S. W. 1179.

That a lessee was required to put certain improvements on the property, which on expiration of the lease, were to become the lessor's property, would not authorize a mechanic's lien upon the property under a contract with the lessee, independent of whether lessor's general manager consented that lessee might give lien. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

The record owner of farm lands, who did not know that a well was being drilled thereon, pursuant to contract with another to whom he later conveyed, until the work was in progress, and did not know that the contractors were not fully informed of the facts relating to the title of the land, did not acquiesce in or consent to the work so as to affect his rights. *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721.

Under mechanics' lien statutes, such as that of Texas, the mere fact that the owner of property acquiesced in or even consented to the furnishing of material to be used on the premises, or the performance of labor, cannot fix liens on the property. *Id.*

One who has only a contract to purchase land is not the owner thereof within the meaning of the mechanics' lien statutes. *Id.*

Under Const. art. 16, § 37, providing for mechanics' liens, and the mechanic's lien statutes, in view of Rev. St. 1911, Final Title, § 3, held, that holder of a 99-year lease had right to subject property to mechanic's lien, and its estate was subject to such lien. *Ogburn Gravel Co. v. Watson Co.* (Civ. App.) 190 S. W. 205.

— **Breach of contract.**—Person contracting to install heating and plumbing in building and abandoning contract upon owner's refusal to pay an estimate held entitled to a lien under this article. *King v. Collins* (Civ. App.) 179 S. W. 899.

— **Persons entitled to lien.**—Where a bankrupt had a subcontract to furnish a building contractor with certain material and millwork called for by the general contract for the construction of a building, to be used by the contractor in the work, and the bankrupt, though having nothing to do with the placing of the material in the building, in order to perform its contract, contracted with petitioner to manufacture and furnish certain material and millwork called for by the bankrupt's contract in accordance with details furnished to petitioner for the manufacture of such materials, the same having been manufactured, supplied to the bankrupt, and used by the contractor in the building, petitioner was entitled to a lien under Const. Tex. art. 16, § 37, providing that mechanics, artisans, and materialmen of every class shall have a lien on the buildings and articles made or repaired by them for the value of their labor done thereon or materials furnished therefor. *Hutting Sash & Door Co. v. Stitt*, 218 Fed. 1, 133 C. C. A. 641.

**Operation and effect—Property, estates, or rights affected.**—Where the title to farm lands stood in the name of one other than the trustee for the farms who managed them and contracted for the cleaning and drilling of wells thereon, it became the duty of the contractors for the work to ascertain what rights had been acquired by such trustee. *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721.

One furnishing materials for construction of a factory has no lien upon machinery installed therein not in any way permanently affixed to the realty. *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

**Waiver of lien.**—Where an instrument provided for waiver of a vendor's lien in favor of a mechanic's lien, the words "mechanic's lien" were used in the sense of a lien given by arts. 5621-5639, covering both material and labor. *Dilworth & Green v. Ed Steves & Sons* (Civ. App.) 169 S. W. 630, writ of error dismissed *Dilworth v. Ed Steves & Sons* (Sup.) 174 S. W. 279.

In action to enforce mechanic's lien, testimony by claimants that they did not intend to waive lien when accepting chattel mortgage is inadmissible, since mortgage may have operated as waiver as matter of law. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

### Art. 5622. [3295] When to be filed.

Cited, *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574.

**Necessity of filing.**—Const. art. 16, § 37, fixes the lien of the materialman, where the materials are furnished under contract with the owner of the premises; and, in order to enforce the lien against the owner, it is not necessary to file an account with the county clerk, as required by this article. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

**Time for filing.**—Plaintiff, who furnished the materials for the construction of an aerial tramway and also furnished a superintendent to oversee the work, is a contractor within this article and therefore had four months within which to file its contract so as to perfect its lien upon the tramway. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

A debt for materials furnished accruing at the date of the last delivery, no lien can be had, where the materials were not included in the contract, but were merely charged to an open account, unless the sworn statement is filed within the four months limited by statute. *Id.*

Where extra materials were furnished for the construction of an aerial tramway, although there was a written contract, a mechanic's lien upon the completed structure for the payment of such materials must be perfected regardless of the contract; the contract provisions as to the time of the maturity of the indebtedness not governing. *Id.*

While the statute extends the time when indebtedness for material furnished shall accrue so as to fix it at the time when the last material was delivered, the furnishing of labor after the last delivery will not further extend the time of accrual of the indebtedness for material so as to support the lien upon a sworn statement filed more than four months after the last delivery. *Id.*

Where a contract requiring plaintiff to furnish a superintendent for the construction of an aerial tramway, materials of which were furnished by plaintiff, provided that for furnishing such superintendent plaintiff should be paid weekly, each weekly item stood alone and a lien could be had upon only those payments which accrued within four months of the time of the filing of the contract. *Id.*

**Effect of failure to file.**—Under Const. art. 16, § 37, a lien is not lost by the materialman's failure to file an itemized account of his claim pursuant to statute. *Harlan v. Texas Fuel & Supply Co.* (Civ. App.) 160 S. W. 1142.

**Art. 5623. [3296] Written notice to owner; filing with county clerk; owner to file contract and bond of contractor; effect.**—Any person, firm or corporation who may furnish any material to or perform any labor for any contractor, sub-contractor, building or improvement, or to repair any house, building or improvement, or to construct any railroad, or its properties, by giving written notice to the owner or his agent of such house, building or improvement, or the railroad company, its agent or receiver, of each and every item furnished, and by showing how much there is due and unpaid on each bill of lumber or material furnished, or labor performed, by such person, firm or corporation, or at any time within ninety days after the indebtedness shall have accrued, may fix and secure the lien provided for in this chapter as to the material or labor furnished at the time or subsequent to the giving of the written notice above provided for, by filing in the office of the county clerk of the county in which such property is located, and if it be a railroad company in any county through which its road may pass, an itemized account of his or their claim as provided in this article, and cause the same to be recorded in a book kept by the county clerk for that purpose. Said owner, railroad company, its agent or receiver, shall cause to be executed a written contract for such erection, repair or improvement, and cause same to be filed with the county clerk of the county where the property is situated, and shall also cause to be executed and filed with said county clerk before the work is begun, a good and sufficient bond by said contractor, conditioned as hereinafter provided; and when said bond and contract shall be so executed and filed, the said owner, railroad company, its agent or receiver, shall in no case be compelled to pay a greater sum for or on account of labor performed, or material, machinery, fixtures or tools furnished, than the price or sum stipulated in the original contract between such owner and contractor. [Acts 1895, p. 194; Act March 31, 1915, ch. 143, § 1.]

**Explanatory.**—This act took effect 90 days after March 20, 1915, date of adjournment. The act amends art. 5623, tit. 86, ch. 2, Rev. Civ. St., 1911.

Cited, *Texas Bldg. Co. v. Collins* (Civ. App.) 137 S. W. 404; *De Bruin v. Santo Dominico Land & Irr. Co.* (Civ. App.) 194 S. W. 654.

**In general.**—Under this article, a materialman who did not fix his lien before the contractor abandoned the contract at a time when there was nothing owing him cannot claim a lien against the property. *First Baptist Church of Tyler v. Carlton Lumber Co.* (Civ. App.) 173 S. W. 1179.

Petitions seeking to establish liability by reason of mechanics' liens, held bad for failing to allege date of giving notice. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

Where laborer fails to take measures provided by arts. 5621-5623, 5631, to secure lien on building intended for occupancy as homestead, he cannot enjoin its delivery by contractor to owner. *Norton v. Elliott* (Civ. App.) 184 S. W. 1096.

**Constitutionality.**—State statute making obligation of contractor's bond inure to benefit of materialmen and laborers as well as owner held valid, and not to impair obligation of contracts, or deprive the parties of due process of law. *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574.

**Notice to owner—Necessity.**—Under the statute, an owner employing a contractor is not liable to a subcontractor or materialman for any amount paid to the contractor until notice is served, but from such notice he cannot make further payments to the contractor without incurring liability for any lien debt. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Where materialmen failed to serve owner of a building for which material was furnished with a written notice of their claims against contractor as required by statute, they did not acquire a lien on property. *Texas Glass & Paint Co. v. Crowdus* (Sup.) 193 S. W. 1072.

Under arts. 5621, 5623, giving contractors' materialmen mechanics' liens, and requiring giving of notice to owner and filing with county clerk, the provisions regarding notice are mandatory. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

A contractor's materialman is entitled to a mechanic's lien only to amount owner owed contractor when materialman notified him that material was being furnished pursuant to this article. *Id.*

— **Sufficiency.**—Itemized notices served upon the agent of the owner of a building under construction, which were shown to the owner when there was enough due under the contract to have paid the claims, held sufficient under this article. *Seeling v. Alamo Iron Works* (Civ. App.) 173 S. W. 520.

When materialman furnishes material used in construction of building, and gives notice to owner before payment of contract price, failure to give notice of each item held immaterial to fix lien. *Ogburn Gravel Co. v. Watson Co.* (Civ. App.) 190 S. W. 205.

— **Filing.**—Under this article, a materialman who gave the required notices to the agent of the owner of a building is entitled to a lien, though he did not file his notice with the county clerk within the 90 days specified by statute. *Seeling v. Alamo Iron Works* (Civ. App.) 173 S. W. 520.

**Itemized account—Sufficiency.**—Where a contract required plaintiff, who furnished the materials for the construction of aerial tramway, to supply the purchaser with a superintendent for its construction, the filing of a sworn statement to secure a lien for extra materials, which were not included within the contract, will not support a lien for items due for the superintendent's services. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

**Limitation of amount of owner's liability.**—A statutory provision limiting owner's liability on mechanic's lien claims to contract price does not prevent a materialman from claiming installments due contractor, although nothing was due him when building was completed, and owner had expended more than contract price in finishing work after contractor quit. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

**Art. 5623a. Duty of owner to take bond; form and contents; suit on bond; change of plans not to discharge sureties.**—The owner, railroad, receiver or his agent shall take from every contractor described in this chapter a good and sufficient bond in the sum of at least the full amount of the contract price, where said contract price is equal to or less than one thousand dollars; three-fourths of the contract price where said contract price exceeds one thousand dollars, but does not exceed five thousand dollars; one-half the contract price where said contract exceeds five thousand dollars, but does not exceed one hundred thousand dollars; and one-third of the contract price where said contract exceeds one thousand dollars, payable to the said owner, railroad or receiver. The condition of said bond shall be the true and faithful performance of the contract, and the payment of all sub-contractors, workmen, laborers, mechanics and furnishers of material by the undertaker, contractor, master mechanic or engineer, the said bond to be made in favor of the owner, sub-contractors, workmen, laborers, mechanics and furnishers of material as their interest may appear, all of whom shall have the right to sue upon said bond; and regardless of the provisions or wording of any such bond, said bond shall be construed by the courts, whether so specified or not, to guarantee the true and faithful performance of the contract and the payment of all claims of each and every sub-contractor, workman, laborer, mechanic and furnisher of material against the undertaker, contractor, master mechanic or engineer, and it shall guarantee the pay-

ment of such claims, regardless of whether or not they are secured by any lien. Suit may be brought on said bond by the owner, sub-contractor, workmen, laborers, mechanics and furnishers of materials, or any of them, and they and each of them shall have the right to recover on said bond in the same manner as if the bond were made payable directly to them. Suit on such bond may be brought in the county where the owner resides or where the work is performed, and at any other place provided by law. No change or alteration in the plans, building, construction or method of payment shall in any way avoid or affect the liability on said bond, and the sureties on said bond shall be limited to such defenses only as the principal on said bond could make. [Act March 31, 1915, ch. 143, § 2.]

**Explanatory.**—Sec. 2 of this act provides that art. 5623a be added to title 86, ch. 2, to read as above.

Cited, *Norton v. Elliott* (Civ. App.) 184 S. W. 1096; *De Bruin v. Santo Domingo Land & Irr. Co.* (Civ. App.) 194 S. W. 654.

**Operation and effect in general.**—Stipulation in building contractor's bond for withholding of payment to contractor until claimants are paid held not to authorize owner to pay claims, whether there was any liability or not. *Texas Fidelity & Bonding Co. v. Brown* (Civ. App.) 179 S. W. 1125.

Where owner and contractor made contract for construction, their contract must be construed and their rights determined in view of this article, as amended by Acts 34th Leg. c. 143, making the benefit of a bond given by a contractor inure to materialmen and laborers. *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574.

**Liability on contractor's bond.**—A surety in a building contractor's bond conditioned on the contractor discharging the property from liens and incumbrances and paying claims which may become liens is not liable to a materialman taking no steps to secure a lien. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Contractor's building bond providing that it was for benefit of all persons who might become entitled to liens, and conditioned that contract should be completed free of liens, read in connection with provision of contract for furnishing owners' release from liens by the bond held to secure claim of subcontractor failing to give statutory notice of lien to builder. *Bullard v. Norton* (Sup.) 182 S. W. 668.

Provisions of a contractor's bond construed, and held to obligate surety to pay claims of materialmen who were entitled to fix a lien on property, but failed to do so because of default in giving statutory notice. *Texas Glass & Paint Co. v. Crowds* (Sup.) 193 S. W. 1072.

Where a contractor's surety guaranteed owner against mechanics' liens, the surety is liable, although the owner made payments to contractor with knowledge of outstanding, unpaid claims. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

**Right of action on contractor's bond.**—Where an owner of land requires of his contractor a bond binding him and his surety to pay all debts contracted for materials, materialmen may sustain an action against the contractor and the surety upon the bond. *General Bonding & Casualty Ins. Co. v. Waples Lumber Co.* (Civ. App.) 176 S. W. 651.

Contractor's surety bond held to run only to the owner, so that, where there was no provision evidencing such undertaking, it could not be sued upon by materialmen, directly or through the owner, as trustee, for their benefit. *Id.*

Where bond of a contractor for the building of a church was for use and benefit of all persons entitled to liens, a materialman who did not give proper statutory notice to church held entitled to sue sureties on bond for payment of his debt. *Buell Planing Mill Corp. v. Bullard* (Civ. App.) 189 S. W. 776.

Under art. 5621, and this article as amended by Acts 34th Leg. c. 143, held, that one furnishing machinery and tools does not receive the benefit of contractor's bond unless named therein; the word "material" not including such articles. *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574.

**Art. 5623b. Cumulative of other remedies.**—The provisions of Articles 5623 and 5623a shall not be construed to deprive or abridge material men, artisans, laborers or mechanics of any rights and remedies now given them by law, and by other articles of this chapter and the provisions of said Articles 5623 and 5623a shall be cumulative of the other provisions of this chapter. [*Id.*, § 3.]

**Explanatory.**—Sec. 3 provides that art. 5623b be added to title 86, ch. 2, to read as above.

Cited, *De Bruin v. Santo Domingo Land & Irr. Co.* (Civ. App.) 194 S. W. 654.

**Art. 5623c. Extent of liability of owner.**—Nothing in this Act shall be construed to fix a greater liability against the owner than the price or sum stipulated to be paid in the contract between such owner and contractor. [*Id.*, § 4.]

**Art. 5623d. Partial invalidity.**—It is provided hereby that if any of the provisions of this Act shall for any reason be held to be invalid or unenforceable, the remainder of this Act shall, nevertheless, not be affected thereby, but shall remain in full force and effect. [Id., § 5.]

**Art. 5628. [3301] Priority of lien.**

**Liberal construction.**—Arts. 5621, 5622, giving a mechanic's lien upon the improvements precedence over prior liens on the land, and authorizing the removal of such improvements, are in derogation of the common law, but, being intended to secure mechanics and materialmen in their pay, and under the express terms of Rev. St. 1879, p. 718, Gen. Prov. § 3, should be liberally construed to effect the purpose. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

**Priorities in general.**—As between a vendor's lien upon the land and the lien of a materialman who subsequently furnished lumber for improvements under a contract with a purchaser of the land under executory agreement, the equities were all with the materialman as respects the improvements. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

A vendor's lien on land sold has priority over a mechanic's lien thereon based upon the drilling of an artesian well for the buyer. *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721.

Liens given to secure notes at a date prior to the furnishing of materials by plaintiff are superior to plaintiff's right to a mechanic's lien. *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

**Sale of property.**—Where a mining company purchased from defendant the materials for a tramway, one end of which was to be situated upon land in which it had no interest, a purchaser of the land after the construction of the tramway took it free from any lien, regardless of whether he knew of the construction of the tramway and that the seller had not been paid. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

**Waiver of liens.**—An instrument waiving a vendor's lien in favor of a mechanic's lien held an offer to waive the lien in favor of any person who would erect a house on the land, and the house having been erected, the vendors were estopped to deny the validity of the waiver because executed by them alone. *Dilworth & Green v. Ed. Steves & Sons* (Civ. App.) 169 S. W. 630, writ of error dismissed *Dilworth v. Ed. Steves & Sons* (Sup.) 174 S. W. 279.

A waiver of a vendor's lien in favor of a mechanic's lien held to cover the cost of material and labor necessary to complete the building, but not taxes paid under the contract or attorney's fees in a note for the price. *Id.*

**Art. 5629. [3302] When improvements sold separately, purchaser may remove.**

**Liberal construction.**—See *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58; note under art. 5628.

**Right to remove improvements.**—See *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

**Art. 5631. [3304] On homestead, how fixed.**—When material is furnished, labor performed, improvements as defined in this chapter and title made, or erections or repairs made upon homesteads, if the owner thereof is a married man, then, to fix and secure the lien upon the same, it shall be necessary for the person or persons who furnish the material or perform the labor before such material is furnished or labor is performed, to make and enter into a contract in writing, setting forth the terms thereof, which shall be signed by the owner and his wife, and privily acknowledged by her, as is required in making sale of homestead. And such contract shall be recorded in the office of the county clerk in the county where such homestead is situated, in a well-bound book to be kept for that purpose; provided, when such contract has been made and entered into by the husband and wife and the contractor or builder, and the same has been recorded, as heretofore provided, then the same shall inure to the benefit of any and all persons who shall furnish material or labor thereon for such contractor or builder. [Acts 1889, p. 110, § 11; Act March 31, 1917, ch. 171, § 1.]

**Explanatory.**—The act amends tit. 86, ch. 2, Rev. Civ. St., so that art. 5631 therein shall read as above. Took effect 90 days after March 21, 1917, date of adjournment.

**In general.**—In an action to foreclose, the defense that the property was a homestead, and that the wife of the owner did not execute any written contract for the work

as required by statute to fix a lien thereon, was available under the general denial. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Where the plaintiff contracted with the defendant to pave the street in front of a lot held under a warranty deed, carrying title to the center of the street, the work was an improvement upon the entire lot, and defendant was entitled to a mechanic's lien, under this article. *Lewis v. Roach Manigan Paving Co.* (Civ. App.) 184 S. W. 680.

**Necessity of compliance with requirements.**—Where laborer fails to take measures provided by arts. 5621–5623, 5631, to secure lien on building intended for occupancy as homestead, he cannot enjoin its delivery by contractor to owner. *Norton v. Elliott* (Civ. App.) 184 S. W. 1096.

A mechanic's lien on a homestead can be acquired only by strict compliance with this article, and, under maxim that equity follows the law, one who fails to secure a mechanic's lien cannot claim an equitable lien. *Colleps v. George W. Smith Lumber Co.* (Civ. App.) 185 S. W. 1043.

**Sufficiency of contract.**—Where the owners of a homestead, desiring to improve the same, executed a note and contract reserving a mechanic's lien to the contractor, who transferred same to plaintiff's testator, who advanced the money, representing that all prior labor and materials had been paid for, the lien was valid as to all work done and materials furnished after the execution of the note and lien contract. *Melcher v. Higbee* (Civ. App.) 165 S. W. 478.

Where defendants purchased rural property for a home, and so notified complainants before purchasing materials to construct a house, they could not fix a lien under a contract not signed and acknowledged by the wife. *Conlee v. Merchants' & Planters' Lumber Co.* (Civ. App.) 173 S. W. 586.

### **Art. 5632. [3305] Notice of sub-contractor or laborer to owner of property.**

**Construction and operation.**—An original contractor cannot complain that notice of materials furnished a subcontractor was not given to him, since the statute only requires notice to be given to the owner of the building. *Wilson v. Sherwin-Williams Paint Co.* (Civ. App.) 160 S. W. 418.

**Effect of notice.**—Though notice of materials furnished a subcontractor was not given the owner of a building until after all the materials were furnished and the lien filed, yet where it was given before the owner had paid the original contractor, the materialman was entitled to enforce his lien. *Wilson v. Sherwin-Williams Paint Co.* (Civ. App.) 160 S. W. 418.

Where the owner of a building, after notice of the claim of a materialman for materials furnished a subcontractor, paid the original contractor, both he and the original contractor became personally liable to materialmen. *Id.*

Under the statute, an owner employing a contractor is not liable to a subcontractor or materialman for any amount paid to the contractor until notice is served, but from such notice he cannot make further payments to the contractor without incurring liability for any lien debt. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Petitions seeking to establish liability by reason of mechanics' liens held bad for failing to show the amount of the contract price unpaid to the contractor at the time of the notice, or the amounts thereafter paid to him. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

### **Art. 5635. [3308] Original contractor to defend suits by sub-contractors, etc.**

Cited, *Wilson v. Sherwin-Williams Paint Co.* (Civ. App.) 160 S. W. 418.

### **Art. 5637. [3310] Liens upon equal footing.**

Cited, *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

**In general.**—In suit to foreclose mechanic's lien, evidence that after it accrued one defendant had purchased subsequent liens on the same property without showing their amount is not a sufficient showing that the property exceeded in value prior liens thereon so as to warrant reversal of judgment refusing foreclosure. *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

### **Art. 5638. Enforcement of.**

**Discharge of surety.**—As between the owner and the building contractor, the contractor's surety is released by failure of the owner to retain 10 per cent. for payment of artisans and mechanics, as required by this article. *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

**Parties.**—In an action against an original contractor and the owner of a building for materials furnished to a subcontractor and to enforce the lien against the building, representatives of the subcontractor were not necessary parties, where he died insolvent and the only property he had was exempt. *Wilson v. Sherwin-Williams Paint Co.* (Civ. App.) 160 S. W. 418.



## CHAPTER TWO A

LIENS ON OIL, GAS, OR WATER WELLS, MINES, QUARRIES,  
AND PIPE LINES

Art. 5639a. Contracting laborers and materialmen entitled to lien.	Art. 5639e. Sale or removal of property; remedies of lienholders.
5639b. Subcontractors entitled to lien.	5639f. Remedy cumulative.
5639c. Priority of lien.	5639g. Extent of liability of owner.
5639d. Proceedings to fix lien; removal of property.	5639h. Partial invalidity.

**Article 5639a. Contracting laborers and materialmen entitled to lien.**—Any person, corporation, firm, association, partnership, materialman, artisan, laborer or mechanic, who shall, under contract, express or implied, with the owner of any land, mine or quarry, or the owner of any gas, oil or mineral leasehold interest in land, or the owner of any gas pipe line or oil pipe line, or owner of any oil or gas pipe line right of way, or with the trustee, agent or receiver of any such owner, perform labor or furnish material, machinery or supplies, used in the digging, drilling, torpedoing, operating, completing, maintaining or repairing any such oil or gas well, water well, mine or quarry, or oil or gas pipe line, shall have a lien on the whole of such land or leasehold interest therein, or oil pipe line or gas pipe line, including the right of way for same, or lease for oil and gas purposes, the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil well, gas well, water well, oil or gas pipe line, mine or quarry for which same are furnished, and upon all of the other oil wells, gas wells, buildings and appurtenances, including pipe line, leasehold interest and land used in operating for oil, gas and other minerals, upon such leasehold or land or pipe line and the right of way therefor, for which said material and supplies were furnished or labor performed. Provided, that if labor supplies, machinery, or material is furnished to a leaseholder the lien hereby created shall not attach to the underlying fee title to the land. [Act Feb. 13, 1917, ch. 17, § 1.]

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

**Art. 5639b. Subcontractors entitled to lien.**—Any person, corporation, firm, association, partnership or materialman, who shall furnish such machinery, material or supplies to a contractor or sub-contractor, or any person who shall perform such labor under a sub-contract with a contractor, or who as an artisan or day laborer in the employ of such contractor or sub-contractor, shall perform any such labor, shall have a lien upon the said land or leasehold interest therein, or oil pipe line or gas pipe line, including the right of way therefor, or lease for oil and gas purposes, the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil well, gas well, water well, oil or gas pipe line and the right of way therefor, mine or quarry, for which same are furnished, and upon all of the other oil wells, buildings and appurtenances, leasehold interest, oil or gas pipe line including right of way, or land used in the operating for oil, gas or other minerals upon said leasehold or land for which said material and supplies were furnished and labor performed, in the same manner and to the same extent as the original contractor, for the amount due him for material furnished or labor performed. [Id., § 2.]

**Art. 5639c. Priority of lien.**—The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien or encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies or specific improvements are placed or located, provided however, that any lien, encumbrance, or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided, for, shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the liens hereby created. [Id., § 3.]

**Art. 5639d. Proceedings to fix lien; removal of property.**—The liens herein created shall be fixed and secured and notice thereof shall be given and such liens shall attach and be enforced in the same manner, and materialman's statement, or the lien of any laborer herein mentioned shall be filed and recorded within the same time, and in the same manner as provided for in Chapter 2, Title 86, entitled "Liens," of the Revised Statutes of 1911 of the State of Texas, relating to liens for mechanics, contractors, builders and materialmen as the same now exists or may hereafter be amended. Whenever any person shall remove any such property to a county other than the one in which the lien has been filed, the lien holder may within 90 days thereafter file an itemized inventory of the property so removed, showing how much there is due and unpaid thereon, with the clerk of the county to which it has been removed, which shall be recorded in the materialman's lien records of such county, and such filing shall operate as notice of the existence of the lien and the lien shall attach and extend to the land or leasehold and other premises, properties and appurtenances to which said properties so removed shall attach, of the kind and character enumerated in Sections one and two hereof. [Id., § 4.]

**Art. 5639e. Sale or removal of property; remedies of lienholders.**—When the lien herein provided for shall have attached to the property covered thereby, neither the owner of the land nor the owner of said oil, gas or mineral leasehold interest therein, nor the owner of any gas pipe line or oil pipe line nor the contractor, nor the sub-contractor, nor the purchaser, nor the trustee, receiver or agent, of any such owner, lessor, lessee, contractor, sub-contractor or purchaser, shall either sell or remove the property subject to said lien or cause same to be removed from the land or premises upon which they were to be used, or otherwise sell or dispose of the same, without the written consent of the holder of the lien hereby created; and in case of any violation of the provision of this article, the said lien holder shall be entitled to the possession of the property upon which said lien exists wherever found, and to have the same then sold for the payment of his debt, whether said debt has become due or not. [Id., § 5.]

**Note.**—Sec. 6 makes it a misdemeanor to remove property subject to the lien, and is set forth post as art. 1430a of the Pen. Code.

**Art. 5639f. Remedy cumulative.**—The provisions of this Act shall not be construed to deprive or abridge materialmen, artisans, laborers, or mechanics of any rights and remedies, now given them by law, and the provisions of this Act shall be cumulative of the present lien laws. [Id., § 7.]

**Art. 5639g. Extent of liability of owner.**—Nothing in this Act shall be construed to fix a greater liability against the owner of the land or leasehold interest therein than the price or sum stipulated to be paid in

the contract under which such material is furnished, or labor performed. [Id., § 8.]

**Art. 5639h. Partial invalidity.**—It is hereby provided that if any of the provisions of this Act, shall, for any reason, be held to be invalid or unenforcible, the remainder of this Act shall, nevertheless, not be affected hereby, but shall remain in full force and effect. [Id., § 9.]

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### CHAPTER THREE

#### LIENS OF RAILROAD LABORERS

##### Article 5640. [3312] Railroad laborers, etc., to have lien, when.

**Who entitled to lien.**—This article applies to copartners who worked themselves and employed about 30 teams on grading work, especially where no profit was made on the job. *Texas Bldg. Co. v. Collins* (Civ. App.) 187 S. W. 404.

This article applies to a subcontractor's foreman or superintendent earning \$200 per month and doing an appreciable amount of manual labor. Id.

**Property subject to lien.**—Where town lands, legal title to which was held by bonus committee of railroad, was sold by their trustee under authority, such land was discharged from the trust, so that grade workers for road could not claim lien by virtue of contract between bonus committee and railroad, but had to look to money representing land. *King v. Lane* (Civ. App.) 186 S. W. 392.

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### CHAPTER FOUR

#### LIENS OF ACCOUNTANTS, BOOK-KEEPERS, ARTISANS, CRAFTSMEN, FACTORY OPERATIVES, MILL OPERATIVES, SERVANTS, MECHANICS, QUARRYMEN, COMMON LABORERS AND FARM HANDS

Art. 5644. Who entitled to liens.	Art. 5645. Liens, how fixed.
5644a. Newspaper workers in editorial, advertising and business departments.	5646. Wages, when paid.
	5647. Right of assignment.

##### Article 5644. Who entitled to liens.

See *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

**Priority.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, in force when oil well's chattel mortgage on machinery, etc., was given, lien of laborers engaged in drilling well, if given by the statute, was prior to that of the chattel mortgage, article 5671 not applying. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

**Persons entitled to lien.**—Where plaintiff contracted to perform personal services at a yearly wage and at the expiration of the first year agreed that payment of the balance due him should be deferred, that agreement did not preclude him from acquiring a laborer's lien for services performed during the second period of service. *Carthage Ice & Light Co. v. Roberts* (Civ. App.) 166 S. W. 12.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, intervener, who managed an abstract business, but performed much clerical work, held entitled to a laborer's lien. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

The assignee of claims of laborers engaged in drilling an oil well, who after foreclosure asserted a lien under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, superior to that of an existing chattel mortgage, had the burden of showing that such a lien was given by the statute. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, prescribing who are entitled to liens, party who threshed wheat with his machine for agreed consideration under contract had no lien on grain. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1918.

**Property subject to lien.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5644, and *Rev. St. 1911*, art. 5502, subs. 1, 6, and *Const. art. 1, § 3*, held that laborers drilling an oil well with the machinery of an oil company had no lien upon such machinery. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

**Art. 5644a. Newspaper workers in editorial, advertising and business departments.**—Whenever any newspaper worker in the editorial

or reportorial department of any newspaper, publication or periodical, whether daily or otherwise, also any solicitor, clerk or other employee in the advertising or business office of any newspaper, publication or periodical, whether daily or otherwise, shall labor or perform any service in any of the departments or offices of such newspaper or periodical, under or by virtue of any contracts or agreements, written or verbal, with any person, employer, firm, corporation, or his, her or their agent or agents, receiver, or receivers, trustee or trustees, in order to secure the payment of the amount due by such contract or agreement, written or verbal, the hereinbefore mentioned employees shall have a first lien upon all products, papers, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, subscription contracts, chattels, thing or things of value of whatsoever character that may be created in whole or in part by the labor of such persons, or necessarily connected with the performance of such labor or service which may be owned by, or in possession of the aforesaid employer, person, firm, corporation or his, her, or their agent or agents, receiver or receivers, trustee or trustees. [Act March 29, 1917, ch. 126, § 1.]

**Explanatory.**—The act amends title 86, chapter 4, Rev. Civ. St. 1911, by adding after art. 5644, a new article to be entitled 5644a. Took effect 90 days after March 21, 1917, date of adjournment.

#### Art. 5645. Liens, how fixed.

**Necessity of compliance with statute.**—In absence of compliance with statutes, farm hand, who contracted to work for wages to be paid out of cotton produced by his labor, had no lien for wages on the cotton, and its acquisition in payment of his services was subject to registered chattel mortgage. *Tom Eads & Co. v. Honeycutt* (Civ. App.) 185 S. W. 1030.

A statutory lien can exist only when it has been perfected in manner prescribed by statute authorizing it. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

**Computation of time for filing account.**—Indebtedness for farm labor performed by the day accrues weekly, regardless of an agreement that payment shall not be made until crop is sold, and hence to protect the lien the laborer must file his account within 30 days after the expiration of the week in which services were rendered. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

#### Art. 5646. Wages, when paid.

**Note.**—This article is to some extent superseded and modified by Act March 1, 1915, set forth ante as arts. 5246—98 to 5246—100, inclusive.

#### Art. 5647. Right of assignment.

**In general.**—Wages, being property, may be sold or assigned as other property if the transaction is in fact a sale and not a usurious loan under the guise of a sale. *Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

## CHAPTER SEVEN

### CHATTEL MORTGAGES

Art. 5654.	Reservation of title in chattel mortgages, and to be recorded.	Art. 5660.	Property not to be removed.
5655.	All instruments intended to operate as liens to be recorded.	5661.	Not to be recorded at length; mortgages on articles attached to realty described in instrument; form of instrument; separate record book.
5659.	Satisfaction to be entered.		

**Article 5654. [3327] Reservations of title, mortgages, and to be recorded.**

Cited, *Biggerstaff v. McGill* (Civ. App.) 175 S. W. 711.

**Conditional sales.**—Under this article, a transaction held to be a sale of a piano with reservation of title, so that where the instrument containing such reservation was not

registered, a purchaser from the buyer in good faith and for value took a good title. *Wing & Son v. Padgett* (Civ. App.) 160 S. W. 422.

Where a tenant absented herself from the leased building containing furniture conditionally bought, the act of the landlord in opening the door to enable the seller to remove the furniture was not a conversion. *Copeland v. Porter* (Civ. App.) 169 S. W. 915.

Plaintiff held entitled to recover the agreed price of personalty sold under an agreement reserving title, which this article treats as a sale and chattel mortgage. *Crenshaw v. Staples* (Civ. App.) 173 S. W. 1184.

Plaintiff held to have no right of action against a furniture company for conversion of furniture sold by it. *Freear-Brin Furniture Co. v. Merritt* (Civ. App.) 174 S. W. 859.

Refusal of plaintiff's tenant to pay rent as for a furnished house held to give plaintiff no right of action against defendant furniture company for conversion. *Id.*

In view of this article, held, that there was an absolute sale of an automobile, avoiding a policy which declared that a change in title should invalidate it. *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173.

An agreement by which plaintiff put a truck in defendant's possession to use, and pay over half its income till the price was paid, held to give him right of possession so long as he complied with it. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

That sellers of goods, shipping them, attached to the bill of lading a draft for the price to the order of the sellers, does not conclusively show an intention to withhold title until payment. *J. & G. Lippman v. Jeffords-Schoenmann Produce Co.* (Civ. App.) 184 S. W. 534.

Where seller retained a chattel mortgage on elevator which purchaser incorporated in a building he was constructing under contract, and owner of building completed it upon contractor's default, the mortgagee could not recover elevator or its purchase price from such owner. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

— **Mortgage.**—A reservation of title to a stock of goods to secure the purchase price, though declared a mortgage by this article, is not within article 3970, declaring void a mortgage on a stock of goods. *Mayfield Co. v. Harlan & Harlan* (Civ. App.) 184 S. W. 312.

**Necessity of registration.**—Under arts. 5654, 5655, a chattel mortgagee of a buyer held to acquire a lien superior to the lien of the seller having a mortgage subsequently recorded. *J. M. Radford Grocery Co. v. Pace* (Civ. App.) 172 S. W. 146.

Under this article, declaring an unregistered reservation of title to chattels to secure the purchase price void as to creditor, the seller, retaking, can hold them against nonlien creditors. *Mayfield Co. v. Harlan & Harlan* (Civ. App.) 184 S. W. 312.

**Validity as between parties.**—Intrusting goods to an agent for sale or return is a bailment within Pen. Code 1911, art. 1348, punishing thefts by bailees, Rev. St. 1911, art. 5654, rendering void unrecorded reservations of title in chattels as security for the purchase price, being inapplicable between the original parties. *Lee v. State* (Cr. App.) 193 S. W. 313.

**Who are "creditors."**—Under arts. 5490, 5654, landlord whose lien attached before registration of contract of conditional sale held to be a creditor entitled to protection under this article, and his lien, therefore, was superior to the vendor's lien. *Low v. Troy Laundry Machinery Co.* (Civ. App.) 160 S. W. 136.

**Art. 5655. [3328] All instruments intended to operate as liens to be recorded.**

Cited, *Maloney v. Greenwood* (Civ. App.) 186 S. W. 228.

**Filing, recording and registration.**—Under this article, declaring chattel mortgages without immediate delivery void as against creditors and subsequent mortgagees in good faith unless forthwith filed for record, held that a mortgage filed seven days after execution was not filed "forthwith," and was void as against mortgages subsequent to its filing. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

The mere omission to deposit and file a chattel mortgage "forthwith," as required by the statute, will not impair the effect of the record as to persons acquiring the rights in the mortgaged property at a date subsequent to the record. *Brinberry v. White* (Civ. App.) 167 S. W. 205.

Registration of a chattel mortgage held effectual, though the county clerk erroneously indexed it. *Murray Co. v. Randolph* (Civ. App.) 174 S. W. 825.

From the time a chattel mortgage is deposited for registration, as required by statute, it becomes constructive notice of the lien, unaffected by failure of the clerk to properly index the names of the parties. *Murray Co. v. Deal* (Civ. App.) 175 S. W. 718.

Where buyer of piano, giving notes secured by mortgage, executed instruments and mailed them to seller for inspection, which remained them the same day to county clerk of county of buyer's residence, mortgage was filed for record "forthwith," within this article. *Western Automatic Music Co. v. Fisher* (Civ. App.) 185 S. W. 675.

— **County of registration.**—Where the buyer of horses executed a mortgage on them in L. county, Tex., and, before the mortgage was recorded, took them to Oklahoma, where he retained them until he sold them to defendant in F. county, Tex., registration in L. county, after the removal, was ineffectual to preserve the lien as against defendant, under this article. *Sublett v. Hurst* (Civ. App.) 164 S. W. 448.

This article, requiring chattel mortgages to be filed in the office of the county clerk of the county where the property "shall then be situated," held to mean where it was situated when the mortgage was executed, and not when it was recorded. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

Where a resident of N. county purchased mules in E. county, and executed a mortgage therefor, and the mules were delivered to him there, where the seller resided,

and where the purchaser represented that he resided, and were not removed to N. county on the day of the sale, a duly recorded mortgage in E. county held prior to mortgages subsequently executed in and recorded in N. county. *Brinberry v. White* (Civ. App.) 167 S. W. 205.

The registration of a chattel mortgage in the county in which personal property was actually situated held sufficient, though it was occasionally moved into an adjoining county. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

— **Foreign registration.**—In view of policy of law declared by this article, chattel mortgage on mules, executed and registered in Oklahoma held not to be given effect on grounds of comity against innocent purchasers of property for value in Texas. *Farmer v. Evans* (Civ. App.) 192 S. W. 342.

— **Record as notice and effect as to priority.**—Where a wife, with the consent of her husband, executed a chattel mortgage upon crops grown on her separate estate, the record of such a mortgage was not constructive notice to a creditor of the husband of the execution thereof by the wife with the husband's consent and authority. *Hanks v. Leslie* (Civ. App.) 159 S. W. 1056.

The prior registration of a crop mortgage will not defeat the landlord's lien upon the crop conferred by arts. 5475-5477. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

An assignee of notes secured by a recorded chattel mortgage was not negligent in permitting the property to remain in the possession of one who he knew had purchased it from mortgagor so as to prevent him from recovering for its conversion by sale, in view of this article. *Nunn v. Padgitt Bros.* (Civ. App.) 161 S. W. 921.

Under this article declaring every chattel mortgage without immediate delivery absolutely void against subsequent mortgagees in good faith unless filed in the proper county office, held that "good faith" was synonymous with conscience and embraced those obligations imposed upon one dealing with property by the circumstances surrounding it at the time. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

Under arts. 5654, 5655, a chattel mortgagee of a buyer held to acquire a lien superior to the lien of the seller having a mortgage subsequently recorded. *J. M. Radford Grocery Co. v. Pace* (Civ. App.) 172 S. W. 146.

Definite extension of a debt secured by chattel mortgage entitles the mortgagee to priority as against a previous unrecorded mortgage covering the same property of which he has no notice. *Ridgill v. E. L. Wilson Hardware Co.* (Civ. App.) 178 S. W. 668.

The mortgagee in a chattel mortgage of cattle who had been told that a levy was going to be made under an execution against his mortgagor, and who endeavored to get the mortgage executed and filed before the levy, was not an innocent lienholder. *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

In absence of compliance with statutes, farm hand, who contracted to work for wages to be paid out of cotton produced by his labor, had no lien for wages on the cotton, and its acquisition in payment of his services was subject to registered chattel mortgage. *Tom Eads & Co. v. Honeycutt* (Civ. App.) 185 S. W. 1030.

Mortgagee of crops duly recorded prior to the mortgage of crops taken by the mortgagor's vendor to secure the purchase-money notes, held to have a lien prior to that of the vendor. *Caldwell, Hughes & Patterson v. Yarbrough* (Civ. App.) 186 S. W. 350.

Evidence held sufficient to show a levy of execution upon mortgaged chattels before the mortgage was recorded. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

— **Failure to file or record mortgage.**—In an action to reform and foreclose a chattel mortgage, it is not necessary for the petition to allege that it was registered; for as between the parties it was a valid and binding obligation without registration. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 990.

### Art. 5659. [3332] Satisfaction to be entered.

**Recording assignment.**—Under art. 5661, providing that all persons shall be charged by the registration of a chattel mortgage with notice thereof and of the rights of mortgagee's assignee, and this article, the failure of the purchaser of chattel mortgage notes to have their assignment to him recorded would not prevent one purchasing the property from being charged with notice of his rights under the mortgage. *Nunn v. Padgitt Bros.* (Civ. App.) 161 S. W. 921.

### Art. 5660. [3333] Property not to be removed.

Cited, *Biggerstaff v. McGill* (Civ. App.) 175 S. W. 711.

**Removal or transfer of property.**—While a chattel mortgagor in possession may sell the property in recognition of the mortgagee's right, a sale in denial of such right would be a conversion by the mortgagor. *Nunn v. Padgitt Bros.* (Civ. App.) 161 S. W. 921.

Where a mortgagee of chattels assigned the mortgage notes to plaintiff and subsequently purchased the mortgaged property, he became, in effect a mortgagor in possession as to plaintiff; and hence his subsequent sale of the property in denial of plaintiff's rights was a conversion. *Id.*

Where the value of converted property covered by a recorded chattel mortgage exceeds the debt, the judgment, in an action by a mortgagee for such conversion, should be for the debt, and, if the debt exceeds the value of the property, should be for such value. *Id.*

An assignee of notes secured by a recorded chattel mortgage was not negligent in permitting the property to remain in the possession of one who he knew had purchased it from mortgagor so as to prevent him from recovering for its conversion by sale, in view of art. 5665, making chattel mortgages void against subsequent purchasers, etc., unless registered, where the property remains in mortgagor's possession. *Id.*

That defendant agreed to advance money with which to purchase property covered by a recorded chattel mortgage only on condition that mortgagors should first convey to her that she might convey to her son and in that method give her what she considered greater security for the money advanced would not prevent defendant's purchase in denial of the mortgagee's rights from being a conversion of the property as to mortgagee. *Id.*

The fact that the county clerk advised purchasers of property covered by a recorded chattel mortgage that the property was not mortgaged would not prevent the purchasers of the property from being liable to the mortgagee for its conversion. *Id.*

That a chattel mortgagor denied, when he sold property covered by a recorded chattel mortgage, that the property was incumbered would not be a defense to the right of the mortgagee to sue the purchaser of the property for its conversion by the denial of such mortgagee's rights. *Id.*

Where chattels subject to a mortgage are sold with the consent of the mortgagee, purchasers acquire them free from the mortgage lien. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

By sale of part of mortgaged chattels with mortgagee's consent, but without waiving lien, neither mortgagee nor mortgagor injured or displaced any right of a junior mortgagee in respect to the security acquired under a mortgage made thereafter on the property not sold. *Keasler v. Wray* (Civ. App.) 171 S. W. 534.

Where a mortgagee of chattels consents to a sale of part, but without waiving lien, the buyers may require the mortgagee to first exhaust the lien on the remaining property before having recourse to the property sold, and, if that is sufficient to satisfy the debt, they become the absolute owners free from the lien. *Id.*

Under this article, defendants purchasing property with notice of a chattel mortgage, and removing it from the county, held liable for conversion. *Oswald v. Giles* (Civ. App.) 178 S. W. 677.

In view of art. 5655, the burden was on the purchasers from a mortgagor of mules to show that their dealing with the mortgaged property was in good faith. *Maloney v. Greenwood* (Civ. App.) 186 S. W. 228.

Mortgagee of cotton to be grown on certain farm, whose claim had been satisfied, held to have no interest in two of the three bales grown thereon and shipped by mortgagor to commission merchant who remitted proceeds to mortgagor. *Hunter v. Abernathy* (Civ. App.) 188 S. W. 269.

In view of this article any person aiding mortgagor in so disposing of proceeds as to defeat mortgagee's interest therein is guilty of wrongful conversion of property, although he is a factor or commission merchant. *Id.*

Under this article and because all persons are presumed to have notice of a recorded chattel mortgage, the pledgee of a ring for a loan to the mortgagor, who sells the ring on the mortgagor's default, to a person outside the county, is liable as for conversion. *Equitable Loan Soc. v. Taylor Bros. Jewelry Co.* (Civ. App.) 189 S. W. 516.

In suit by chattel mortgagees for conversion of mortgaged crop of cotton against purchasers of crop, trial court properly allowed defendants' claim for items for cotton picking and rent. *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

Where crop was mortgaged to secure advances to amount of \$300 and such other advances as mortgagee at his option might make, mortgagor can, no advances beyond amount stipulated having been made, dispose of his crop subject to lien for that amount. *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

**Art. 5661. [3334] Not to be recorded at length; mortgages on articles attached to realty described in instrument; form of instrument; separate record book.**—Chattel mortgages and other instruments intended to operate as mortgages or liens upon personal property shall not hereafter be recorded at length as heretofore required; and when deposited and filed in accordance with the provisions of this law, shall have the force and effect heretofore given to a full registration thereof, and all persons shall be thereby charged with notice thereof, and of the rights of the mortgagee, his assignee or representatives thereunder, but nothing herein contained shall be so construed as to in any manner affect the rights of any person under any instrument heretofore recorded as required by law. Provided, that when any machinery or other manufactured article is susceptible of being attached to the realty in such a way as to become a fixture thereto and is located upon real estate in such manner as the same may be deemed a fixture thereto, and at the time of its location upon such real estate there is a lien or mortgage evidenced by written instrument or any instrument reserving title in such machinery or other manufactured article to secure an indebtedness thereon, executed by the purchaser or owner of such machinery or other manufactured article at the time of its location on such real estate, and the instrument evidencing said lien, mortgage or reservation of title contains a description of said machinery or other manufactured article, as well as

the real estate upon which it is to be located or situated, reasonably sufficient to identify said real estate, and such instrument is registered under the provisions of this Act, then the registration of such instrument evidencing said lien, mortgage, or reservation of title as provided for by this Act, shall be notice to all persons thereafter dealing with or acquiring any right or interest in said machinery or other manufactured article, or the realty upon which the same is located or other improvements or property situated on said real estate, of all of the rights of the owners or holders of the indebtedness secured by said instrument the same as if recorded at length in the deed records or records of mortgages upon realty of the county where the real estate is situated, and such lien, mortgage or reservation of title upon or to such machinery or other manufactured article shall be as to such machinery and other manufactured article superior to any lien or rights existing in any one to said real estate or other improvements or other property located and situated thereon existing at the time of the location of said machinery or other manufactured article thereon, but nothing herein contained shall be held to give the holder of such lien, mortgage or reservation of title any right to or claim upon the real estate save and except the right to establish and foreclose his lien, mortgage or reservation of title upon such machinery or other manufactured article, and to enforce his rights thereto under the instrument evidencing his lien, mortgage or reservation of title, as in other cases of liens upon personal property hereunder. Provided, further that all such instruments shall be endorsed on the back thereof, to wit, "Liens on machinery situated on realty," and shall be registered in the county the real estate is located in the same manner as other chattel mortgages except that there shall be kept, indexed and recorded, as now herein provided for chattel mortgages, a separate book to be endorsed "chattel mortgage records on realty." The record thereof shall in addition to the other requirements of this Act contain a brief description of said real estate to which said fixtures are to be attached. [Acts 1879, p. 134, § 7; Act March 30, 1917, ch. 153, § 1.]

**Explanatory.**—The act amends Art. 5661, Rev. Civ. St. 1911. Sec. 2 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

**Former law.**—A purchaser of real estate is unaffected by a recorded chattel mortgage on a fixture becoming a part of the realty. *Murray Co. v. Randolph* (Civ. App.) 174 S. W. 825.

Purchaser of real estate with mortgaged fixture held not charged with notice of chattel mortgage record. *Phillips v. Newsome* (Civ. App.) 179 S. W. 1123.

If when a silo was being erected on the land it had been understood and agreed between the sellers and the purchaser that it might be severed and removed, it would continue to be personalty, even as against purchasers of the land with knowledge. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

Where seller retained a chattel mortgage on elevator which purchaser incorporated in a building he was constructing under contract, and owner of building completed it upon contractor's default, the mortgagee could not recover elevator or its purchase price from such owner. *First Nat. Bank v. Lyon-Gray Lumber Co.* (Civ. App.) 194 S. W. 1146.

**Recording assignment.**—Under the provision of this article that all persons shall be charged by the registration of a chattel mortgage with notice thereof and of the rights of mortgagee's assignee, and article 5659 requiring a mortgage to be satisfied by acknowledging satisfaction upon the registry, the failure of the purchaser of chattel mortgage notes to have their assignment to him recorded would not prevent one purchasing the property from being charged with notice of his rights under the mortgage. *Nunn v. Padgett Bros.* (Civ. App.) 161 S. W. 921.

#### DECISIONS RELATING TO SUBJECT OF CHAPTER SEVEN IN GENERAL

**2. Chattel mortgages—Distinguished from other transactions.**—An assignment of rents made by assignor for purpose of accepting such rentals from a threatened foreclosure sale of the land, and accepted by assignees to secure attorney's fees due them, constitutes only a mortgage, and not an absolute conveyance. *J. B. Farthing Lumber Co. v. Williams* (Civ. App.) 194 S. W. 453.

**3. — Property which may be the subject of mortgage.**—Stock subscribed for with a future promise to pay and held pending payment vests the subscriber with but a quali-



fied right therein, not capable of being mortgaged. *Cattlemen's Trust Co. of Ft. Worth v. Turner* (Civ. App.) 182 S. W. 438.

A chattel mortgage on crops not in existence and to be grown on land of the mortgagor will be enforced as a lien on the crops when they come into the possession of the mortgagor when their acquisition from the land was contemplated when the mortgage was made. *Caldwell, Hughes & Patterson v. Yarbrough* (Civ. App.) 186 S. W. 350.

4. — **Debts which may be secured.**—A mortgage can be given to secure future debts or advances. *Tinkham v. Wright* (Civ. App.) 163 S. W. 615; *Law Sprinkle Mercantile Co. v. Hause* (Civ. App.) 184 S. W. 737; *Coleman Nat. Bank v. Cathey* (Civ. App.) 185 S. W. 661; *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

A stipulation in a chattel mortgage that it should be security for any other debt due from the mortgagor held valid. *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

As between parties chattel mortgage for future advances is valid for whatever advances may be made by mortgagee and accepted by mortgagor, though in excess of amount mortgagee agreed to furnish, where it was intention of parties that such additional advances should be secured. *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

Where amount to be advanced by chattel mortgagee is stipulated, parties may increase it by oral agreement which will be enforced as between them where mortgage provides that mortgagee may furnish an additional amount. *Id.*

10. — **Description of property.**—A chattel mortgage of cotton described as 10 bales of crop of 1910 then being picked and to be ginned in F. county, owned by the mortgagor free from all liens, held not void for uncertainty, since it could be identified by showing what cotton the mortgagor was having picked when it was executed. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

A chattel mortgage, mentioning seven horses and mules but not describing them except by color, age, and height, and not stating that the mortgagor was the owner of the property or where it was situated, held void for uncertainty as to two of the mortgagor's mules. *Id.*

A recorded chattel mortgage of one "Maxwell 4-passenger automobile, factory No. 32466," was not such a description as to charge the purchaser of a "five-passenger Maxwell automobile, model 1-3 car, No. 2466," with notice that the car purchased was the one covered by the mortgage. *McQueen v. Tenison* (Civ. App.) 177 S. W. 1053.

Description in a recorded chattel mortgage "one Jersey cow, unbranded, bought from Willie Gardner, Asherton, Tex.," held sufficiently definite to charge a purchaser from the mortgagor with constructive notice of mortgage. *Conley v. Dimmit County State Bank* (Civ. App.) 181 S. W. 271.

A description in a chattel mortgage held sufficiently definite to warrant foreclosure; parol evidence being admissible. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

The registration of a chattel mortgage, in which a mule was described only as a "bay horse mule, 15 hands high, five years old," without stating its situs was not sufficient to charge third persons with notice of the mortgagee's rights. *Maloney v. Greenwood* (Civ. App.) 186 S. W. 228.

Description in mortgage of a certain black mule, which was in fact not black, but dark brown or blue, held not to put purchasers from the mortgagor upon inquiry to ascertain, when they dealt with it, whether it was identical with the black mule described in the mortgage. *Id.*

A mortgage of the crops to be grown on the "Lewis Place" owned by mortgagor, in a certain county, held sufficiently to describe the premises to be notice. *Spiller v. W. J. Mann & Co.* (Civ. App.) 187 S. W. 1014.

14. **Construction and operation—Debts secured.**—A mortgage executed to secure a note of \$100 and a future indebtedness does not secure an indebtedness incurred after full settlement of the indebtedness contemplated by the parties when the mortgage was executed. *Cantrell v. Cawyer* (Civ. App.) 162 S. W. 919.

A chattel mortgage will secure a future debt of the mortgagor if that be the intention of the parties. *Pouiter v. Weatherford Hardware Co.* (Civ. App.) 166 S. W. 364.

A chattel mortgage executed by a farmer to a hardware company to secure certain notes and "for all other amounts I may now be due or hereafter become due," as well as for the purpose of securing a line of credit from the mortgagee, held not to cover a judgment against mortgagor in favor of a third person which mortgagee purchased. *Id.*

A chattel mortgage, by reason of its recital, held to secure a note subsequently given. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

For a chattel mortgage to secure a future debt, it need not show the amount of such debt, or by its terms limit the time within which it shall be incurred. *Id.*

Parties to a chattel mortgage may agree that it shall secure a later debt, or one different from that described in the mortgage. *Coleman Nat. Bank v. Cathey* (Civ. App.) 185 S. W. 661.

A chattel mortgage, conditioned to be annulled by payment of a note "unless the holder of said note shall elect to hold said property to secure any other liability, or liabilities of mine in the hand of the holder," secures a note of mortgagor, although not primarily payable to mortgagee, which is owned by mortgagee at the time of payment of the first note. *Id.*

A chattel mortgage, with a printed clause covering future indebtedness up to \$150, held not to cover an indebtedness of \$155 for a stump puller, where the parties intended the clause to cover future indebtedness for store supplies. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

15. — **Property mortgaged and estates and interests of parties therein.**—A chattel mortgage of 10 bales of cotton of the crop of 1910 then being picked and to be ginned

in a certain county would not convey any specific bales, but in equity would be sufficient to convey an interest in the cotton described in the proportion of 10 bales to the entire amount then being picked by the mortgagor. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

Descriptions in mortgages are to be interpreted in the light of the facts known and before the minds of the parties at the time of their execution. *Conley v. Dimmit County State Bank* (Civ. App.) 181 S. W. 271.

A mortgage of the crops to be grown and the rent note on a place for a year held to cover all interest of the mortgagor in the rents. *Spiller v. W. J. Mann & Co.* (Civ. App.) 187 S. W. 1014.

Mortgagee of next three bales of cotton raised on farm after three bales covered by prior mortgage held to have no interest in two of only three bales raised; first mortgagee's claim having been satisfied. *Hunter v. Abernathy* (Civ. App.) 188 S. W. 269.

Son held not to have placed upon his own crop the lien of a chattel mortgage on his father's crop by promising to pay his father's indebtedness secured by such chattel mortgage. *Slagle v. First State Bank of Paris* (Civ. App.) 189 S. W. 347.

15½. — **Renewal.**—Renewal chattel mortgage has all binding force of original mortgage. *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

17. **Priorities of mortgages.**—In view of Rev. Civ. St. 1911, art. 5475, giving a landlord a preference lien upon crops, etc., for rent, held, that a landlord's lien, operative before the tenant's crop was planted, was superior to the lien of a previously executed chattel mortgage. *Ivy v. Pugh* (Civ. App.) 161 S. W. 939.

Where a tenant on October 7th mortgaged 10 bales of cotton of the crop of 1910 then being picked in a certain county, a showing by the landlord that he purchased 12 bales of the tenant after October 13th held not to support a judgment in favor of the mortgagee against the landlord for the excess over the landlord's lien. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

A landlord being preferred, his lien for supplies furnished a tenant to enable the latter to make a crop takes precedence over a crop mortgage. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

The lien provided by Acts 24th Leg. c. 21, § 18 (Rev. St. 1911, art. 5009), for water furnished land for irrigation purposes, is enforceable against crops of tenant for water furnished tenant under contract and is superior to crop lien under mortgage. *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

Where chattel mortgage for future advances provided for furnishing of stipulated amounts and authorized mortgagee at his option to make other advances, held, that other liens created before such optional advances were made were superior to additional advances, optional agreement being unilateral. *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

A mortgagee secured by a crop mortgage for future advances, having made optional advances beyond amount specified, held entitled to lien to amount at which his mortgage was listed in subsequent mortgage. *Id.*

19. — **Notice affecting priority.**—Party to whom mortgaged pianos were delivered, without mortgagee's consent, for repairs and tuning held not entitled to retain possession until charges were paid as against the mortgagee, where it knew of the mortgage. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

The possession of a tenant being notice of the landlord's right, a mortgagee of the tenant's crop cannot take in preference to the landlord's lien for rent and advances as an innocent lienholder. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

Sheriff's return on a prior execution sale of house held not notice to one foreclosing mortgage on fixtures therein, and removing them. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

One foreclosing mortgage on fixtures in a house, and removing them, held not charged with notice of right of purchaser at execution sale, because of presence of a tenant; he being the prior owner. *Id.*

20. **Rights and liabilities of parties—Possession or control of property.**—Chattel mortgage, authorizing mortgagee to take possession upon default or if he felt unsafe, held valid and to entitle him to take possession without the mortgagor's consent, if he could do so peaceably. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

A chattel mortgage which provides that on default in the payment of the notes at maturity, or in case the mortgagor shall violate any of the conditions of the mortgage, etc., the mortgagee shall have the right to immediate possession, gives the mortgagee the right to immediate possession for nonpayment of the notes at maturity. *State Exchange Bank v. Smith* (Civ. App.) 166 S. W. 666.

Where commission merchant, to whom mortgagor shipped cotton, defending as against third mortgagee, was not claiming under prior mortgages, he could not insist that the cotton was subject thereto. *Hunter v. Abernathy* (Civ. App.) 188 S. W. 269.

Where mortgagor of cotton, defending as against a third mortgagee, was not claiming under prior mortgages, he could not insist that the cotton was subject thereto. *Id.*

21. — **Conversion of or injury to property.**—In an action for conversion of mortgaged cotton, evidence held to warrant a finding that the cotton purchased by defendants included that mortgaged. *Houssels v. Coe & Hampton* (Civ. App.) 159 S. W. 864.

Whoever, with actual or constructive notice of the chattel mortgage, is directly or indirectly the instrumentality through which a conversion of mortgaged property is brought about is liable for the conversion. *Nunn v. Padgitt Bros.* (Civ. App.) 161 S. W. 921.

Party who acquired possession of mortgaged pianos without the consent of either the mortgagor or mortgagee held to have converted them by refusing to deliver them to

the mortgagee, unless its charges for storage, tuning, and repairs were paid, and unless the mortgagor consented to such delivery. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

In action for conversion against party claiming right to hold mortgaged pianos until its charges for storage, tuning, and repairs were paid, evidence held insufficient to show that it was given possession by the mortgagor. *Id.*

Where a second mortgagee foreclosed his lien and bought in the mortgaged property, denying the rights of the prior chattel mortgagee, there was a conversion, and he was liable for the purchase price. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

Where a subsequent chattel mortgagee converted the property, sums collected from him should be credited on the judgment against the mortgagor, while sums collected from the mortgagor should be credited on the judgment against such mortgagee. *Id.*

22. — **Measure of damages for conversion.**—A bank which had a chattel mortgage upon an undivided interest in certain sheep, subject to a prior mortgage on the entire interest which the bank held for collection, could recover from the purchaser of the sheep, on the ground of a conversion hostile to the mortgage, only one-half of the value thereof remaining after the purchaser had paid the amount necessary to satisfy the first chattel mortgage. *First Nat. Bank v. Dunlap* (Civ. App.) 159 S. W. 502.

In an action for conversion of mortgaged cotton, the measure of damages is the fair market value of the property at the time of the conversion, provided such value does not exceed the amount sued for. *Houssels v. Coe & Hampton* (Civ. App.) 159 S. W. 864.

The measure of damages for the conversion of mortgaged property is the market value of the property taken, with interest from the date of conversion. *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

In action for converting mortgaged cotton, answer alleging that selling price was paid plaintiff, and that plaintiff was paid market value, less cost of picking, held to state a meritorious defense. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

23. **Assignment of mortgage or debt.**—Where mortgaged property is turned over to the mortgagee to apply the proceeds on the debt, a junior mortgagee who acquires the property with notice thereof, on taking an assignment of the debt and senior mortgage, must apply the proceeds accordingly to discharge the debt secured by that mortgage. *Keasler v. Wray* (Civ. App.) 171 S. W. 534.

Assignee of chattel mortgage held not required, in order to establish his lien upon the property, to prosecute a suit against a nonresident mortgagor. *Oswald v. Giles* (Civ. App.) 178 S. W. 677.

24. **Waiver or loss of lien.**—A chattel mortgagee failing to take immediate possession of the chattels on the nonpayment of the debt at maturity and accepting partial payments or written consent, on a compromise with the mortgagor of the indebtedness after the levy of the attachment, to take possession of the property in controversy when released from the levy, is not thereby estopped from maintaining the statutory action for the trial of the right of property. *State Exchange Bank v. Smith* (Civ. App.) 166 S. W. 666.

25. **Payment, release or satisfaction.**—Where a chattel mortgage was given to secure the payment of a note and for any additional goods furnished during the year, and the mortgagor paid the note prior to the end of the year, the chattel mortgage did not secure the payment of the debt contracted for goods purchased after the payment. *John E. Morrison Co. v. Butler* (Civ. App.) 158 S. W. 1185.

Execution of larger note by the maker of a smaller note secured by a chattel mortgage, upon an agreement that the holder and mortgagee would surrender the note and cancel the mortgage, held to operate as a present cancellation of the mortgage. *Helmke v. Uecker* (Civ. App.) 161 S. W. 17.

Such agreement held, if not a present cancellation of the mortgage, to be a covenant to cancel it, enforceable in a suit on the mortgage note. *Id.*

The giving of a renewal note does not operate to cancel a chattel mortgage given to secure the original note. *Cantrell v. Cawyer* (Civ. App.) 162 S. W. 919.

A mortgage lien on a stock of goods is not released by the mortgagee joining in a bill of sale of the goods, it being agreed with the purchasers that it should not be delivered till the mortgagee was paid. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

Where a creditor held chattel mortgages on a debtor's cotton and stump puller, a credit obtained by delivering some of the mortgaged cotton to the mortgagee should be applied on the cotton mortgage. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

26. **Foreclosure.**—The proceeds of the sale of property mortgaged to a bank to secure a note could not, without the debtor's consent, be applied to the payment of another of his debts, not secured by the mortgage, and the debtor's consent to so apply such proceeds cannot be presumed. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

On facts stated, held, that the holder of a larger note executed by the maker of a smaller note secured by a chattel mortgage was entitled to judgment on the larger note, with foreclosure of the mortgage to the extent of the smaller note. *Helmke v. Uecker* (Civ. App.) 161 S. W. 17.

Provisions, in chattel mortgages that if default was made in any payments and they were given to an attorney for collection, or if suit was brought thereon, an additional 10 per cent. on the principal should be added as collection fees, held to cover fees only upon the principal remaining unpaid at the time the claim for fees accrued, and not fees upon the original principal. *Marshall v. G. A. Stowers Furniture Co.* (Civ. App.) 167 S. W. 230.

A chattel mortgage may be foreclosed by action, though containing no power of sale. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

Evidence in a suit to enforce liens against well-driving machinery sold to a contractor with defendant county held sufficient to support a finding that machinery belonged to the contractor, and not to county. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

## CHAPTER EIGHT

### OTHER LIENS

Art.	Art.
5663. In favor of hotels, etc.	5666. Where no price agreed upon.
5664. Livery stable keepers.	5667. Sales may be made for charges.
5665. Possession may be retained, when.	5671. Other liens, etc., not affected.

#### Article 5663. [3318] Lien in favor of hotels and boarding houses.

Cited, *Johnson v. State*, 71 Cr. R. 206, 159 S. W. 849.

**Ownership of property.**—Under this article, property in the possession of hotel guest is subject to a hotel keeper's lien, though it belonged to a third person, if the proprietor had no notice of the true ownership. *Kieffer v. Keough* (Civ. App.) 188 S. W. 44.

**Persons whose property is subject to lien.**—A person who rented an unfurnished room and furnished it with his own furniture at a rooming house, and was furnished with bell-boy service, lights, water, heat, etc., held a guest of a hotel, and his property subject to a lien for his unpaid hotel bill under this article. *Kieffer v. Keough* (Civ. App.) 188 S. W. 44.

**What constitutes "hotel."**—A rooming house, where both furnished and unfurnished rooms are rented by the day, week, or month, and bell-boy service, lights, water, phone, and laundry service furnished, held a hotel within this article. *Kieffer v. Keough* (Civ. App.) 188 S. W. 44.

#### Art. 5664. [3319] Lien of livery stable keepers and pasturers.

Cited, *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

**Duties of livery stable keepers.**—Livery stable keepers were under duty to use ordinary care as to boarded horse while in their custody and to render proper medical aid after it was injured. *Attaway v. Schmidt & Madigan Grocery Co.* (Civ. App.) 188 S. W. 1010.

**Right to lien.**—One pasturing cattle for a purchaser, who had given a note and a chattel mortgage for the purchase money and who had agreed to pay \$600 on account of pasturage, had a lien upon the cattle remaining in his possession as against the purchaser as security for his debt. *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

**Conversion of animals subject to lien.**—Plaintiff, who, under an agreement with the owner, had a lien upon horses for their food and care, had a right of action for their conversion by a purchaser from the owner, who did not discharge the lien. *Liberal Loan & Realty Co. v. Meyers* (Civ. App.) 186 S. W. 433.

#### Art. 5665. [3320] Mechanics may retain possession of article repaired, when.

Cited, *Malcolm v. Sims-Thompson Motor Car Co.* (Civ. App.) 164 S. W. 924.

**Extortionate charges.**—Where plaintiff who repaired an automobile demanded a greater price than that agreed upon, withholding possession until he could compel the payment of such price, his possession was unlawful. *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030.

**Effect of surrender of possession.**—Where plaintiffs who repaired defendant's automobile voluntarily surrendered possession of it before the repair charges had been paid, their right to a lien under arts. 5665, 5666, is waived. *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030.

Where defendant, a mechanic, surrendered an automobile on which it had made repairs to plaintiff, the owner, without payment, and permitted the machine to remain in the owner's possession for several months, when it was voluntarily carried to the mechanic for other repairs, which were paid for, its lien for the original repairs was lost, though no rights of a third person had intervened, and an instruction authorizing a recovery for deterioration, if any, the reasonable rental value of the automobile, and in addition an award of possession, or in lieu thereof what it was reasonably then worth on the market, was proper. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

**Rights of third persons.**—Party to whom mortgaged pianos were delivered, without mortgagee's consent, for repairs and tuning held not entitled to retain possession until charges were paid as against the mortgagee, where it knew of the mortgage. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

**Art. 5666. [3321] Where no price is agreed upon.**

Cited, *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

**Extortionate charges.**—See *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030; note under art. 5665.

**Effect of surrender of possession.**—See *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030; note under art. 5665.

**Art. 5667. [3322] When property may be sold for charges.**

Cited, *Dickensheets v. Hudson* (Civ. App.) 167 S. W. 1097.

**Art. 5671. [3326] Other liens and contracts not affected.**

Cited, *Texas Bank & Trust Co. of Beaumont v. Smith* (Sup.) 192 S. W. 533.

**Application.**—Under art. 5644, in force when oil well's chattel mortgage on machinery, etc., was given, lien of laborers engaged in drilling well, if given by the statute, was prior to that of the chattel mortgage, article 5671 not applying. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

**Right to lien.**—Under this article a company repairing and storing automobiles is entitled to a lien on a car for storage after the owner improperly refused to pay for repairs and remove it. *Malcolm v. Sims-Thompson Motor Car Co.* (Civ. App.) 164 S. W. 924.

## DECISIONS RELATING TO SUBJECT-MATTER OF CHAPTER IN GENERAL

1. **Liens in general.**—In an action for fraud in an exchange of property, defendant having exchanged the property received with other property for land in M., plaintiff was entitled to an equitable lien on the entire M. property for the damages sustained in the absence of proof by defendant as to the value the additional property added to that received from plaintiff to form the consideration of the M. property; and this though a part of such consideration was defendant's homestead. *Sanders v. Dunn* (Civ. App.) 158 S. W. 1041.

A lien is a legal claim or hold on property, either real or personal, as security for the payment of some debt or obligation. *Hunker v. Estes* (Civ. App.) 159 S. W. 470.

Where owner of dam and water power in conveying other land agreed to erect and maintain irrigation pump and furnish water and subsequently conveyed the dam to parties who assumed performance of such contract, plaintiff held to have no lien on the dam property for his damages for nonperformance. *Abney v. Roberts* (Civ. App.) 166 S. W. 408.

Where a contract for sale of onions to be grown was repudiated by buyer before time for performance, seller could sell them and recover the difference. *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 187 S. W. 747.

The purchaser of a warranted plow, under false and fraudulent representations, who rescinded, could not, unless the seller was insolvent, have a lien on the plow for the amount of any damages decreed him. *Hackney Mfg. Co. v. Celum* (Civ. App.) 189 S. W. 988.

Recitals of a note held to constitute a lien on mules referred to therein. *T. W. Marse & Co. v. White* (Civ. App.) 189 S. W. 1027.

In an exchange of land, party having exhausted his defenses against an incumbrance which he had not agreed to pay, and a judgment having been rendered against him, held entitled to a judgment against the other and a lien on the land received by the latter. *Neeley v. Lane* (Civ. App.) 193 S. W. 390.

2. **Waiver or release of lien in general.**—When a contract for the sale of land is rescinded, it is wholly abrogated, and the rescission carries with it a provision in the contract that the vendor should have a lien upon crops raised on the land by the vendee. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

3. **Vendor's lien—In general.**—A note executed by a vendee to a third person furnishing the funds to pay the vendor, and reserving a vendor's lien, is good in the hands of the payee. *Roberts v. Prather* (Civ. App.) 158 S. W. 789.

Unless expressly waived, a vendor's lien to secure the purchase price arises upon the sale of land. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

If a part of the price is the assumption of an indebtedness due a third person having no claim on the land, a lien arises in favor of such third person. *Id.*

A purchase-money note for four leagues of county school land, dated October 9, 1902, payable 40 years after date, could not be legally paid off on July 1, 1912, but constituted a valid blanket lien on all the four leagues. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

4. — **Lien reserved in contract or conveyance.**—A vendor's lien recited in a note given in return for a deed held enforceable as being an integral part of the only transaction whereby plaintiff could claim title to the land. *Page v. Vaughan* (Civ. App.) 173 S. W. 541.

Decree of foreclosure of vendor's lien held erroneous, the description in the deed being defective, while the only description in the purchase notes was by reference thereto, there being no proof as to the intent or that there was a mutual mistake. *Stewart v. Thomas* (Civ. App.) 179 S. W. 886.

Where deed recited payment of cash consideration, notes which grantors took up by deeding land to grantee cannot, because of recital in deed that they were of even date therewith, establish that they were lien on land. *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

Express provision retaining vendor's lien will be given effect notwithstanding ambiguous recitals in the consideration clause as to whether a lien was retained for the purchase-money notes, one of which was secured by mortgage on other lands. *Archenhold v. Branch* (Civ. App.) 193 S. W. 457.

5. — **Implied or equitable lien.**—Where part of the consideration for contracts by a traction company to construct a particular street car line was the conveyance of certain real estate, an implied vendor's lien arose in favor of the grantor to secure performance of the contract by the traction company. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Where grantee took a deed in blank and on sale by him filled in the name of his purchaser, the first grantee had an implied equitable lien, though not connected with the record title. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

An implied equitable lien in favor of the vendor of realty taking a purchase-money note arises incidental to the contract of sale, on the equitable principle that when a vendor sells his land upon a deferred consideration, he is entitled to a lien, which equity, not the contract, by virtue of the transaction creates in his favor. *Id.*

In absence of distinct waiver, equity raises lien by implication in favor of a vendor to secure unpaid purchase money. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

6. — **Operation and effect.**—A vendor of real estate retains the superior title until the purchase money is paid. *Ivy v. Pugh* (Civ. App.) 161 S. W. 939.

The vendor of land with a reservation of lien to secure purchase money holds the legal title thereto, and may pass the purchasers' equitable title, with the latter's consent, by conveyance of his own legal title. *O'Neal v. Bush & Tillar* (Sup.) 173 S. W. 869, reversing judgment *Bush & Tillar v. O'Neal* (Civ. App.) 140 S. W. 242. Judgment reversed on rehearing (Sup.) 177 S. W. 953.

Where land is conveyed by deed retaining an express lien to secure part of the purchase money, legal title to the land remains in the vendor until the purchase money is paid. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

The title remaining in the vendor is held by him for the benefit alone of the holder of the purchase-money notes so long as they remain unpaid. *Smith v. Tipps* (Civ. App.) 191 S. W. 392.

Where a deed contained covenants of warranty of title and recited execution of notes for purchase money and that such notes were vendor's liens upon land conveyed, such deed with notes constituted an executory contract to sell land. *Key v. Jones* (Civ. App.) 191 S. W. 736.

Vendor's lien created by express reservation exists as long as debt it secures, unless it is discharged by some valid agreement between the parties or by payment of the debt. *Archenhold v. Branch* (Civ. App.) 193 S. W. 457.

7. — **Amount and extent of lien.**—When vendor's lien is expressly reserved against land to secure payment of series of notes, lien secures all of notes co-ordinately, and none are entitled to priority as between assignees. *Archenhold v. Branch* (Civ. App.) 193 S. W. 457.

9. — **Priority of lien.**—Where a contract between the owner of land and the purchaser who was admitted into possession without payment of any of the purchase price, created a lien upon the crops to be grown, and was filed and registered before the crops were grown, it was sufficient notice under the statute to perfect the owner's lien. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

Priority of liens of the holders of different vendor's lien notes determined. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

Execution and record of indemnity note and trust deed by original purchaser of land held to create a lien in favor of the holders of the note subject to the lien of the holder of vendor's lien notes previously acquired by a subsequent purchaser of the property. *Grubbs v. Eddleman* (Civ. App.) 179 S. W. 91.

A holder of vendor's lien notes held not to have a lien for improvements superior to the lien of the holders of a note to indemnify indorsers upon a note given for the price. *Id.*

Where a mortgagee took a deed of the mortgaged land in satisfaction of the debt and in ignorance of a vendor's lien upon the land, made after the mortgage, the mortgage lien did not merge with the equity of redemption, but remained, superior to the vendor's lien. *Tankersley v. Jackson* (Civ. App.) 187 S. W. 985.

The owner of land and his immediate grantee, both having reserved liens and the last purchaser having assumed payment, held to have prior liens over that of the judgment creditor of the purchaser. *Johnson v. Morgan* (Civ. App.) 189 S. W. 324.

Subsequent creditors who furnished fuel and oil to a public service corporation, but who did not fix any lien in the manner provided by statute, are not entitled to preference over the pre-existing vendor's lien. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

10. — **Assignment of lien or claim for purchase money.**—*Bona fide* purchasers, see arts. 582, 6824, 6842.

The renewal of a debt due from a real estate purchaser to the assignee of notes for the price secured by a vendor's lien operates as a renewal of the lien, but the renewal cannot affect the rights of a third person accruing prior to the renewal and while the original debt and lien were barred. *Stansberry v. Boogherly* (Civ. App.) 158 S. W. 247.

Though a vendor's lien note is barred by limitations, a subsequent transfer by the vendor of the legal title to the assignee of the note is valid, and the assignee takes title superior to that of the purchaser, but the bringing of a suit on the debt and obtaining of a decree of foreclosure of the vendor's lien concludes any assertion of the superior title remaining in the vendor while the purchase money is unpaid. *Id.*

A vendor of land who retained a vendor's lien thereon owns a superior title to the land; and while he cannot convey the equitable title owned by his vendee, he may convey his legal title. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

Where the payee of a series of notes severally transfers them all to different persons, the transferees are entitled to share equally in the proceeds of the security. *Martin v. Gray* (Civ. App.) 159 S. W. 118.

The rule that where the payee indorses part of a series of notes and retains the balance, the transferee has a prior right to the proceeds of the security of the notes does not apply, where the indorsement was without recourse. *Id.*

Where part of a series of vendor's lien notes is indorsed without recourse, and an assignment, which states that the notes are prior incumbrances on the land, the transferred notes are entitled to priority in the distribution of proceeds of the security. *Id.*

When several vendor's lien notes given for the same land are assigned to different parties all have equal rights to have satisfaction out of the land or the proceeds on foreclosure, without reference to the order of assignment or maturity. *Armstrong v. Parr* (Civ. App.) 162 S. W. 1003.

Where the assignee of vendor's lien notes accepted them under an agreement that they should be subject to other notes retained by the vendor, that agreement is binding, no rights of any innocent purchaser intervening, even though they were merely indorsed in blank. *Id.*

Where the assignee of a vendor's lien note agreed that it should be subject to other notes retained by the vendor, the fact that the assignee subsequently exchanged his note for another on the same land did not change the respective rights of the parties under the agreement. *Id.*

A vendor who receives vendor's lien notes and desires to assign some of them may contract that notes which he retains shall have a preference over those assigned. *Id.*

In an action for breach of a written contract for the exchange of property, held, that plaintiff was not entitled as against defendant to recover judgment for vendor's lien notes transferred by defendant to a third person as collateral security for the debt which plaintiff had assumed. *Baker v. Robertson* (Civ. App.) 163 S. W. 326.

Where a deed is given to a vendor by the vendee to satisfy the debt and the vendor before that time has sold the note to another, the legal and equitable title do not coalesce in the vendor's hands; but the vendor holds subject to the lien. *Price v. Logue* (Civ. App.) 164 S. W. 1048.

The transfer of a vendor's lien note by the vendor to the vendee created a presumption of intention on the part of the vendor that the vendee, the maker of the note, should thereafter hold it absolutely as his own property. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

That the lien reserved was but one lien given to secure two notes did not prevent a merger as to one of the notes indorsed by the vendor and redelivered to the vendee. *Id.*

Where a grantor had previously assigned secured notes and conveyed at the same time to the assignee the "vendor's lien rights, equities, and interest" which, as prior vendor, he then had in the land, a second grantee and assignee of the notes only took by conveyance to him the right to receive any balance of the proceeds of a sale made to satisfy the notes. *Green v. Eddins* (Civ. App.) 167 S. W. 196.

An ordinary transfer of a vendor's lien note to a stranger to the title of the land does not carry with it the superior title of the vendor. *Scott v. Watson* (Civ. App.) 167 S. W. 268.

An assignee of a vendor's lien note without transfer of the title cannot recover the land. *R. B. Godley Lumber Co. v. Slaughter* (Civ. App.) 171 S. W. 779.

Transfer of a debt secured by a vendor's lien transfers the lien, but not the land. *Id.* Assignment of a purchase-money note and lien held not to pass to the assignee the title to the land. *Id.*

A transferee of vendor's lien notes may not demand a judgment for the notes and a foreclosure of the lien, and for a recovery of the land, but he must elect his remedy. *Smith v. Tipps* (Civ. App.) 171 S. W. 816.

A person furnishing the money to take up notes secured by a vendor's lien cannot obtain a superior lien as against the payee of the other notes secured by the same lien, in the absence of an agreement with the payee for subrogation. *Braun v. Hickman* (Civ. App.) 176 S. W. 879.

Purchasers for value and without actual notice of previous transfers of vendor's lien notes are, as against unrecorded transfers of such notes, bound only by their actual knowledge or notice appearing from the records. *Lubbock State Bank v. H. O. Wooten Grocery Co.* (Civ. App.) 179 S. W. 1141.

As the purchase of a vendor's lien note carries with it as an incident the lien, and the latter is within the registration statutes, one desirous of protecting his lien should secure a written assignment and record it. *Id.*

A holder of a subsequent series of vendor's lien notes held to have a lien superior to those of the holder of unrecorded earlier notes, there being nothing in the record to give notice or to cast suspicion on the statements of the seller. *Id.*

Where a purchaser, who had given vendor's lien notes in payment, retransferred the land on condition that she should be discharged from payment of such notes, and the vendor retained the notes, the notes are on reissue thereafter valid as against the vendor. *Id.*

Where a deed reserved a vendor's lien securing the purchase money notes, and a trust deed authorizing appointment of trustee was executed as additional security, the action of the grantor's successor in appointing a trustee and the sale of the property under the trust deed after the notes had been transferred to a third person was unauthorized and conveyed no title. *Etheridge v. Campbell* (Civ. App.) 170 S. W. 1144.

An equitable lien in favor of the vendor of land, taking a purchase-money note, exists in favor of his assignee of the note, as the lien follows the debt. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

The right to rescind a contract of sale of land for default of the purchaser in payments passes to the buyer of the vendor's lien note. *Walls v. Cruse* (Civ. App.) 185 S. W. 1033.

Right of the vendor to rescind ceases on his sale of the vendor's lien note. *Id.*

Assignment of lien by holder of two vendor's lien notes to transferee of one note does not release the holder's lien for note retained by him, but merely gives transferee lien prior thereto. *Archenhold v. Branch* (Civ. App.) 193 S. W. 457.

11. — **Transfer of property by purchaser.**—Purchaser of land subject to vendor's lien, when sued in trespass to try title by purchaser in foreclosure suit to which he was not a party, held entitled to have his equities protected upon tender of the amount due the vendor, although he had made no previous tender. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

Where an owner of land who held it subject to the payment of vendor's lien notes conveyed the same, his grantee agreeing to discharge the notes, the holder of the notes might sue the grantee directly. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

Plaintiff, claiming under a purchaser from a vendee with notice of the vendor's lien and superior title, held not entitled to recover against those claiming under the vendor. *Vinson v. W. T. Carter & Bro.* (Civ. App.) 161 S. W. 49, writ of error denied 106 Tex. 273, 166 S. W. 363.

A deed to certain land which was subject to the lien of certain vendor's lien notes, reciting that the notes constituted a part of the consideration, etc., held to indicate that plaintiff agreed to assume the notes, and not merely that he took the land subject to the payment thereof. *Fisher v. Hemming* (Civ. App.) 164 S. W. 913.

Defendant, who purchased land from one who purchased from grantees, who had given vendor's lien notes therefor, held liable for part of the amount of such notes, having assumed the debt, though an intermediate owner had not assumed the debt. *Allen v. Traylor* (Civ. App.) 174 S. W. 923.

One purchasing from a purchaser in an executory contract of sale, duly recorded, takes subject to a vendor's lien, and, where he abandons the contract, his heirs cannot recover. *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

Where vendee executed a note secured by deed of trust to indemnify indorsers upon a purchase-money note for the property, such lien was not destroyed by a sale subsequently made by him in consideration of the vendee's assumption of the original vendor's lien notes. *Grubbs v. Eddleman* (Civ. App.) 179 S. W. 91.

In action on lien note payment of which was assumed by subsequent purchaser, plaintiff, as lawful holder held entitled to recover thereon, unless it was subject to defenses which subsequent purchaser might have urged against it in hands of the original vendor. *Orand v. Whitmore* (Civ. App.) 185 S. W. 347.

When purchaser of land contracted with sellers to assume payment of vendor's lien notes executed by them to their vendor, such purchaser became legally bound for payment, becoming principal, and the sellers sureties. *Brannin v. Richardson* (Tex.) 185 S. W. 562.

Purchaser of land, who assumed payment of vendor's lien notes given by his sellers to their vendor, could plead failure of consideration as defense when sued for the price by the sellers to him. *Id.*

All land sold, with a retention of vendor's lien, remains primary security for the debt, and does not become a mere surety, in the absence of consent by the holder of the note, notwithstanding subsequent sales of the land, and agreements between the parties thereto. *Newby v. Harbison* (Civ. App.) 185 S. W. 642.

First grantee of land, who conveyed to second party, who conveyed to third, both assuming vendor's lien note as part of price, had cause of action against third grantee, whose failure to pay note occasioned loss to first grantee of land covered by note, but not sold by him. *Bollinger v. Baylor* (Civ. App.) 185 S. W. 1021.

In action by first grantee of land, against grantee of party to whom he conveyed, both grantees assuming vendor's lien note as part of price, for damages sustained through third grantee's failure to pay, measure of damages was value of land which first grantee had not sold, but which was covered by lien, and so lost to him. *Id.*

Where plaintiff, as the assignee of vendor lien notes, was also transferee of the title of one of the vendors, he could recover title and divest the title of the other vendor, who disclaimed any right or title to the land. *Smith v. Tipps* (Civ. App.) 191 S. W. 392.

12. — **Waiver, loss or discharge of lien.**—A vendor who repudiated contract and refused to convey held not entitled, in action by the purchaser for damages, to judgment for the amount due, with a foreclosure of the vendor's lien. *Cornelius v. Harris* (Civ. App.) 163 S. W. 346.

The vendor's lien evidenced by a note transferred back by the vendor to the vendee, and by him pledged as collateral security to intervener, held discharged or without effect as to the holder of other lien notes. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

A deed which does not retain a vendor's lien evidences an executed sale, and the title passes to the grantee. *Closner v. Chapin* (Civ. App.) 168 S. W. 370.

A waiver of a vendor's lien in favor of a mechanic's lien held to cover the cost of material and labor necessary to complete the building, but not taxes paid under the contract or attorney's fees in a note for the price. *Dilworth & Green v. Ed. Steves & Sons* (Civ. App.) 169 S. W. 630, writ of error dismissed *Dilworth v. Ed. Steves & Sons* (Sup.) 174 S. W. 279.

An instrument waiving a vendor's lien in favor of a mechanic's lien held an offer to waive the lien in favor of any person who would erect a house on the land, and the house having been erected, the vendors were estopped to deny the validity of the waiver because executed by them alone. *Id.*

The renewal of a vendor's lien note by one of the makers revived his personal obligation, and also the lien against his undivided half interest in the land. *Spearman v. Connor Bros.* (Civ. App.) 175 S. W. 478.



Where the first vendor's lien note was barred by limitations, the holder lost his priority over the second lien note, and the revival of the first holder's lien did not restore his priority, but made it subordinate to that of the holder of the second note. *Id.*

Where a contract for the sale of land and the cultivation of cane was secured by a vendor's lien, failure to assert the lien upon a partial breach held not waiver for future performance. *Imperial Sugar Co. v. Cabell (Civ. App.) 179 S. W. 83.*

The implied equitable vendor's lien arising in favor of a vendor of realty, taking a purchase-money note, is not waived by the substitution of a third person for the original vendor as payee of the note. *Fennimore v. Ingham (Civ. App.) 181 S. W. 513.*

Vendor's lien held not merged by reconveyance to vendor by deeds by which he assumed payment of the vendor's lien notes, which he afterwards assigned as collateral. *Henningsmeyer v. First State Bank of Conroe (Civ. App.) 192 S. W. 286.*

While law gives a vendor's lien when purchase money for land is not paid, yet it may be waived by taking additional or independent security when it does not appear that vendor relies on lien implied. *Knox v. Gruhlkey (Civ. App.) 192 S. W. 334.*

Vendor of lands who takes independent security for purchase price waives his implied lien, unless it appears that he relied thereon. *Archenhold v. Branch (Civ. App.) 193 S. W. 457.*

Quitclaim by vendor of land to transferee of one of two vendor's lien notes does not bar the vendor's right to foreclose lien of other note. *Id.*

Vendor who took other security for purchase-money notes did not thereby waive his vendor's lien, where he expressly retained such lien in deed of conveyance. *Id.*

13. — **Payment, release or satisfaction.**—The land described in a deed was section 82, block 12, certificate 2/251, H. & G. N. Ry. Co. school land, and the recited consideration was \$3,700; \$1,500 cash, one note for \$1,000, and one for \$1,200, and a vendor's lien retained in both the deed and notes. A deed of release by the vendor recited that it released section 82, block 12, certificate 2/251 H. & G. N. Ry. Co. school land from the lien of a note for \$2,400. Held, that the release did not release the lien of the \$1,200 note described in the deed. *Hunker v. Estes (Civ. App.) 159 S. W. 470.*

Where defendant gave vendor's lien notes in payment of land and after bankruptcy deposited the amount of the note then due with the payee under an agreement that the deposit should be returned to him in case it was held in the bankruptcy court that the land was not his homestead, the payee's wrongful retention of the deposit after an adjudication adverse to the homestead claim did not constitute payment. *Brown v. Bay City Bank & Trust Co. (Civ. App.) 161 S. W. 23.*

A release of a vendor's lien held to release it as to a money consideration only, and not as to performance of a contract for the cultivation and sale of sugar cane. *Imperial Sugar Co. v. Cabell (Civ. App.) 179 S. W. 83.*

Construction of power of attorney executed by vendor of lots, empowering third person to release the vendor's lien as \$30 for each lot should be paid to the vendor or a bank, as requiring the vendor himself to release lots on which a house stood for such payment, held erroneous. *Stone v. Robinson (Civ. App.) 180 S. W. 135.*

For the purchaser or his heirs, after apparently abandoning the contract for many years, to perfect title, they must pay the amount of the unpaid vendor's lien note, with interest and all expenses, including taxes, incurred in protecting title, by the successor to the vendor's rights. *Walls v. Cruse (Civ. App.) 185 S. W. 1033.*

Where deed to land in payment for which vendor accepted vendor's lien notes provided that purchaser on payment of one-tenth of balance due might select a proportional part of land, "balance due" includes principal and unpaid interest. *California State Life Ins. Co. v. Elliott (Civ. App.) 193 S. W. 1096.*

Under a deed which authorized a purchaser who made payment in vendor's lien notes to select a proportional part of land after payment of one-tenth of balance due thereon, held, that purchaser could not after default and foreclosure suit make such payment and demand proportional part of the land. *Id.*

14. **Marshaling.**—As a rule the doctrine of marshaling securities will not be applied so as to deprive a debtor, who has not waived his rights thereto, of his homestead or exempt property. *Pugh v. Whitsitt & Guerry (Civ. App.) 161 S. W. 953.*

The doctrine of marshaling assets will not be enforced so as to require a creditor, whose mortgage covers exempt and nonexempt property, to first resort to the exempt property, that other creditors not secured by such property may satisfy their claims out of the nonexempt residue. *Id.*

A junior mortgagee who took a mortgage on the remainder after sale of part of mortgaged chattels, with the senior mortgagee's consent, but without waiving lien, and who later took an assignment of the senior mortgage, could not invoke the doctrine of marshaling securities as against equities of the buyers. *Keasler v. Wray (Civ. App.) 171 S. W. 534.*

Taking a junior mortgage on the remainder after sale of part of mortgaged chattels with the senior mortgagee's consent would not so far overcome the prior equities of the buyers as to compel marshaling in favor of the junior mortgagee against them. *Id.*

The doctrine of marshaling assets will not be applied in favor of a party whose equities are inferior to that of others claiming the same securities. *Id.*

A remote purchaser of a part of a tract subject to a vendor's lien held to possess such equities as to demand a sale of the remainder in satisfaction of the lien and a sale of his part for any balance due. *Kynard v. Tucker (Civ. App.) 171 S. W. 1086.*

Where a part of a tract subject to vendor's lien notes was purchased for a valuable consideration, a foreclosure against that part could only be had for any balance due after ascertaining the value of the remainder owned by the holder of the notes. *Id.*

Where it is inequitable that the earliest grantee's land should primarily bear the burden of a common charge, either in whole or in part, equity will presume an intention of the parties to the conveyance that the part conveyed shall be free from such

burden until the grantor's land was first exhausted. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

In suit to restrain foreclosure under trust deed and for judgment on mortgage note and foreclosure of mortgage and vendor's lien notes, held that plaintiff was entitled to have 199 acres out of 413-acre tract sold first, and proceeds applied to payment of vendor's lien notes prior to first mortgage note. *Crawford v. Spruill* (Civ. App.) 187 S. W. 361.

The release of a parcel of a tract from a vendor's lien released the parcels previously sold, and therefore entitled the purchasers to have the released parcel first applied from the lien to the extent of the value of the parcel released. *Wiggins v. Wagley* (Civ. App.) 190 S. W. 736.

The release from a vendor's lien of a part of a tract of land whose value was sufficient to pay the amount then due discharges parcels previously sold from the lien, though before foreclosure suit the amount of the lien has been increased to more than the value of the property released. *Id.*

Rule that when payee of series of notes secured by vendor's lien retains part of series, transferring remainder by usual indorsement or guaranty, notes so retained will be postponed in enforcement of lien in favor of transferees, does not apply where transfer of part of series is without recourse. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

**15. Enforcement of vendor's lien.**—The transferee of secured lien notes could in trespass to try title against himself and his transferrer, who had conveyed to plaintiff's grantor, have in a cross-action the lien enforced for the attorney's fees stipulated for in the notes, and other sums due thereon. *Childs v. Juenger* (Civ. App.) 162 S. W. 474.

Where plaintiff advanced \$2,500 to defendant to be used in erecting a \$2,000 house on plaintiff's lots, which were to be conveyed to defendant on payment of the note for the money, plaintiff could properly foreclose his vendor's lien on the lots, or he might have sued on the note and subjected the lots to its payment. *O'Donnell v. Chambers* (Civ. App.) 163 S. W. 138.

If a vendor can have foreclosure, he is limited to that remedy, and is not permitted to assert his superior title against his vendee or those claiming under him, when the equities of such persons so require. *Kynard v. Tucker* (Civ. App.) 171 S. W. 1086.

A vendor who retains the superior title may, on failure of the purchaser to perform, either sue for the price and foreclose his lien, or rescind the contract. *Moore v. First State Bank of Teague* (Civ. App.) 173 S. W. 231.

A vendor of land who transfers the legal title to the holder of the vendor's lien note thereby gives him the right to foreclose. *Moon v. Sherwood* (Civ. App.) 180 S. W. 296.

Where it appeared that the rights of third persons could be protected only by restricting the vendors to their remedy of foreclosure of their lien, held that the court properly refused to declare a forfeiture of the executory contract for sale of the land because of default in payment of the purchase money. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

Where the vendor of realty by deed reserving a vendor's lien foreclosed, he could not thereafter claim that he continued to hold the superior title to make out his right to the insurance money payable on the burning of the house. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

Holder of vendor's lien notes may enforce an agreement between defendant and an owner of the equity of redemption that defendant should discharge such notes. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

For the vendor or one succeeding to his rights to rescind for nonpayment of vendor's lien note, after waiting over 20 years, he must pay back, with interest, the cash payment made. *Walls v. Cruse* (Civ. App.) 185 S. W. 1033.

A suit to foreclose a vendor's lien for the unpaid purchase price of land is not such an election of remedies as will prevent the vendor from amending his petition and asking for a recovery of the land. *Garvin v. Garvin* (Civ. App.) 188 S. W. 37.

When a purchaser of land defaults in the payment of the purchase price, the vendor may elect to sue on the note and foreclose his lien, or to sue for the land itself. *Id.*

City which purchased land for reservoir, but used only part and failed to pay part of price, cannot complain of judgment foreclosing seller's lien on part of lands not actually in use. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

Execution on judgment on notes for purchase price of land should be stayed in a sufficient amount to protect the purchaser against lien of incumbrances not yet due, against which the insolvent vendor covenanted. *Chapin v. Ford* (Civ. App.) 194 S. W. 494.

**16. — Defenses.**—In an action on a note given in renewal of certain vendor's lien notes, reserving all the rights conferred in the originals, it was immaterial that the consideration for the original notes was in part borrowed money, as well as the price of the land. *Duller v. McNeill* (Civ. App.) 163 S. W. 636.

A grantee resisting the payment of notes for the price and the foreclosure of a vendor's lien retained in the deed cannot go back of the notes and deed; and a pleading directed to the contract of sale is insufficient. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

A vendee's contention that there were outstanding vendors' liens in favor of one plaintiff against the property to which all the plaintiffs tendered their deed held not available as a defense. *Bushong v. Scrimshire* (Civ. App.) 172 S. W. 155.

**18. — Evidence.**—In a suit to foreclose a vendor's lien, a finding that mortgagee, who was also assignee of judgment, asked sale by administrator for purpose of satisfying judgment held not unsupported by evidence, where it was undisputed that the note secured by the mortgage included the amount due under the judgment. *Cole v. Lewis* (Civ. App.) 159 S. W. 180.

In an action on vendor's lien notes, evidence held to show that the notes by mistake recited that the conveyance was from the payee to the maker instead of that the conveyance was from a third person to the maker. *Brown v. Bay City Bank & Trust Co.* (Civ. App.) 161 S. W. 23.

In a suit to foreclose vendor's lien notes, where plaintiff claimed priority, notwithstanding an agreement whereby plaintiff's assignor, to whom the note was originally assigned, was to have only a junior lien, evidence held insufficient to establish a new agreement abrogating the original agreement. *Armstrong v. Parr* (Civ. App.) 162 S. W. 1003.

In an action to foreclose a vendor's lien, evidence held insufficient to show that the vendee or his grantee had repudiated the vendor's title. *Hardy v. Wright* (Civ. App.) 168 S. W. 462.

In an action on vendor's lien notes, evidence held insufficient to show that one of the defendants was authorized by the other defendant to sign his name to a renewal of the note sued upon. *Spearman v. Connor Bros.* (Civ. App.) 175 S. W. 478.

In action on purchase-money notes based as to one defendant on his alleged assumption thereof on purchasing land from another defendant, evidence indicating the land had not been deeded, but he had merely taken and forfeited an option, held insufficient to show assumption. *Macik v. Garrett* (Civ. App.) 188 S. W. 1011.

In a suit to foreclose a vendor's lien notes, evidence held to show that debt had been paid. *Key v. Jones* (Civ. App.) 191 S. W. 736.

In an action on a note secured by a vendor's lien, evidence examined, and held not to show that subsequent purchaser, who was made a party to the suit, had agreed to pay note so as to authorize a personal judgment against him. *Neeley v. Lane* (Civ. App.) 193 S. W. 390.

21. — **Sale and proceeds.**—A lienholder who advanced money to pay interest on vendor's lien notes held entitled under a contract to which the vendors were a party, to be repaid from the proceeds of a sale of the land before payment of the notes. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

22. — **Title and rights of purchasers at sale.**—A judgment in a second foreclosure of a vendor's lien secured by a series of notes could in no way affect title of purchaser under a prior foreclosure. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

23. — **Redemption from sale.**—Where the vendee of land on which the vendor reserved a lien for the unpaid purchase money gave a deed of trust which was subsequently foreclosed, the purchaser acquired the vendee's right to redeem from the lien by paying the indebtedness. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

Where a husband conveys community property to his wife, expressly reserving vendor's lien in seller, wife is not estopped after foreclosure to which she was not made a party from tendering purchase money. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

24. **Right to recover possession of land in general.**—Plaintiff held not entitled to recover the land or rescind the contract, but could recover the balance of the purchase price, less certain credits in defendant's favor, and foreclose lien therefor. *Humphreys v. Douglass* (Civ. App.) 177 S. W. 569.

Plaintiff held not entitled to recover the land or rescind the contract but could recover the balance of the purchase price less certain credits in defendant's favor and foreclose lien therefor. *Id.*

A vendor, who has reserved an express vendor's lien to secure the consideration for a conveyance, may, on default by the vendee, rescind the contract and recover the land in trespass to try title. *Imperial Sugar Co. v. Cabell* (Civ. App.) 179 S. W. 83.

Payment by a vendee before he died of only a small portion of the purchase price on a land contract, possession thereafter by his widow, and the fact that by indulgence of vendor a small portion of the first purchase-money note was not promptly paid at maturity, and that the land had enhanced in value since the contract was made, held not sufficient to entitle the widow to defeat vendor's recovery of the land by paying or actually tendering the balance of the purchase price. *Hughes v. Burton Lumber Corp.* (Civ. App.) 188 S. W. 1022.

Where the vendor has done nothing to waive his right, he may in every case of an executory sale of land, where the vendee defaults in payment of the purchase money, maintain a suit for the recovery back of land. *Id.*

Although notes for purchase price of land, together with a conveyance, reciting that such notes were to be vendor's liens upon land conveyed constituted an executory contract to sell land, where it appeared that debt had been paid, and notes are barred by statute of limitation, vendor should not be allowed to rescind contract and recover land. *Key v. Jones* (Civ. App.) 191 S. W. 736.

25. **Actions for recovery of possession of land.**—In an action by a vendor to recover land after default of purchaser, where the petition specifically asked that the amount of purchase money paid and the value of improvements be ascertained and adjusted, defendant was entitled to the purchase money paid, as well as the value of improvements made. *King v. Hutson* (Civ. App.) 168 S. W. 401.

In an action by vendor for the recovery of land, evidence held sufficient to sustain a finding that conveyance by vendor was not in trust and that default of purchaser was made under such circumstances as would entitle the vendor to a foreclosure for the amount due but not a recovery of the land. *Garvin v. Garvin* (Civ. App.) 188 S. W. 37.

26. **Lien of purchaser of land for purchase money.**—A purchaser suing for damages from the vendor's failure to convey held to have no lien and not entitled to foreclosure except for amount of taxes paid by him. *Cornelius v. Harris* (Civ. App.) 163 S. W. 346.

Buyer of land induced to contract by seller's false claim of good title was entitled to lien on land for price paid. *Stockwell v. Melbern* (Civ. App.) 185 S. W. 399.

**32. Attorney's lien.**—An attorney has the right to apply money collected for his client to payment of any valid subsisting claim he has against her. *Doran v. Campbell* (Civ. App.) 194 S. W. 674.

**42. Pledges.**—One consenting to a pledge of his chattels by a third person to secure a loan for his benefit is not liable for a personal judgment, but the pledgee may only foreclose the pledge. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

Invalidity of a principal debt destroys the claim of the creditor on collateral securities held for its payment. *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

While an actual delivery usually accompanies and constitutes a pledge of personal property, yet, where property is already in the hands of a creditor, an agreement that it may be held as collateral security still leaves the transaction a "pledge." *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

Until there has been a change of possession sufficient to divest the owner by an act amounting to a delivery in case of sale, it is not a pledge, but a mere executory contract for one. *Riley v. Hallmark* (Civ. App.) 180 S. W. 134.

Lien cannot be claimed under an agreement to pledge except as to articles there-actually delivered; delivery and possession being essential. *First Nat. Bank v. Campbell* (Civ. App.) 193 S. W. 197.

**43. — Title of pledgor.**—When a collateral note has been delivered, the pledgee is the legal owner to the extent of the debt, and the pledgor owns the remainder. *Baldwin v. Jordan* (Civ. App.) 171 S. W. 1016.

**45. — Possession or control of property.**—When a collateral note has been delivered, the pledgee can collect the note. *Baldwin v. Jordan* (Civ. App.) 171 S. W. 1016.

On a trial of the right of property attached in the hands of a tenant, claimed by the landlord as security for a debt, an instruction that possession, to support a pledge, need not be actual physical possession was properly refused. *Riley v. Hallmark* (Civ. App.) 180 S. W. 134.

**48. — Conversion of property before default.**—On conversion by a pledgee, the pledgor may sue for the property or its proceeds if sold, or for damages for breach of the contract of pledge; but if he sues for conversion he cannot recover judgment for the property. *King v. Boerne State Bank* (Civ. App.) 159 S. W. 433.

When a sale of pledged property is authorized, but the purchase by the pledgor, though in good faith, is unauthorized, the purchase does not constitute a conversion; but, if the purchase is a nullity and the pledgee thereafter exercises rights as owner, he is guilty of conversion. *Id.*

Where a pledgee sold pledged property to himself in bad faith and in disregard of the rights of the pledgor, and thereafter asserted ownership or the right to hold the property as security for debts other than those for which the property was pledged, the pledgor might elect to charge him with conversion. *Id.*

Proof of tender of a debt for which collateral was pledged and the pledgee's refusal to accept or return the collateral evidence a conversion; but no tender is required where the pledgee asserts absolute ownership of the pledge and an intention to hold it for debts other than those for which it was pledged. *Id.*

Sale of collaterals by a bank, to which plaintiff had pledged them, to the bank's president for a grossly inadequate price on the very day when the president had led plaintiff to believe that he would have a few days to pay the debt, and the president's refusal to return the stock except on payment of other debts for which it was not pledged, held to evidence a conversion. *Id.*

Where a bank wrongfully sold certain pledged collaterals to its president, who paid the price and then took an assignment of the debt, the transaction so far as the bank was concerned should be viewed as if the sale had been made to a stranger. *Id.*

Tender of a return of personal property converted by defendant is no defense to a suit for damages for the conversion. *Id.*

In suit for damages for conversion of property pledged, it was error to set aside the pledgee's wrongful sale of the property and direct that unless it was redeemed by payment of the debt it should be sold in satisfaction of the judgment therefor. *Id.*

A wrongful sale of pledged property by the pledgee so as to put it out of his power to redeliver on payment of the debt constitutes a conversion. *Id.*

**53. — Sale of property.**—Though only a suit to redeem can be instituted against a bona fide purchaser of pledged collaterals, such rule does not apply to a purchaser with knowledge of a wrongful sale, who in receiving and dealing with the stock has been guilty of conversion. *King v. Boerne State Bank* (Civ. App.) 159 S. W. 433.

Where plaintiff's stock pledged to a bank was sold to its president for an inadequate price, plaintiff's motive in suing for conversion instead of to redeem was immaterial, nor was he precluded from having the question of damages submitted to the jury, because it was claimed that the stock at the time of the sale was worthless. *Id.*

Where a bank wrongfully sold pledged collaterals to its president for an inadequate price, and he denied the pledgor's right to redeem except on payment of debts for which the securities were not pledged, the pledgor was not limited to a suit to redeem but could sue for conversion. *Id.*

A pledgee, though authorized to sell pledged collateral at private sale without notice to the pledgor, was nevertheless bound to conduct the sale fairly and in good faith so as to subserve the interests of both parties. *Id.*

Since the law does not require the doing of that which is useless, it is unnecessary to obtain an order to sell collateral, where such collateral was worthless, notwithstanding that the judgment upon which the order is based provided therefor. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

54. — **Actions to enforce right of action pledged.**—Where one pledged his chattels to secure a debt due from a third person to the pledgee, the pledgee, to foreclose the pledge, must obtain a judgment establishing the debt. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

56. **Subrogation.**—In shipper's action against buyer and compress company to recover for cotton converted by compress company, held that shipper was subrogated to buyer's right to enforce liability against compress company. *Shippers' Compress & Warehouse Co. v. Cumby Mercantile & Lumber Co.* (Civ. App.) 172 S. W. 744.

Purchaser under unauthorized sale of a specific portion of land by one cotenant cannot be subrogated to such tenant's rights against his cotenants. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Mere delivery, to party loaning money to mortgagor to satisfy and cancel the mortgage, of the instrument and the note was not sufficient to show agreement that lender should be subrogated to the rights of the mortgagee under the old instrument. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

57. — **Discharge of incumbrances by purchasers of property.**—One who acquired the vendor's lien notes given for an undivided half interest in land incumbered by prior vendor's lien notes, which were acquired by the administrator of the deceased purchaser acting individually, and the execution purchaser of the other undivided half interest, could pay the prior vendor's lien notes and thereby become subrogated to the liens of the notes as to the purchaser's half interest, but not as to the undivided half interest acquired by the execution purchaser. *Fallen v. Weatherford* (Civ. App.) 158 S. W. 1174.

A purchaser, whose payment was by agreement applied to a mortgage on the premises, held on rescission not entitled to be subrogated to the rights of the mortgagee. *Good v. Smith* (Civ. App.) 170 S. W. 257.

Where the seller of an interest in a business declined to pay the broker the agreed commission and did not authorize the buyer to do so, the buyer has no right to pay the commission, and, having paid it, cannot recover from the seller. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

Where the grantee of land who took with notice that the deed to his grantor was intended as a mortgage paid one of the secured notes in the hands of an innocent holder, he was entitled to be subrogated to all the rights of the innocent holder. *Harris v. Hamilton* (Civ. App.) 185 S. W. 409.

If a lot be subjected to payment of a vendor's lien in the hands of one who has bought it free therefrom, he is entitled to subrogation against those personally liable for the debt. *Newby v. Harbison* (Civ. App.) 185 S. W. 642.

58. — **Persons making advances for discharge of debt or incumbrance.**—Corporation, which used money borrowed by its officers on their personal note in paying its debts, held bound to reimburse them for a judgment recovered on the note, including interest as stipulated and attorney's fees. *Georgetown Mercantile Co. v. First Nat. Bank* (Civ. App.) 165 S. W. 73.

Where purchasers of vacant land, in order to procure the construction of a building to be used as their home, executed a mechanic's lien contract to the contractor, who was thereafter paid by the vendor, after which the purchasers executed a deed of trust to secure the debt, the vendor was entitled to subrogation to the rights of the contractor under his lien. *Wood v. Smith* (Civ. App.) 165 S. W. 471.

Plaintiff, who had paid purchase-money notes and discharged of record a vendor's lien against herself and defendant jointly, was entitled, as against defendant and a purchaser from him with constructive notice, to subrogation to the rights of the holder to enforce payment of half of the joint indebtedness against defendant. *Holloman v. Oxford* (Civ. App.) 168 S. W. 437.

One not a stockholder of a liquidating national bank, participating in an advancement of funds to take up a debt owing to another, to consummate a scheme to take over the liquidating bank's assets, held entitled to subrogation, to the rights of the creditor equally with others participating in the advancement. *First Nat. Bank of Merkel v. Armstrong* (Civ. App.) 168 S. W. 873.

One lending money to the owner of land to discharge purchase money notes is subrogated to the vendor's lien on the land. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

A bank which advanced money used by a contractor in discharging liens on a building held not subrogated to the rights of the lienors, there being no understanding to that effect. *Western Nat. Bank of Ft. Worth v. Texas Christian University* (Civ. App.) 176 S. W. 1194.

Plaintiff, surety on a note secured by the maker's mortgage of certain mules, who, after all the mules but one had been sold and the proceeds applied on the debt, paid the balance of the note, was subrogated to the rights of the creditor against the principal and the purchasers of the remaining mule. *Maloney v. Greenwood* (Civ. App.) 186 S. W. 228.

A party, who, without interest to protect, voluntarily loans to a mortgagor to satisfy and cancel the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee unless a subrogation takes place by agreement of the parties. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

Where money was lent a mortgagor to discharge mortgages, and the lender retained the instruments, their payment gave it the right of subrogation, if it was not a mere volunteer. *Id.*

Bank held not subrogated to rights of holder of notes, executed by bank's cashier and his brother, and deposited with it or its president for collection, to which were applied the proceeds of notes delivered to the bank through its cashier by his brother for collection. *First State Bank & Trust Co. of Hereford v. Vardeman* (Civ. App.) 188 S. W. 695.

Where the surety on a note secured by chattel mortgage paid note, he was subrogated to rights of the mortgagee under mortgage and debt. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

One paying for the vendee the purchase money due upon a homestead takes by an equitable assignment, if not by an actual transfer, the debt which he discharges, and is subrogated to the vendor's lien. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

Plaintiff, who advanced money to pay vendor's lien note, held to have lien superior to other liens not arising out of the sale transaction. *Sullivan v. Doyle* (Sup.) 194 S. W. 136.

Surety and those secondarily liable for payment of indebtedness are entitled upon payment thereof to be subrogated to rights of creditor, with respect to any security given for payment of indebtedness. *Nunn v. Smith* (Civ. App.) 194 S. W. 406.

A bank lending money to a street improvement contractor could not claim by subrogation the rights of materialmen against the contractor's surety solely because the money loaned was used to pay such claims. *Lion Bonding & Surety Co. v. First State Bank of Paris* (Civ. App.) 194 S. W. 1012.

59. — **Benefit of remedies of creditor.**—Indorser of a note secured by mortgage should have paid such note and subrogated himself to the rights of the mortgagee, if he desired a foreclosure for his own security. *Thompson v. Pennington* (Civ. App.) 174 S. W. 944.

60. — **Extent of right.**—Plaintiff, subrogated to the rights of the holder of vendor's lien notes to enforce payment of a part of the joint indebtedness assumed by defendant because of a discharge of such notes, held not entitled to recover interest at the rate named in the notes or the attorney's fees specified therein. *Holloman v. Oxford* (Civ. App.) 168 S. W. 437.

Officers and stockholders of a corporation held subrogated to the vendor's lien retained by the grantor of land to the corporation paid off by them, but not to his interest in the land. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

A surety who paid part of the debt, the balance of which was paid by the principal, is entitled to subrogation for the part paid by him. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

Where at time of execution of notes for \$3,000 secured by mortgage on maker's homestead there was due to payees \$1,600, the balance of what they had previously paid for the maker upon his purchase-money notes for the homestead, the payees, in suit to enforce the notes, were entitled to judgment foreclosing the vendor's lien for \$1,600, together with interest and attorney's fees stipulated in the original purchase-money notes. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

Plaintiff, advancing money to pay one of two vendor's lien notes under agreement with a second vendee to hold the note as security, held not entitled to subrogation as against the original vendor, though he was entitled to subrogation as against the second vendee. *Sullivan v. Doyle* (Sup.) 194 S. W. 136.

## TITLE 87

## LIMITATIONS

Chap.

1. Limitation of actions for lands.
2. Limitation of personal actions.

Chap.

3. General provisions.

## CHAPTER ONE

## LIMITATION OF ACTIONS FOR LANDS

Art.

5672. Three years' possession, when a bar.  
 5673. "Title" and "color of title" defined.  
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5678. Same subject.  
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**Article 5672. [3340] Three years' possession, when a bar.**

Cited, *Houston Oil Co. of Texas v. Davis* (Civ. App.) 181 S. W. 851; *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

**In general.**—Where, in a suit to determine the location of a disputed boundary line between two sections, all under one fence, plaintiff was in possession of one section under a lease, and had no color of title as to the other and no actual possession of the strip in dispute, he was a mere intruder, and was not entitled to the benefit of the three-year statute of limitations. *Hooper v. Acuff* (Civ. App.) 159 S. W. 934.

The three-year statute of limitations was not available where the portion claimed had been disposed of by the assignee of a survey prior to the execution of the bond for title to the one under whom the adverse party claimed. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

**Art. 5673. [3341] "Title" and "color of title" defined.**

**Unrecorded deed.**—Under Rev. St. art. 6324, making unrecorded deeds void against subsequent purchasers, an unrecorded deed held color of title within the three-year limitation law. *Phelps v. Pecos Valley Southern Ry. Co.* (Civ. App.) 182 S. W. 1156.

**Void, irregular or defective deeds.**—A void deed does not constitute color of title required by the three-year statute of limitations. *O'Hanlon v. Morrison* (Civ. App.) 137 S. W. 692.

**Patents, grants, certificates and surveys.**—Junior patentees of the state, or persons holding under the patentees, hold under the sovereignty of the soil within the three-year statute of limitations. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

Junior patents on lands, where the issue of patents has not been expressly prohibited, are color of title to support the three years' statute of limitation, whether based on pre-emption or otherwise. *Houston Oil Co. of Texas v. Wm. M. Rice Institute* (Civ. App.) 194 S. W. 413.

**Art. 5674. [3342] Five years' possession, when a bar.**

**In general.**—The owner of a junior survey may acquire title to land covered by a senior survey under the five-year statute of limitations by his adverse holding of land in conflict, even though he only pays taxes upon his own survey, and there is nothing on the ground or field notes showing conflict, if the field notes and survey of the junior grant cover the disputed strip. *Payne v. Ellwood* (Civ. App.) 163 S. W. 93.

Where the purchaser of land immediately placed his deed on record, inclosed the land and continuously used it for more than five years as pasture for stock, and paid taxes thereon, he acquired title under the five-year statute of limitations. *Randolph v. Lewis* (Civ. App.) 163 S. W. 647.

Where the grantee's deed sufficiently described the land by metes and bounds, and was duly recorded for more than five years, and his vendors had had possession thereunder during such time, paying all taxes, he acquired title by the five years' statute of limitations. *Williams v. McComb* (Civ. App.) 163 S. W. 654.

Where the lot in controversy was inclosed in 1906 by defendant's tenant at will and continuously used by such tenant adversely up to the time of suit, with payment of taxes by defendant, held that defendant had title by limitation. *Johnson v. Sullivan* (Civ. App.) 163 S. W. 1015.

Defendant in trespass to try title, who purchased the land involved in February, 1903, recorded his deed in March of the same year, and to whom in February, 1905, plain-

tiff, under a mistake as to his own boundaries, attorned and paid rent to November, 1910, and who paid all taxes on the land from 1903 to 1912, inclusive, was entitled to the land under the five-year statute of limitations. *Wilson v. Seigel* (Civ. App.) 167 S. W. 1090.

To perfect a title by limitation, the land must not only be inclosed with a fence, but "cultivated, used, or enjoyed." *Buie v. Penn* (Civ. App.) 172 S. W. 547.

A grantee of a league openly claiming it and paying taxes and in possession thereof by tenants for more than ten years held to acquire title to the entire league by adverse possession, though others entered on the property adversely until dispossessed by him. *Word v. Colley* (Civ. App.) 173 S. W. 629.

P. having a recorded tax deed, and five years' possession through a tenant, all the time paying the taxes, acquired title under the five-year statute. *Holloway v. Purington* (Civ. App.) 175 S. W. 507.

To establish title by limitations, it must appear that possession has been open, hostile, adverse, notorious, and uninterrupted for the statutory period, and that there is no saving to any person for personal disabilities. *Cline v. Booty* (Civ. App.) 175 S. W. 1081.

Action to set aside sale by administrator to pay off vendor's lien, or to declare that an interest in the land was held in trust for plaintiff, held barred by the statute of limitations of five and ten years. *Nuckols v. Stanger* (Civ. App.) 176 S. W. 153.

A grantee under a deed conveying school lands, who went into possession and paid taxes, can rely on the five-year statute of limitations, though his claim conflicts with patented land under a senior survey. *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

To make title by adverse holding the true owner must have actual knowledge of the claim, or it must be so open and notorious that his knowledge will be presumed. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

No real owner ought to be deprived of land under the statute of limitations unless he has actual or constructive notice of the adverse claim thereof. *Walker v. Knox* (Civ. App.) 191 S. W. 730.

Where taxes were paid by plaintiff's ancestor from 1877 to 1883, inclusive, but possession was maintained only to 1879, inclusive, it was error to submit the issue of adverse possession under the five-year statute. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

To establish title to land under five-year statute of limitation, it is necessary to have a deed duly registered, possession, use, and enjoyment, and to pay all taxes. *Dowdell v. McCardell* (Civ. App.) 193 S. W. 182.

Where defendant took a deed to certain interests in land which was void, but took possession and paid taxes to the extent of such interest, and later took a valid deed to the entire acreage and continued to pay taxes only on the amount covered by the void deed, he could not complete title under the five-year statute of limitations. *Id.*

One has title under the five-year statute of limitations, having had of record a deed properly describing the land and having paid the taxes for five years, with a tenant on the land for such time under a lease contract covering the entire tract. *Durham v. Houston Oil Co. of Texas* (Civ. App.) 193 S. W. 211.

Evidence held to establish adverse possession under the 5-year statute where the property, together with some other tracts, was fenced on three sides, the other side being bounded by a river which usually kept in the cattle, stock was grazed upon it, portions cultivated, and taxes paid. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**Possession.**—In trespass to try title, defendant relying on adverse possession could not recover where the possession had not been continuous and exclusive, and where the premises had not been fenced for the five-year period. *Purington v. Broughton* (Civ. App.) 158 S. W. 227.

A person who fenced land and used it continuously, exclusively, peaceably, and notoriously for a pasture for live stock had sufficient possession thereof within the five-years statute. *Griswold v. Comer* (Civ. App.) 161 S. W. 423.

Under the limitation statute of five years there must be evidence of an open, notorious exercise or control, or dominion over all land in controversy, before the benefits of constructive possession under color of title will avail claimant so as to perfect limitation under the statute. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Rev. St. 1911, arts. 5677, 5678, providing that possession of land in certain cases is not adverse unless inclosed, etc., applies only to the 10-year, and not to the 5-year, statute. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**Payment of taxes.**—The five-year statute of limitations does not apply where the land which has been rendered for taxation, and upon which the taxes have been paid, is not the land for which the suit was brought. *Gaal v. Camp* (Civ. App.) 164 S. W. 1070.

To acquire title by adverse possession for five years under this article, payment of all taxes, including city and school taxes, held necessary. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

Holder of deed to undivided interest who has deed registered, and has possession of any part of the land, and claims the same for five years and pays taxes on land equal to the interest conveyed by the deed for five years, completes limitation under the five-year statute, although no taxes on the other undivided interest have been paid. *Dowdell v. McCardell* (Civ. App.) 193 S. W. 182.

**Claim under deed duly registered—In general.**—For a tax deed to be sufficient as a basis for prescription under the five-year statute, all the prerequisites of the law need not be complied with in making the tax sale, and it is sufficient in spite of an incorrect reference to the name of the survey and the certificate number. *Griswold v. Comer* (Civ. App.) 161 S. W. 423.

A tax deed not void on its face, but only because of extrinsic evidence, is a deed within the five-year statute of limitations. *Davis v. Howe* (Civ. App.) 176 S. W. 759.

A tax deed, reciting that notices were posted more than twenty days successively



next before the day of sale, is not void, and possession thereunder is within the five-year statute of limitations. *Id.*

Where a landholder parted with the title acquired by a deed to him, such deed cannot be made the basis for a claim by his heirs of title by limitation under the five-year statute. *Shaw v. Thompson Bros. Lumber Co. (Civ. App.) 177 S. W. 574.*

Under five-year statute it is not necessary that grantor should have had title to land in order that deed given by him may convey color of title. *Village Mills Co. v. Houston Oil Co. of Texas (Civ. App.) 186 S. W. 785.*

The five-year statute of limitations cannot be based on a defectively acknowledged married woman's deed. *Walker v. Knox (Civ. App.) 191 S. W. 730.*

Where during partition suit two persons in interest conveyed a specific tract after *lis pendens* notice was filed, their interest passed subject to the termination of the suit, and where judgment decided that grantors had no title, and therefore deed conveyed none, it remained effective after the judgment for the purpose of limitation under the five-year statute. *Rosborough v. Cook (Sup.) 194 S. W. 131.*

To support limitation under the five-year statute, the deed under which claim is made need not convey title, but is sufficient if it describes and purports to convey the land and is on its face a good deed. *Id.*

Under this article, a quitclaim deed will support a claim only as to the interest of the grantor; and, where the grantor had only a leasehold, the claimant can perfect rights only to the leasehold. *Barksdale v. Benskin (Civ. App.) 194 S. W. 402.*

— **Registration.**—Where heirs of holder of recorded tax deed partitioned the land, an heir's possession thereafter held under a registered deed within the five years statute as to the whole tract, though she did not record her own deed. *Griswold v. Comer (Civ. App.) 161 S. W. 423.*

Heir of holder of recorded tax deed, to whom land was granted by partition deed held not guilty of fraud or concealment of her ownership because she did not record the partition deed or leases of the land by her. *Id.*

Under Rev. St. arts. 6786, 6789, 6790, 6791, a deed, duly deposited with the clerk for record, must be considered as recorded within article 5674, fixing a five-year limitation for recovery of land. *Billingsley v. Houston Oil Co. of Texas (Civ. App.) 182 S. W. 373.*

That a grantee took possession and held for himself and his grantor does not show possession under color of title within this article, where recording of the grantee's conveyance was delayed for three months. *Sweeten v. Taylor (Civ. App.) 184 S. W. 693.*

To put the five-year statute of limitations in operation under a lease contract, the contract need not be recorded, nor in writing, nor delivered, if in writing, but it is enough if the relation of landlord and tenant under it is created and recognized and understood by its parties. *Durham v. Houston Oil Co. of Texas (Civ. App.) 193 S. W. 211.*

— **Description of land.**—Under the five-year statute of limitations, which requires the adverse possession relied upon to give title to be under a deed duly registered, the deed must describe the land with sufficient certainty to identify it. *Griswold v. Comer (Civ. App.) 161 S. W. 423.*

If the description in a deed is sufficient to prevent it from being void for uncertainty, it is sufficient to give notice of a claim under the statute of limitations. *Hinkle v. Hays (Civ. App.) 162 S. W. 435.*

Where a deed describes land by section and certificate numbers, but refers to the patent and field notes, which otherwise designate the land, for the description of the land, the record of such deed is sufficient notice of an adverse holding to the extent of the boundaries in the field notes. *Payne v. Ellwood (Civ. App.) 163 S. W. 93.*

A tax deed from which the land in controversy in suits in trespass to try title could not be identified was insufficient to support defendants' claim of title under the five-year statute of limitation. *Porter v. Brooks (Civ. App.) 170 S. W. 103.*

Under a statute requiring registration of the deed under which a claim by adverse possession is made, a deed, not describing the land in fact nor according to the field notes claimed to be applicable thereto, is insufficient. *W. T. Carter & Bro. v. Collins (Civ. App.) 192 S. W. 316.*

**Forged deed.**—To defeat the five-year statute of limitations because of the forgery of a deed under which the defendant claims, plaintiff must affirmatively allege and prove the fact. *Hanks v. Houston Oil Co. of Texas (Civ. App.) 173 S. W. 625.*

This article refers to the deeds relied on in support of the plea, and not to prior deeds in the chain of title not necessary to support the plea. *Olsen v. Greele (Civ. App.) 190 S. W. 240.*

### Art. 5675. [3343] Ten years' possession, when a bar.

Cited, *Hickman v. Ferguson (Civ. App.) 164 S. W. 1085; J. D. Fields & Co. v. Allison (Civ. App.) 171 S. W. 274.*

In general.—Under the 10-year statute of limitations, it is not required that the claimant shall pay taxes on the land in order to perfect his title thereto, but it is only necessary that he have peaceable and adverse possession thereof, cultivating, using, or enjoying it for 10 years prior to the institution of the suit. *Gotoskey v. Grawunder (Civ. App.) 158 S. W. 249.*

Evidence of a certain deed conveying land in controversy to plaintiff, dated June 3, 1901, held sufficient to show title in plaintiff under the 10-year statute of limitations. *Hooper v. Acuff (Civ. App.) 159 S. W. 934.*

One who has adverse, peaceable, and continuous possession of land for more than ten years acquires a prescriptive title. *Frazier v. Houston Oil Co. (Civ. App.) 161 S. W. 20.*

Adverse possession for ten years perfects a title. *Glover v. Pfeuffer (Civ. App.) 163 S. W. 984.*

Where plaintiff, the owner of a building adjoining a bank, upon demand of the bank, repudiated a covenant of his grantor to pay one-half the cost of a party wall, and held possession for 16 years thereafter, he acquired title by adverse possession. *First Nat. Bank of Wichita Falls v. Zundelowitz* (Civ. App.) 163 S. W. 40.

To perfect a title by limitation, the land must not only be inclosed with a fence, but "cultivated, used, or enjoyed." *Buie v. Penn* (Civ. App.) 172 S. W. 547.

To establish title by limitations, it must appear that possession has been open, hostile, adverse, notorious, and uninterrupted for the statutory period, and that there is no saving to any person for personal disabilities. *Cline v. Booty* (Civ. App.) 175 S. W. 1081.

Action to set aside sale by administrator to pay off vendor's lien, or to declare that an interest in the land was held in trust for plaintiff, held barred by the statute of limitations of five and ten years. *Nuckols v. Stanger* (Civ. App.) 176 S. W. 153.

A private easement held adversely and exclusively for 20 years against the claim of plaintiff held to be lost. *Walton v. Harigel* (Civ. App.) 183 S. W. 785.

Color of title is not necessary to perfect title by adverse possession, in the absence of statutory provisions expressly or by clear implication requiring it. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

To make title by adverse holding the true owner must have actual knowledge of the claim, or it must be so open and notorious that his knowledge will be presumed. *Id.*

In view of Acts 1895, § 10, and *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 5435a, 5435b, 5435d, and *Rev. St. 1911*, art. 5436, the ten-year statute of limitation is not applicable in favor of an adverse occupant of school land, and cannot be invoked against a purchaser from the state before patent, where the amount of land is not a multiple of 40 acres and the adverse claimant claims under transfer by a judgment against the purchaser. *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502.

To acquire easement of way by prescription, limitation must have continued for period of ten years. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

No real owner ought to be deprived of land under the statute of limitations unless he has actual or constructive notice of the adverse claim thereof. *Walker v. Knox* (Civ. App.) 191 S. W. 730.

To authorize judgment for one claiming under ten-year statute of limitations part of larger survey, evidence need not show possession and adverse claim to specified tract. *Patterson v. Bryant* (Civ. App.) 191 S. W. 771.

**Possession.**—Under this article, the occupation which will give title by adverse possession must be exclusive and continuous. *Gallup v. Cammack*, 229 Fed. 68, 143 C. C. A. 344.

In order to create a title by limitations, the holding must be adverse. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

### Art. 5676. [3344] Ten years' possession construed to embrace, what.

Cited, *Gallup v. Cammack*, 229 Fed. 68, 143 C. C. A. 344.

**In general.**—This article contemplates that a possessor shall receive 160 acres in a body, and he cannot acquire title to a parcel in one corner of a survey and another parcel in another corner; the total aggregating 160 acres. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

One who fenced and cultivated two farms on a league of land consisting of 125 and 175 acres each, and built houses and barns on the farms in 1843, and lived thereon until 1865, claiming the whole league as his own, held to have acquired title under the ten-year statute of limitations. *Hickman v. Ferguson* (Civ. App.) 164 S. W. 1085.

Where the actual possession of plaintiffs in trespass to try title, claiming separate and distinct tracts of 160 acres out of a survey, entitled each to an undivided 160 acres, the fact that a location for one, made without regard to the other's claim, but with regard to the shape of the survey, would cover a portion claimed by the other, held not to destroy the right of each to title to 160 acres. *Davis v. Collins* (Civ. App.) 169 S. W. 1128.

Under this article where plaintiff claimed 160 acres by adverse possession, it was not necessary that he mark or identify a specific 160 acres on the ground, but it was enough that he lived, cultivated, used, enjoyed, and claimed adversely 160 acres including his improvements. *Wickizer v. Williams* (Civ. App.) 173 S. W. 288, rehearing denied 173 S. W. 1162.

That a part of defendant's fence on improved land lies on another quarter section adjoining the one on which he has a residence and the remainder of his improvements does not prevent him from recovering the quarter section. *Houston Oil Co. of Texas v. McGrew* (Sup.) 176 S. W. 45, affirming judgment (Civ. App.) 143 S. W. 191.

One claiming title by adverse possession, without color of title, acquires no title to any land except that which is in actual possession, and, under the 10-year statute of limitations, providing its requisites have been met, to 160 acres. *Walker v. Knox* (Civ. App.) 191 S. W. 730.

Under this article limitation of 10 years may be claimed without registration of the deed. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

One who holds peaceable and adverse possession on land on which his improvements are situated, using, cultivating and enjoying it for more than 10 years, can under proper pleadings recover such land to be run out so as to include his improvements, or by showing that the exact land described was a fair and equitable partition. *Dowdell v. McCordell* (Civ. App.) 193 S. W. 182.

Evidence that plaintiff's improvements and greater portion of his field and pasture were on a survey to which he claimed title to 160 acres under 10-year statute, warrant a judgment for entire 160 acres out of such survey, although small portions of his field

and pasture were on another survey. *Houston Oil Co. of Texas v. Loftin* (Civ. App.) 194 S. W. 996.

Where plaintiff enters intending to acquire 160 acres by adverse possession under 10-year statute, gradually extends his possession, and makes all improvements on such survey except small portions of his field and pasture, he acquires title to 160 acres of that survey, irrespective of his rights on adjoining surveys on which he encroached. *Id.*

In action to establish title by adverse possession under 10-year statute, fact that defendant's predecessor in title operated a tramroad over a portion of such tract some 12 or 15 years before suit was filed or that public road through the tract was used during the four years preceding suit does not segregate land on side opposite from plaintiff's improvements, so as to prevent him from claiming title to entire tract. *Id.*

**Possession under written memorandum.**—Under this article held, that plaintiff, who went into possession under a deed for 130 acres which included some of defendant's land, could not, having held possession only to the limits of his deed, claim 160 acres of defendant's property. *Chapman v. Weaver* (Civ. App.) 178 S. W. 660.

Plaintiff, in an action for possession of land claimed by 10 years' adverse possession, held not entitled to claim land outside the boundaries of the patent containing his improvements. *Williamson v. Miller-Vidor Lumber Co.* (Civ. App.) 178 S. W. 800.

### Art. 5677. [3345] Land surrounded by other lands, etc., peaceable possession of defined.

Cited, *Kelly v. Blakeney* (Civ. App.) 172 S. W. 770.

**In general.**—This article and art. 5678 constitute matter in avoidance of the limitation statute which need not be negated by the party pleading limitations. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

This article and art. 5678 apply only to the 10-year, and not to the 5-year, statute. *Id.*

### Art. 5678. [3346] Same subject.

Cited, *Sullivan v. Fant* (Civ. App.) 160 S. W. 612; *Kelly v. Blakeney* (Civ. App.) 172 S. W. 770.

**In general.**—Persons held entitled to claim by adverse possession under this article. *Howard's Unknown Heirs v. Skolant* (Civ. App.) 162 S. W. 978.

This article held to have no application to dispute regarding boundary of surveys included in tract of over 5,000 acres on which there were no improvements, except a fence around it. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

This article and art. 5677 apply only to the 10-year, and not to the 5-year, statute. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

This article and art. 5677 constitute matter in avoidance of the limitation statute which need not be negated by the party pleading limitations. *Id.*

Evidence does not establish title by adverse possession under the 10-year statute where over 5,000 acres were inclosed, but one-tenth of each survey was not cultivated as required by this article. *Id.*

### Art. 5679. [3347] Possession gives full title, when.

Cited, *Rowe v. Dyess* (Civ. App.) 177 S. W. 521; *Whitaker v. McCarty* (Civ. App.) 188 S. W. 502.

**Nature and extent of title acquired.**—A title by limitation is not a good, merchantable title. *Cline v. Booty* (Civ. App.) 175 S. W. 1081; *Adkins v. Gillespie* (Civ. App.) 189 S. W. 275.

Where a contract required the vendor to sell and convey by deed with covenants of general warranty and to furnish an abstract showing good merchantable title, he was bound to deliver a record title, and could not compel the vendee to accept a title by limitations. *McLane v. Petty* (Civ. App.) 159 S. W. 891.

The interest in land acquired by adverse possession is not undivided, but its location is fixed to a certain extent, and a purchaser from the possessor must take notice of that fact and of the fact that he acquires no title unless he purchases the land whose location is so fixed. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

The distinction between title by limitation and prescription is that the latter is based upon a presumed grant, while the former is not. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

In trespass to try title, where plaintiff claimed by adverse possession, the appointment of commissioners to apportion a tract of 160 acres to plaintiff out of the survey, including plaintiff's improvements, held proper, under the pleadings and evidence. *Wickizer v. Williams* (Civ. App.) 173 S. W. 1162, denying rehearing 173 S. W. 288.

Wife having adverse possession after husband's death of lots part of which was community property and part belonging to a stranger held to acquire the whole interest therein, and not merely an undivided half interest. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

The statutes of limitations, when complied with, confer absolute title on the claimant of land. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

A limitation title when it matures is as good as any other title. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

Where title to land has been established by limitation, upon death of the occupants it descends to their heirs and becomes their separate property. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

Title acquired by adverse possession is a legal title, and not an equitable one. *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

**What will not divest title—In general.**—Where a third person acquiring by adverse possession title to 160 acres in a survey claimed by defendant conveyed other 160 acres to defendant, who surrendered to plaintiff, plaintiff was not prejudiced by the conveyance and could not appropriate the land acquired by the third person. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

Where plaintiffs had title by limitations before receiving a deed from defendant reserving a vendor's lien, they were not estopped by the deed from asserting their adverse title, as the deed was without consideration. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

Where plaintiffs had title to 160 acres by adverse possession, and accepted a deed to 200 acres, including the 160 acres from defendant, failure to tender back the 40 acres held not to defeat their right to assert their adverse title to the 160 acres. *Id.*

An offer of plaintiff to pay defendant \$500 for land, title to which was in dispute, will not divest her of title acquired by adverse possession. *Graves v. Graves* (Civ. App.) 192 S. W. 1105.

If defendant in trespass to try title had complete title by limitation of ten years, his act in thereafter attorning to the true owner as his tenant did not effect a divestiture of title. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

**Subsequent loss of possession.**—Where an adverse holder resided on the land in suit for over 12 years, her title by adverse possession was perfected, and where she removed to an adjoining tract from which she exercised control over the land in suit, she did not lose her title. *Thompson Bros. Lumber Co. v. Williamson* (Civ. App.) 177 S. W. 987.

### Art. 5680. [3348] "Peaceable possession" defined.

**In general.**—"Peaceable possession" is (by statute) such possession as is continuous and not interrupted by adverse suit to recover the estate, and hence the possession of plaintiff against all the world except trespassers who entered and took possession of a part of the land was peaceable where no suit was instituted. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

**Interruption by suit.**—A suit prosecuted to effect against a tenant in possession within the ten-year statute of limitations breaks the continuity of the landlord's adverse possession. *Stark v. Brown* (Civ. App.) 193 S. W. 716.

**Continuity of possession.**—Under the statute of limitations, the continuity of one's adverse possession cannot be broken by entry of the owner, but only by suit brought. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Plaintiff's peaceable and adverse possession as against defendants held not broken by an entry upon the land by trespassers without the consent and over the protest of plaintiff, and who were ousted by plaintiff, and such entry could not inure to the benefit of those claiming under such trespassers. *Id.*

An adverse possession to perfect a title must be continuous and exclusive as against the owner, and, if there is a break in the possession, the statute of limitations is checked, because, when it is interrupted and the land becomes vacant, the possession of the owner, in contemplation of law, is resumed. *Id.*

To constitute "disseisin," the person in possession must be forcibly expelled from the land, or there must be some act regarded in law as equivalent to an expulsion; a mere entry on another's land is no disseisin unless accompanied by expulsion. *Id.*

Judgment for defendants on their plea of title under the five-years statute of limitations held unauthorized, where the possession under which they claimed was in subordination to the true owner's title from January, 1904, to January 5, 1906, cultivation of the land in 1906 was not shown, and that there was no use or occupancy of the land in 1909. *Porter v. Brooks* (Civ. App.) 170 S. W. 103.

When "use" of land is relied upon to establish title, it must be continuous. *Buie v. Penn* (Civ. App.) 172 S. W. 547.

Where one does not inclose any part of the land, but merely cultivates small parts of it, different each year, and some years cultivates none, for want of water, the possession is not continuous. *Stevens v. Pedregon*, 106 Tex. 576, 173 S. W. 210, reversing judgment (Civ. App.) 140 S. W. 236.

Where plaintiff resided on land claimed adversely except for some two months when his home was used by tie cutters with his consent, his possession was continuous. *Wickizer v. Williams* (Civ. App.) 173 S. W. 288, rehearing denied 173 S. W. 1162.

Short breaks in the continuity of possession will not defeat the possessor's adverse claim, where the absence is reasonable. *Id.*

A grantee of a league, openly claiming it and paying taxes and in possession thereof by tenants for more than ten years, held to acquire title to the entire league by adverse possession, though others entered on the property adversely until dispossessed by him. *Word v. Colley* (Civ. App.) 173 S. W. 629.

Temporary vacancy of the premises, when there was no intent to abandon them, will not prevent the running of the 10-year statute of limitations. *Wickizer v. Williams* (Civ. App.) 173 S. W. 1162, denying rehearing 173 S. W. 288.

The occupancy of uninclosed land for the purpose of cutting timber under authority from the true owner was sufficient to break the continuity of possession of an adverse claimant. *South Texas Development Co. v. Manning* (Civ. App.) 177 S. W. 998.

Where defendant set up adverse possession under the five-year statute evidence held insufficient to show that defendant or its predecessor had for any continuous period of five years, held the land adversely. *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

No title was acquired by adverse possession under the five-year statute, where there was an interval of nearly three months, during which the land was unoccupied and there

was no proof that such period was a reasonable interval. *Taylor v. Dunn* (Sup.) 193 S. W. 663.

A tenant's illness and consequent failure to occupy premises does not excuse a break in his landlord's continuous adverse possession of the property. *Id.*

### Art. 5681. [3349] "Adverse possession" defined.

**In general.**—"Adverse possession" is (by statute) an actual and visible appropriation of land commenced and continued under a claim of right inconsistent with and hostile to the claim of another. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

When two persons are in mixed possession, one by title, and the other by wrong, the one having title, held in possession to the extent of his rights, so as to preclude adverse possession by the other. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

After termination of action quieting title and enjoining trespass by defendant, he may nevertheless acquire title by adverse possession by entering and holding possession for statutory time. *Ludtke v. Smith* (Civ. App.) 186 S. W. 266.

Where the father died, and the mother conveyed half the land to each of two sons, providing that she reserved from the land her homestead rights until her death, and also all other rights to which she was entitled, but agreed that her grantees should not be disturbed in actual possession, the reservation would not toll the running of limitations. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

**Actual and visible appropriation.**—It is not necessary to title by adverse possession that the land be separately inclosed, but it is sufficient if it is within a general inclosure, even though other tracts are included therein. *Moran v. Moseley* (Civ. App.) 164 S. W. 1093; *Randolph v. Lewis* (Civ. App.) 163 S. W. 647.

That defendant occasionally entered upon land, planting a small quantity of sugar cane and occasionally using the land for pasturage, will not constitute an adverse holding; it appearing that the amount of land used was very small. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

Where land was cultivated, used, and enjoyed by a person, to the exclusion of all others, for more than ten years, this met the demands of the statute of ten years' limitation, even though the land was not fenced. *Dryden v. Makey* (Civ. App.) 160 S. W. 302.

Grazing cattle indiscriminately on land which defendant claimed adversely, and on land in which he claimed no interest, held not sufficient possession to sustain a plea of adverse possession. *Patrucio v. Selkirk* (Civ. App.) 160 S. W. 635.

Merely that one side of a tract of land, to which defendant in trespass to try title claimed title under the five-year statute of limitations, was not fenced, but was bounded by a river, could not defeat defendant's claim. *Randolph v. Lewis* (Civ. App.) 163 S. W. 647.

That a lot claimed by adverse possession was inclosed generally with other lots and not inclosed separately would not prevent it from being claimed by adverse possession. *Johnson v. Sullivan* (Civ. App.) 163 S. W. 1015.

Ten years' adverse possession of wooded land, which was fenced and used, in connection with a larger tract, for pasturage and firewood, held sufficient to support title. *Moran v. Moseley* (Civ. App.) 164 S. W. 1093.

Where plaintiff and those under whom he claimed resided about four miles from the tract which was never occupied by them or tenants nor fenced or improved, and the only visible claim of right of ownership was the cutting of timber and converting it into lumber and firewood, and such cutting was not continuous for ten years, title was not acquired by adverse possession. *Meredith v. Mitchell* (Civ. App.) 167 S. W. 189.

That house erected by adverse claimants was some distance from the tract held not to prevent the acquisition of title, where they had had adverse possession for more than ten years, and thereafter claimed, used, enjoyed, and occupied the land, and made a resurvey embracing the house. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

Where one does not inclose any part of the land, but merely cultivates small parts of it, different each year, and some years cultivates none, for want of water, the possession is not adverse. *Stevens v. Pedregon*, 106 Tex. 576, 173 S. W. 210, reversing judgment (Civ. App.) 140 S. W. 236.

One claiming under a tax deed held to have acquired title to the entire tract under the five-year statute of limitations, though part was not fenced. *Davis v. Howe* (Civ. App.) 176 S. W. 759.

Defendants who claimed a strip of land, not included in their deed, by adverse possession by a lessee, are not entitled to verdict, where the strip was not included in the lessee's inclosure. *Weatherington v. Welch* (Civ. App.) 178 S. W. 691.

The building of logging railroad coupled with the cutting of timber, etc., from land available only for timbering purposes, held to show adverse possession within the five-year limitation statute. *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

To constitute adverse possession, the person occupying the land must appropriate it to some purpose in order to support the statute. *O'Hanlon v. Morrison* (Civ. App.) 187 S. W. 692.

Under this article, defendant's acts in using vacant lot to store lumber, and tie stock in common with others, in a manner at first not inconsistent with the title of the owner although he bought tax title and later fenced it, held not sufficient to show continuous or exclusive use of the property. *Id.*

Mere felling or cutting timber on land would not in itself constitute adverse possession as against the true owner, but such acts when done for the purpose of clearing the land to permit use for farming purposes and as a home may show adverse possession. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

**Possession as notice.**—Plaintiff in 1902 purchased 160 acres of land in the C. survey and thereon built his house and appurtenances. Prior to his purchase there had been an encroachment over the unlocated boundary line between the C. survey and an adjoining unoccupied section of from one to two acres, cultivated, upon which had been erected a wagon shed, with a roof, but with uninclosed sides. Plaintiff in 1903 moved on his land, and cultivated his own land and about an acre and a half to two acres in the adjoining section, corresponding practically to the former encroachment. In 1903, and again in 1907, he moved away from his land, and while away no one lived in his house, but during all of the time he cultivated his own land and the encroachment, except in 1910, and in that year he planted 12 to 15 fruit trees on the encroachment, in extending an orchard on the C. survey, and tended them, and also stored tools in the wagon shed and pastured hogs on the unoccupied section. At different times he also pastured hogs and cut posts and wood and pickets there. Held, that there was a mere encroachment, and not such a continuous adverse possession as to give the owner of the unoccupied section notice that he was claiming adversely any part of the section, or to authorize him to recover 160 acres of land from such section. *Gallup v. Cammack*, 229 Fed. 63, 143 C. C. A. 344.

The mere fact that the deed under which plaintiff in trespass to try title claimed did not locate or describe the line as claimed by him would not estop him from claiming to such line as against defendant who purchased when he had possession up to such line; such possession being notice of his claim. *Gotoskey v. Grawunder* (Civ. App.) 158 S. W. 249.

The possession required to give a claimant the benefit of the statute of limitations must be such as to charge the real owner with notice of a hostile holding against him. *Hooper v. Acuff* (Civ. App.) 159 S. W. 934.

Fences placed across an alley in a town were sufficient to put the county on notice of an adverse claim to the alley by the person placing it. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

The actual possession of 15 or 20 acres of a 160-acre tract cannot as a matter of law, be held insufficient to give notice to the owner of the 160 acres that the person in possession was claiming a part of it, though the latter supposed when he first went upon the land that it was vacant public land, where he continued to claim the land after learning that it was not. *Felder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

An owner of premises is presumed to know the true location of his boundaries, and is bound to take notice of the nature and extent of possession by a claimant. *Wilson v. Seigel* (Civ. App.) 167 S. W. 1090.

Possession of a few acres inclosed by a fence held not to give notice of an adverse claim to 640 acres included in a large pasture. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

That land under fence belonged partly to the occupant and partly to another, whom he was endeavoring to deprive of title by adverse possession, did not render the adverse occupancy insufficient as not sufficient to give a diligent owner notice. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 178 S. W. 669.

To make a good claim by adverse holding, true owner must have actual knowledge of hostile claim, or possession must be so open, visible, and notorious as to raise presumption of notice to world that rights of true owner are invaded intentionally, and with purpose to assert claims of title adversely to him. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In determining whether possession is open, visible, and notorious so as to charge owner with notice of adverse claim, nature, situation, and use of property are to be considered, as well as quantity or proportion of land actually occupied. *Id.*

As prescription is founded on supposition of grant, use or possession on which it is founded must be adverse or of nature to indicate that it is claimed as right and not by permission, or any compact short of grant. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

The character of use to which land is put and acts done by one in possession must reasonably apprise persons in general in the community or the true owner of the land that the possessor is claiming the right to appropriate it to his own use in hostility to the claim of the true owner. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

The registration of defendants' conveyances and payment of taxes, as shown on the tax rolls, together with their use of the land, conclusively charged plaintiffs with notice of their adverse holding. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**Possession of part.**—One holding a part of a tract of land adversely is not entitled to the whole on the theory of constructive possession, in the absence of a showing of an actual claim for the entire tract during the period of limitations or that it would be unjust and inequitable to set off to them only that portion actually held. *Dupont v. Texas & N. O. R. Co.* (Civ. App.) 158 S. W. 195.

In trespass to try title where defendants set up constructive possession of the whole tract, they are not entitled to judgment unless their claim to the entire tract, in addition to the possession of a part, be shown by clear and definite testimony; a mere inference not being sufficient. *Id.*

Where a lease gave the tenant the right to possession of the entire tract of land, only part of which was improved, the tenant could not, by limiting his claims to the improved portion, defeat the lessor's constructive possession of the entire tract. *Frazier v. Houston Oil Co.* (Civ. App.) 161 S. W. 20.

A grantee who takes actual possession of a part of the land conveyed by his deed duly recorded, acquires thereby constructive possession to the limits of the boundaries specified in the deed, though the deed includes land in a prior grant to another, who has not taken actual possession. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

Party who surveyed 160 acres in a tract, the record title to which was in another, and took possession of a small portion, held to acquire title by limitation only to the part in his actual possession, where the record owner took possession of a part of the

tract before limitations had run. *Combes v. Stringer*, 106 Tex. 427, 167 S. W. 217, reversing judgment (Civ. App.) 142 S. W. 668.

Possession of part will not support adverse possession of the whole, where the owner of the superior title is in actual possession of any part of the land, when entry on part by one claiming under a deed is disseisin only to the extent of actual possession taken. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

A defendant in trespass to try title held to show possession of the whole of a league of land, within the five-year statute of limitations, by the attainment to the defendant of a grantee in a deed of a portion of the league. *Hanks v. Houston Oil Co. of Texas* (Civ. App.) 173 S. W. 635.

Where the adverse holder knew the exact location of the parcel of land which she claimed, although only part of it was under cultivation, her title extended to the boundaries of her claim, though the land had never been surveyed. *Thompson Bros. Lumber Co. v. Williamson* (Civ. App.) 177 S. W. 987.

The occupancy of a part of uninclosed land by the true owner, though only for the purpose of cutting timber, carries with it the constructive possession of such part of the whole tract as is not in the actual occupancy of one claiming title by limitation. *South Texas Development Co. v. Manning* (Civ. App.) 177 S. W. 998.

When two persons are in mixed possession, one by title, and the other by wrong, the one having title, held in possession to the extent of his rights, so as to preclude adverse possession by the other. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

If person other than true owner be in possession of part of premises under color of title giving boundaries, such possession, if adverse, though under inferior title, will create disseisin of holder of superior title to extent of boundaries contained in inferior title, except as to such part as is in actual possession of holder of superior title. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Generally, where one enters under color of title into the actual occupancy of part of premises described in instrument giving color of title, his possession is not considered as confined to that part of premises in his actual occupancy, but he acquires possession of all land embraced in instrument. *Id.*

One can claim adverse possession by tenant to only cleared part of land in dispute, where tenant's lease restricts his use of premises to farming purposes only, with prohibition against cutting or destroying any timber. *Id.*

If adverse possessor be without deed or other written memorandum defining possession and is a mere naked trespasser, his possession will be confined to extent of actual inclosure. *Id.*

Under five-year statute of limitations, to gain title there must be open, notorious exercise of dominion and control over all the land claimed under color of title in order to constructively extend limits of actual possession of part of land to boundaries included under color of title. *Id.*

The rule that possession by the true owner of a part of a tract gives constructive possession of all not actually adversely held does not apply where true owner cuts from land logs sold him by adverse occupant. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

Possession by a tenant of a part of a tract under an instrument describing it specifically by metes and bounds does not establish his landlord's constructive possession to the whole tract, but only to the tract described. *Walker v. Knox* (Civ. App.) 191 S. W. 730.

Actual possession of part of premises, by a tenant of one holding color of title, under a lease not restricting the tenant's possession, gives the colorable title holder constructive possession coextensive with the boundaries of his conveyance. *Id.*

Actual possession of part of premises under color of title will not draw to it constructive possession of the balance, unless such color of title is also accompanied by claim of title coextensive with the boundaries of the conveyance. *Id.*

Generally, where a person enters under color of title, his constructive possession embraces all the land covered by the instrument under which he claims, provided no other person is in the actual occupation of the part not actually occupied by him. *Id.*

Land, not in actual possession of any one, is in the constructive possession of the legal owner. *Id.*

True owner of land has constructive possession and seisin of all land to which he has title, if there be no other person in possession. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Title to entire tract of land by limitation cannot be acquired through claim of small portion thereof. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

Where the record owner's lessee resided upon the land, such lessee had constructive possession of the entire tract, and a trespasser could only disseise the true owner to the extent of his actual possession. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

A landlord, through his tenant, held, for purpose of adverse possession, to have constructive possession of entire tract leased, though the tenant did not, by improvement and cultivation, extend his possession beyond a part he had previously occupied under deed of land described as outside the leased land. *Durham v. Houston Oil Co. of Texas* (Civ. App.) 193 S. W. 211.

Where an original survey was subdivided into two tracts, but both were subsequently by the same deed conveyed to the plaintiff in trespass to try title, his possession upon one of the tracts extended to and embraced the other to the extent of the original survey. *Houston Oil Co. of Texas v. Wm. M. Rice Institute* (Civ. App.) 194 S. W. 413.

What constitutes hostile possession.—Under the statute of limitations possession must be one adverse and hostile as to the owner, though not as against all the world. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

An admission made by one of plaintiffs' grantors before the 10 years, in which plaintiffs claimed limitations had matured, would not affect plaintiffs' title by limitations. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

Where the widow had a right of homestead, her possession was not adverse to the brother and sole heir of decedent; he having no right to possession, and hence he was not required to sue within ten years after knowledge of defendant's claim to prevent it from ripening into a title. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

Possession held adverse as to the true owner, though adverse claimant recognized that he could not hold as against the state without paying taxes, and purchased an outstanding tax title. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

The three and five year statutes of limitation had no application to a boundary dispute, where plaintiff only claimed the land paid for by him and claimed up to a fence only because he thought his deeds embraced the land up to the fence. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

Hostile possession must be manifested by such acts as would constitute grounds for action against an adverse claimant. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

Entry under claim of right, essential to adverse possession, is wanting, where entry is for the avowed purpose of acquiring title by possession. *Stevens v. Pedregon*, 106 Tex. 576, 173 S. W. 210, reversing judgment (Civ. App.) 140 S. W. 236.

Possession under a tax deed during the time allowed the owner for redemption is not adverse under the five-year statute of limitations. *Davis v. Howe* (Civ. App.) 176 S. W. 759.

Where defendants held continuous adverse possession of land, for the statutory period, claiming it under their deeds, their holding ripened into adverse title, even if the dividing line had previously been located at a place other than that called for in the deeds. *Harris v. Kiber* (Civ. App.) 178 S. W. 673.

Where a verbal way over land is granted, possession under such grant is adverse; the verbal grant being void under the statute of frauds. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

Possession under a tax deed is not adverse to title of owner, and cannot be used as a basis for possession under statute of limitation until after the period of two years allowed for redemption. *O'Hanlon v. Morrison* (Civ. App.) 187 S. W. 692.

Under this article, entry under "claim of right" means an entry not subordinate to another's title, but with claim of right to the land, hostile and adverse to the true owner, although the person so entering knows he has no title except such as possession may confer. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

Under this article, defining "adverse possession," in an action to recover land, plaintiff's testimony that he went on land intending to pay rent for it to any one who proved himself to be real owner held to support a finding that his possession was not adverse. *Nerio v. Christen* (Civ. App.) 189 S. W. 1038.

Use of way over land of another when owner is also using it is not such adverse possession as will serve as notice of claim of right; as it is not inconsistent with license from owner. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

One who enters on land with knowledge that he has no title, and that another has, but with the intention to occupy in hostility to all the world, and who does so occupy openly and visibly, is in adverse possession. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

The mere fact of obtaining deeds to land unaccompanied by open and notorious adverse claim would not be an ouster of cotenants. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

Where the father died, and the mother conveyed half the land to each of two sons, reserving a homestead right, but other heirs claimed an interest, to establish title by adverse possession the two grantee sons need hold adversely only to the other heirs, and not to their mother. *Id.*

A party may establish title by adverse possession under the 10-year statute by entering for that express purpose, although he then knew he had no title. *Houston Oil Co. of Texas v. Loftin* (Civ. App.) 194 S. W. 996.

**Necessity of claim of right.**—One who enters upon land which he is entitled to acquire conditionally in acknowledgment of the superior right of another cannot claim by adverse possession unless he meanwhile obtains a superior outstanding title, or repudiates the title under which he entered, and gives its owner notice that he is claiming adversely to him. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

Where one takes possession of the land of another by permission, his holding will not become adverse to the owner without some open and hostile act on his part to evidence his claim. *Kelly v. Blakeney* (Civ. App.) 172 S. W. 770.

Where N. took possession without being in a fiduciary relation to, or recognizing title of, plaintiffs, he need not, when thereafter taking lease from P., disavow plaintiffs' title, for P. through N., to hold adversely to them. *Holloway v. Purington* (Civ. App.) 175 S. W. 507.

Evidence held insufficient to establish defendant's title by limitations not showing that the defendant in possession notified plaintiff of his attornment to the other defendants. *Shaw v. Thompson Bros. Lumber Co.* (Civ. App.) 177 S. W. 574.

To sustain a plea of title in a donor by limitation of ten years, the donee must show that his donor held the land under a claim of right. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

Where the defendant, claiming under a tax title, used a vacant lot for pasturing stock in common with others, storing lumber and wire in a manner consistent with subordination to title of owner, and gave no notice of his change of intention to a hostile possession under a claim of right until a year or so before he fenced land three years before beginning of action, held he could not claim title under the ten-year statute of limitations. *O'Hanlon v. Morrison* (Civ. App.) 187 S. W. 692.



On the issue of title by adverse possession the inquiry is whether claimant has actually claimed adversely to the owner, and it is not material whether his claim would have been different if his knowledge of the title had been correct. *Houston Oil Co. of Texas v. Stepany (Civ. App.)* 187 S. W. 1078.

Adverse possession cannot ripen into title unless accompanied by an intent by the occupant to make it exclusive and hostile. *Id.*

Claim of title or claim of right by the occupant is necessary in all cases where title is established by adverse possession. *Id.*

Entry and possession without a claim of right can never ripen into good title, no matter how long continued. *Id.*

Title by ten-year statute held not shown, where it appears only that one entered under some kind of trade with the original grantee, and lived on and claimed the land for that period, as it must be clearly and positively shown that possession was adverse, and not by permission. *Durham v. Houston Oil Co. of Texas (Civ. App.)* 193 S. W. 211.

**Vendor and purchaser.**—The possession of a purchaser of land, who is admitted under the contract, is not adverse to his vendor unless he repudiates the trust relation by claiming to hold the land adverse to his vendor and brings the knowledge of his repudiation home to his vendor. *McCulloch v. Nicholson (Civ. App.)* 162 S. W. 432.

Where husband and wife conveyed land and retained a vendor's lien to secure purchase money notes, the vendee did not hold adversely to the wife, though the deed as to her was void because defectively acknowledged. *Vanderwoik v. Matthaei (Civ. App.)* 167 S. W. 304.

**Landlord and tenant.**—Lessee holding over without repudiation of lease with notice held not to acquire title by adverse possession. *Fahey v. Kaies (Civ. App.)* 181 S. W. 782.

**Tenants in common.**—A cotenant entering into possession cannot, by mere occupancy, acquire title by adverse possession against another cotenant, but he must give notice of his adverse claim. *Davis v. Houston Oil Co. of Texas (Civ. App.)* 162 S. W. 913.

The execution of a deed by a tenant in common conveying the entire tract of land and its registration by the grantee, who took open and adverse possession thereunder and paid the taxes, was notice to the other cotenant of the assertion of an adverse claim. *Olsen v. Greele (Civ. App.)* 190 S. W. 240.

Where one tenant in common assuming to convey the entire estate, conveys it by metes and bounds, the deed gives color of title to the whole tract, and entry by the purchaser thereunder, claiming title to the whole, will operate as an actual ouster and disseisin of the cotenant. *Walker v. Knox (Civ. App.)* 191 S. W. 730.

Recorded deeds to entire tract, undertaking in good faith to convey the whole title to such tract, and purchaser's claim of title through his tenant constituted notice to cotenants of the grantor that purchasers were asserting adverse claims to the cotenants' interest in the tract. *Id.*

**Persons in fiduciary relation.**—The possession held by a trustee of land after his repudiation of the trust would be the possession of the beneficiary under the limitation statutes, where it was established, in an action between the parties, that such possession was held as trustee and the title was adjudged to be in the beneficiary. *Sullivan v. Fant (Civ. App.)* 160 S. W. 612.

Where a party who held land in trust for another, although his conveyance was absolute on its face, possessed the property adversely to other claimants, the trustee's adverse holding inured to the benefit of the cestui que trust. *Ratcliff v. Ratcliff (Civ. App.)* 161 S. W. 30.

**Evidence.**—In trespass to try title, where defendants pleaded limitations, evidence held sufficient to support a finding that defendants had not recognized the right of another to the land involved. *Dryden v. Makey (Civ. App.)* 160 S. W. 302.

The acceptance by a party claiming title by limitations of a payment from another for repairing a fence on the land was admissible in evidence to show that his possession was not adverse. *Id.*

In trespass to try title, where plaintiff claimed by adverse possession, evidence held sufficient to support a finding that the possession was not adverse for the whole period of limitation. *Ratcliff v. Ratcliff (Civ. App.)* 161 S. W. 30.

Evidence of failure to pay taxes on land while it was alleged that adverse possession was being asserted was admissible as against the claimants by adverse possession. *Houston Oil Co. of Texas v. Jones (Civ. App.)* 161 S. W. 92.

Evidence held not insufficient to show payment of taxes by one claiming title by prescription merely because the tax receipts gave a wrong certificate number. *Griswold v. Comer (Civ. App.)* 161 S. W. 423.

Evidence held not to sustain a finding that a cotenant entering into possession acquired title by adverse possession against another cotenant. *Davis v. Houston Oil Co. of Texas (Civ. App.)* 162 S. W. 913.

A deed was properly admitted in evidence in support of defendant's plea of five-year limitation, though it incorrectly stated the certificate number and the name of the original patentee where the land could be otherwise located from its recitals. *Randolph v. Lewis (Civ. App.)* 163 S. W. 647.

Payment of taxes, when relied on as the basis of title by five-years limitations, may be shown by parol or circumstantial evidence. *Id.*

Evidence held to sustain a finding that defendants had acquired title to certain lots, including the alley in a town, by adverse possession. *Guadalupe County v. Poth (Civ. App.)* 163 S. W. 1050.

Evidence held insufficient to show a prescriptive right, by exercise thereof for ten years, by defendant and its predecessor, prior to the suit, to take all the water from a lake for irrigation. *Lakeside Irr. Co. v. Kirby (Civ. App.)* 166 S. W. 715.

Evidence of an acknowledgment of tenancy by plaintiff claiming land by adverse possession after the bar of the statute was complete held applicable only to the question whether his prior possession was adverse. *Wickizer v. Williams* (Civ. App.) 173 S. W. 238. Rehearing denied *Id.* 1162.

Evidence held to sustain a finding of defendants' open and adverse possession of the tract of land described by them in their cross-bill for more than ten consecutive years. *Rotge v. Simmler* (Civ. App.) 176 S. W. 614.

Evidence held insufficient to show that defendant had prescriptive title to the uninclosed portion of land in controversy. *South Texas Development Co. v. Manning* (Civ. App.) 177 S. W. 998.

Defendants, setting up title by limitation, must prove their plea by a preponderance of the evidence. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

Evidence held insufficient to sustain finding for defendants on the issue of possession under a claim of right, so as to establish title by adverse possession. *Id.*

Evidence in trespass to try title held to warrant a finding of continuous occupancy by defendant, through tenants, for such time as to complete the bar of the five-year statute. *Beaumont Wharf & Terminal Co. v. McFaddin* (Civ. App.) 178 S. W. 722.

In trespass to try title, where defendant set up title by adverse possession, evidence held insufficient to show such possession and use by defendant's predecessor as would give him and his successors title. *Hall v. Shoemaker* (Civ. App.) 178 S. W. 803.

Evidence held to justify a finding that defendants acquired title under the five and ten years' statutes of limitations. *Houston Oil Co. of Texas v. Miller & Vidor Lumber Co.* (Civ. App.) 178 S. W. 830.

Where plaintiff, a railway company, claimed its possession and leasing of property to date from 1887, its charter, not issued until 1889, should have been admitted. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination to the rightful owner. *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

Where defendant set up adverse possession under the five-year statute, evidence held insufficient to show that defendant or its predecessors had, for any continuous period of five years, held the land adversely. *Id.*

In trespass to try title, evidence held to sustain findings that plaintiff's predecessor in interest had occupied land for statutory period for grazing purposes. *Dawson v. Groesbeeck* (Civ. App.) 183 S. W. 866.

Evidence held sufficient to show that plaintiffs acquired an easement or prescriptive right of way over defendants' property by adverse possession. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

In action to recover land on title by adverse claim and occupancy, evidence held to support verdict for plaintiffs. *Houston Oil Co. of Texas v. Jones* (Civ. App.) 184 S. W. 611.

Evidence, in an action on a vendor's lien note against original purchaser and a subsequent purchaser, held not to show that the statute of limitations had divested the original vendor of title to a tract at the time of his conveyance to the original purchaser. *Orand v. Whitmore* (Civ. App.) 185 S. W. 347.

Evidence examined, and held to show that plaintiff's possession was by permission, and that there had been no repudiation of tenancy sufficient to start statute running, and as matter of law no adverse possession was shown. *Ludtke v. Smith* (Civ. App.) 186 S. W. 266.

Where evidence failed to disclose sufficient description of that portion of land inclosed, or that portion adversely used for pigpens and slaughterhouses, to enable jury to segregate such tracts from larger tract, verdict for plaintiff held to be not against weight of evidence. *Id.*

Evidence establishing adverse possession ought to be certain. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In trespass to try title, evidence held sufficient to sustain a verdict for plaintiff, where defendant had repudiated the contract of tenancy under which he claimed lawful possession and thereafter had asserted adverse title. *Rice v. Schertz* (Civ. App.) 187 S. W. 245.

Evidence to indicate that the possession was adverse, and not by permission, must be clear and positive. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

Evidence held not to show that claimant's tenant, holding under restricted lease, extended his possession beyond the parcel he was occupying over the tract claimed. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

In trespass to try title claimed under the ten-year statute of limitation, the defense being permissive tenancy under defendant, evidence held to show such tenancy. *Pippin v. Simmons* (Civ. App.) 192 S. W. 588.

Evidence showing successive grantees holding adversely for 24 years and by deed for 6 years until plaintiff purchased land held sufficient to support finding in plaintiff's favor for an undivided 640 acres. *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

In an action of trespass to try title, evidence held to support findings of court that plaintiff had been in possession of only the easterly half of a strip of land four feet wide for more than ten years. *Graves v. Graves* (Civ. App.) 192 S. W. 1105.

Evidence held to warrant jury in finding that defendant in trespass to try title had had ten years' peaceable and adverse possession prior to the time of bringing suit. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

Where defendants claimed title by adverse possession, but plaintiffs claimed they were only cotenants, deeds constituting defendant's chain of title are admissible to show their adverse holding. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

Where the father died, and the mother conveyed half of the land to each of two sons, making a reservation of homestead rights, and the two sons paid taxes and claimed ex-

clusively for 20 years, the deeds to them were properly admitted in evidence as a notice of claim to title. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

### Art. 5682. [3350] Possession may be held by different persons.

Cited, *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

**Tacking successive possessions.**—Possession prior to the segregation of two tracts from a survey could not be added to possession of one of such tracts in order to complete 10 years' adverse possession of that tract. *Smith v. Huff* (Civ. App.) 164 S. W. 429.

Under this article held that it was immaterial that some of the conveyances through which some of the parties claimed failed to accurately describe the land in controversy, where the several grantees claimed adversely and exercised acts of ownership over the same property. *Moran v. Moseley* (Civ. App.) 164 S. W. 1093.

**Privity of estate.**—Where a widow who repudiated the interest of her brother-in-law's heirs was herself a tenant in common with them, her repudiation did not inure to the benefit of her daughters, who were also tenants in common, in the absence of an agreement by the daughters authorizing the mother to take possession for their benefit. *Williams v. Randall* (Civ. App.) 158 S. W. 253.

Where a widow, in possession with her daughters of land, owned jointly by her husband and his deceased brother, repudiated the interest of the brother's heirs, but removed from the land before the 10 years required by the statute of limitations, leaving the daughters in possession, the adverse possession was broken, in the absence of evidence showing that the daughters were holding for their mother or under a claim from her. *Id.*

**Vendor and purchaser.**—A verbal sale of improvements and right of possession by one holding under the ten-year statute of limitations, made before the statute had run, is sufficient to constitute privity, and enable the vendee to tack his possession to that of his vendor. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

**Landlord and tenant.**—A defendant, claiming constructive possession by a tenant under two leases, may tack the terms of the two leases. *Hanks v. Houston Oil Co. of Texas* (Civ. App.) 173 S. W. 635.

The possession by a tenant is sufficient to support a claim of adverse possession under the 10-year statute of limitations. *Wickizer v. Williams* (Civ. App.) 173 S. W. 1162, denying rehearing 173 S. W. 288.

### Art. 5683. [3351] Right of the state not barred, etc.

**In general.**—The word "town" implies the idea of a considerable number of people living in close proximity, as distinguished from a rural settlement, but does not necessarily imply incorporation. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

Title to public land cannot be acquired by limitation. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

This statute has no application to a private easement. *Walton v. Harigel* (Civ. App.) 183 S. W. 785.

**State.**—In trespass to try title, evidence held sufficient to show that the state had parted with its title prior to the commencement of plaintiff's alleged adverse possession. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

Plaintiff claiming title to land by adverse possession must show that the state has parted with its title either by patent or grant, or its equitable title by location and survey. *Id.*

Where a town, after establishment by the Spanish government, was permanently abandoned, all its land except that conveyed to individuals reverted to the government and passed to the state of Texas, and title by limitation to any part thereof could not be acquired. *Alexander v. Garcia* (Civ. App.) 168 S. W. 376.

**Claimant under purchase from state—Former statute.**—Where the state of Texas placed grants made by any former sovereign on the same footing as those made by the state, rights originating by treaty or under the Constitution or laws of the state were not violated, and such grants were not protected from the operation of the statute of limitations. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

**County.**—Limitations do not apply to settle title to unlocated school lands as against a county holding and disposing of such lands granted it by the state in trust for purposes of education. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

**City.**—In an action to enjoin a city from opening or using a street under a dedication by plaintiff's ancestor, held that, where less than five years elapsed between the claimed dedication and the passage of this article, the city's claim to open the street was not barred. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

Under this article, appropriation of lands by the city is not necessary in order to prevent acquisition of title by limitation by other parties. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Limitations run against the title of a city acquired by patent from the state as they would had it acquired land by purchase from an individual. *City of Laredo v. De Moreno* (Civ. App.) 183 S. W. 827.

In spite of this article, a person can maintain adverse possession and acquire title against the city as to outlying wild and unimproved land covered with timber and brush. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

**Roads and streets.**—This article prevents limitations as to streets from running either in favor of or against any person. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Under this article, where city platted its land and sold lots with reference thereto, limitations do not run against its title to streets. *City of Laredo v. De Moreno* (Civ. App.) 183 S. W. 827.

**Alley.**—Under this article, title to an alley in a town which was fenced could be acquired by adverse possession, though the town were not incorporated. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

### Art. 5684. [3352] Does not run against infants, etc.

Cited, *Vanderwolk v. Matthaai* (Civ. App.) 167 S. W. 304.

**In general.**—Evidence held to show that during the claimed prescriptive period some of the plaintiffs were under disability. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

Where during the life of an owner who was laboring under no disability prescriptive use of land began, the fact of an intervening disability will not defeat the prescriptive right. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 181 S. W. 496.

Where the adverse possession limitation statute commences to run against a person, his death will not interrupt its running, although his heirs are minors or of unsound mind. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**Minors.**—Under this article, the two years in which to institute a bill of review does not in the case of minor commence to run until he attains majority. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

The statute of limitation of 10 years does not begin to run against the claims of persons who, when the possession was commenced, were minors. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

**Married women.**—Where female children were married and of legal age when their brother obtained a deed from the parents and took possession and set up an adverse claim to common family property, limitations ran against the female children. *Ryman v. Petruka* (Civ. App.) 166 S. W. 711.

Where the 10-year statute of limitation did not begin to run against one heir, owing to her disability of coverture, but on her death the land descended to her coheirs, the statute began to run only when the land was cast by her death. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

A wife's community interest in land held adversely is barred by the 10-year statute of limitation when she was living when the adverse possession was begun, and such adverse possession is not legally stopped by the disabilities of her heirs, to whom her title descended. *Id.*

Under this article the statute limiting time to sue for recovery of real property does not run against a married woman until she is 21 years of age. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

## CHAPTER TWO

### LIMITATION OF PERSONAL ACTIONS

Art.	Art.
5685. Actions to be commenced in one year.	5692. Actions for specific performance.
5686. Survival of cause of action.	5693. Time in which power of sale may be exercised.
5687. Actions to be commenced in two years.	5694. Rights under vendor's lien barred, when.
5688. What actions barred in four years.	5695. Contracts of extension, how made and construed; proviso.
5689. On bond of executor, etc.	5696. Judgments shall be revived, when.
5690. All other actions barred, when.	5697. On motion for not returning execution.
5691. Actions on foreign judgments barred, when.	

### Article 5685. [3353] Actions to be commenced in one year.

**Subdivision 1.**—Where cause of action for malicious prosecution is not barred by limitations, it is immaterial that petition also contains charges of slander and libel, action for which would be barred. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

### Art. 5686. [3353a] Survival of cause of action.

Cited, *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

**In general.**—No action can be maintained under this article unless the injury did not cause decedent's death. *Black v. Texas & P. Ry. Co.* (Civ. App.) 161 S. W. 1077.

Though under common law, actions for personal injuries abated on the death of the injured person, by this article the action of an injured person whose injuries do not result in death survives for the benefit of his heirs or legal representatives. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

**Pleading.**—A petition, in an action by a surviving widow for personal injuries to her husband, is insufficient as stating a cause of action for injuries not resulting in death, when it did not allege whether the injuries were or were not the cause of the husband's death. *Black v. Texas & P. Ry. Co.* (Civ. App.) 161 S. W. 1077.

In view of this article held, that where plaintiff died pending his suit, and his surviving children were doubtful as to the real cause of death, they might frame

their petition for a recovery for injury causing his death, or for his death from some other cause. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954.

### Art. 5687. [3354] Actions to be commenced in two years.

Cited, *Pecos & N. T. Ry. Co. v. Rayzor* (Civ. App.) 174 S. W. 916.

**Subdivision 1.**—A prescriptive right to an easement is not acquired by possession and user for more than two years. *American Cement Plaster Co. v. Acme Cement Plaster Co.* (Civ. App.) 181 S. W. 257.

The four, and not the two, year statute of limitations applies to an action for injuries to a shipment of horses in transit. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

A petition for damages to an automobile during shipment held to state an action in tort to which the two-year statute of limitation applied. *Panhandle & S. F. Ry. Co. v. Hubbard* (Civ. App.) 190 S. W. 793.

The two-year statute of limitation does not bar recovery in condemnation proceedings of the incidental damages to plaintiff's land not taken caused by the proper construction of the railroad along the right of way condemned. *Quanah, A. & P. Ry. Co. v. Collett* (Civ. App.) 190 S. W. 1128.

**Subdivision 2.**—Where defendant bank contracted to take over the assets of the M. bank and to pay its liabilities, an action to recover the value of M. bank's stock, pledged to plaintiff, which value had been paid by defendant to the pledgor held an action on the contract, and not for conversion, and not barred by the two-year statute of limitations. *Guaranty State Bank of Carthage v. Continental Bank & Trust Co. of Shreveport, La.* (Civ. App.) 164 S. W. 411.

Where fences of the value of \$500 were placed on school lands by a lessee, and defendant acquired the lease, and then purchased the lands from the state and held possession from 1906 until 1912, he acquired title to the fences, both by purchase and limitation under two year statute. *Elza v. State* (Civ. App.) 169 S. W. 633.

An action for the recovery of money paid by plaintiff's assignor to the transferee of a note given by the assignor to defendant and wrongfully appropriated by him is for detention and conversion of personalty, and barred in two years under this article. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

**Subdivision 4.**—The two-year limitations run against a county to bar an action by it against a canal company for reimbursement for amounts expended in repairing a bridge, the construction and subsequent repair of which was made necessary by the canal. *Cow Bayou Canal Co. v. Orange County* (Civ. App.) 158 S. W. 173.

An action for deceit is an action for debt within the two-year statute of limitations. *Howell v. Bank of Snyder* (Civ. App.) 158 S. W. 574.

An action to recover for deficiency of quantity of land conveyed, alleging fraudulent representations concerning the quantity of land, held not within the two-year statute of limitation, with reference to frauds, but within Rev. St. 1895, art. 3358, prescribing a four-year limitation for actions not otherwise provided for. *Holland v. Ashley* (Civ. App.) 158 S. W. 1033.

Where a former station agent of a railroad company on March 31, 1905, sued to recover money paid out by him for additional help at his station and pay for overtime work, so much of these claims as accrued on and prior to March 31, 1903, was barred by the limitation of two years. *Beard v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 160 S. W. 633.

A suit against plaintiff's tenants in common for contribution of their share of the expense incurred by him in improving the land, instituted within two years after the cause of action accrued, was not barred. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

A claim on account of fraud and deceit in a sale is within this article; the indebtedness not being evidenced by written contract. *Bostick v. Heard* (Civ. App.) 164 S. W. 34.

A broker's claim for commissions for procuring a sale of property is barred by the two-year statute of limitations. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

An action for the value of 30 bales of cotton delivered with other cotton for shipment is one for breach of contract where based upon a bill of lading covering the whole shipment, though plaintiff was advised shortly after the delivery of the rest the other bales were destroyed by fire; and hence the action is not barred by the two-year statute of limitations. *R. W. Williamson & Co. v. Texas & P. Ry. Co.*, 166 S. W. 692, 106 Tex. 294, reversing judgment (Civ. App.) 138 S. W. 807.

The four-year statute of limitations, and not the two-year, is applicable to an action for damages resulting from the breach by the seller of a written contract to set up gin machinery. *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806.

Limitations of two and four years held not to apply to collection by execution of costs awarded by judgment to successful party in trespass to try title. *Baumont Irrigating Co. v. De Laune* (Civ. App.) 173 S. W. 514.

Where in an action on a note executed by plaintiff's attorney defendant claimed that the note was given to be used by plaintiff to secure money to pay an attorney fee owing to defendant, the two-year statute of limitation barring an action for the fee was inapplicable to the issue thus presented. *O'Neil v. Gibson* (Civ. App.) 177 S. W. 183.

Action to recover money paid under mistake of fact held not barred by the two-year statute of limitations. *Lindsay v. Vogelsang* (Civ. App.) 179 S. W. 58.

Where plaintiff gave his own personal negotiable note in settlement of decedent's debt, there was an immediate payment of the debt, so that an action for reimbursement, which would be one on an implied contract and not on a written obligation, accrued when the note was given, and the two-year statute applied. *Yndo v. Rivas* (Sup.) 180 S. W. 96.

An action for balance of purchase price on logs sold by oral contract to a corporation, accruing before but not brought until after its dissolution, and not brought against its statutory trustee until more than two years after dissolution, held barred by the two years' statute of limitations. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

Action of deceit, based on oral representations made to induce plaintiff to purchase land, held one for deceit, and not on contract, governed by the two-year statute of limitations; the four-year statute not applying. *Sowell v. Hoffman* (Civ. App.) 182 S. W. 1152.

Under the statute of limitations the right to rent under a lease not in writing is barred if suit is not commenced in two years after it accrues. *Donada v. Power* (Civ. App.) 184 S. W. 793.

When a life insurance agent, on refusal of the insurer to accept a risk, refused to return the applicant's premium note, and negotiated it, the right of action arose, and the statute of limitations began to run, barring action for the conversion after two years. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

Accommodation surety who pays the note can recover from the principal only on the implied promise, and not on the note, and his action is barred in two years. *McCavick v. McBride* (Civ. App.) 189 S. W. 795.

The two-year statute of limitation applied to liability of sheriff to county on implied contract to refund county moneys wrongfully had and received by him, to which he could in no event be entitled. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

A damage action for fraudulently obtaining real estate, being one for debt, is barred by the two-year statute of limitations. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

**Subdivision 6.**—The two-year statute of limitations was applicable where the gist of the action was for damages for personal injuries, though the petition also alleged that a settlement with defendant was procured by fraud, and asked that it be set aside; such allegations not making the four-year limitations applicable. *Texas Cent. R. Co. v. Hawkins* (Civ. App.) 163 S. W. 132.

**Subdivision 7.**—Under Rev. St. 1911, art. 4694, subd. 2, amended by Acts 33d Leg. c. 143, giving a right of action for death by wrongful act, the foundation of the action is the act causing the injury, although this article provides that the cause of action is deemed to have accrued upon death of injured party. *Slate v. City of Ft. Worth* (Civ. App.) 193 S. W. 1143.

### Art. 5688. [3356] What actions barred in four years.

Cited, *Ogg v. Ogg* (Civ. App.) 165 S. W. 912; *Leonard v. Kendall* (Civ. App.) 194 S. W. 786; *City of Laredo v. Salinas* (Civ. App.) 191 S. W. 190; *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

**Subdivision 1.**—An action not brought until after the expiration of four years from the maturity of the note is barred. *Howell v. Bank of Snyder* (Civ. App.) 158 S. W. 574.

The fact that when plaintiff corporation sued on notes it was not legally entitled to sue under Rev. Civ. St. 1911, art. 7399, because it had not paid its franchise tax, would not cause the action to be barred by the four-year limitation, though before an amended petition was filed showing compliance with the statute more than four years had elapsed since maturity of the last note. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

An action on a fraternal benefit certificate brought in 1914, while the court found that the member died after September 7, 1902, and before December 31, 1905, held barred by the four-year statute of limitations. *Supreme Lodge of Pathfinder v. Johnson* (Civ. App.) 168 S. W. 1010.

The four-year statute of limitations, and not the two-year, is applicable to an action for damages resulting from the breach by the seller of a written contract to set up gin machinery. *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806.

Action of deceit, based on oral representations made to induce plaintiff to purchase land, held one for deceit, and not on contract, governed by the two-year statute of limitations; the four-year statute not applying. *Sowell v. Hoffman* (Civ. App.) 182 S. W. 1152.

The four, and not the two, year statute of limitations applies to an action for injuries to a shipment of horses in transit. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

A suit for rent of additional land where a lease provided for leasing of additional land by a supplemental contract, which was made, but not in writing, held a suit "founded upon any contract in writing" within the four-year statute of limitation. *Donada v. Power* (Civ. App.) 184 S. W. 793.

This article applies to an action to recover on bill of lading. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Civ. App.) 187 S. W. 354.

Four-year statute of limitations applied to sheriff's and sureties' liability on official bond to refund amounts paid him, on his false claim for hire of jail guards which he had not in fact employed. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

**Subdivision 3.**—A partner who paid a firm debt nearly three years after the death of one member of the firm and the sale of the last of the firm property held, under this article entitled to recover, at any time within four years, from his copartners. *Roberts v. Nunn* (Civ. App.) 169 S. W. 1086.

**Art. 5689. [3357] On bond of executor, administrator or guardian.**

**In general.**—An action against an administrator's bondsmen is barred by this article four years after the administrator's discharge, as against heirs who were then of age. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

**Art. 5690. [3358] All other actions barred, when.**

Cited, *Texas Cent. R. Co. v. Hawkins* (Civ. App.) 163 S. W. 132; *Dupree v. Gale Mfg. Co.* (Sup.) 184 S. W. 184; *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

**In general.**—An action to recover for deficiency of quantity of land conveyed, alleging fraudulent representations concerning the quantity of land, held not within the two-year statute of limitation, with reference to frauds, but within this article. *Holland v. Ashley* (Civ. App.) 158 S. W. 1033.

The four-year statute of limitations is applicable to a suit to enforce plaintiff's rights as a stockholder in a corporation and for an accounting. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

Limitations of two and four years held not to apply to collection by execution of costs awarded by judgment to successful party in trespass to try title. *Beaumont Irrigating Co. v. De Laune* (Civ. App.) 173 S. W. 514.

Suit by heirs of assignors for benefit of creditors to recover the balance, held by the assignees held not subject to the defense of laches, nor, in view of *Vernon's Sayles' Ann. Civ. St.* 1914, art. 106, relating to reports by assignees, to the general law of limitations. *Bass v. McCord* (Civ. App.) 178 S. W. 998.

Judgment of a justice may be revived within 10 years of its rendition; the 4-year statute of limitations not applying. *Gallagher v. Teuscher & Co.* (Civ. App.) 186 S. W. 409.

Where a petition of plaintiff's predecessor in 1881 to a corporation for recognition as owner of a certificate and for the issuance of a renewal certificate was refused, plaintiffs' suit, subsequent to 1909, to compel recognition of their ownership of same certificate, was barred by four-year limitation. *Converse v. Galveston City Co.* (Civ. App.) 189 S. W. 539.

Where a corporation issued stock for property, and there was no attempt to conceal terms of transaction whereby stock was issued the right of minority stockholders to any relief was barred by four years' statute of limitations. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**Cause of action.**—Motion to correct minutes of judgment in action of trespass to try title by inserting proper section number of land, an erroneous number having been inserted, is not an action within this article, and hence is not barred by four-year delay. *Waggoner v. Rogers* (Sup.) 193 S. W. 136.

**Actions for recovery of real estate.**—While a suit to reform a deed and one in trespass to try title may be determined in one proceeding, yet, if the title depends upon the reformation of the deed, and the right to such reformation is barred by the statute of limitations, the right to proceed with the suit in trespass to try title also fails. *Hamilton v. Green* (Civ. App.) 166 S. W. 97.

The four-year statute of limitations does not apply to an action of trespass to try title. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

In a suit of trespass to try title to lands claimed by plaintiff under mineral land patents from state, a prayer that field notes be corrected would not deprive suit of its character as one for recovery of real estate or cause four-year statute of limitations to apply to such prayer. *Plummer v. McLain* (Civ. App.) 192 S. W. 571.

A suit seeking specific performance of an alleged contract and the right to recover thereunder a one-half interest in a tract of land being one for specific performance of a contract for conveyance of real estate, the four-year statute is inapplicable. *Cubit v. Jackson* (Civ. App.) 194 S. W. 594.

**Rescission or cancellation.**—An action to cancel a deed conveying land in trust in favor of grantor is governed by four-year statute of limitations. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

**Reformation or correction of instrument.**—An answer seeking affirmative relief and indorsed as required for a suit in trespass to try title, but which relied upon mistake in the deed to plaintiff's grantor of which plaintiff had knowledge, held to allege a suit for the reformation of the deed, which was barred in four years, and not a suit to recover the land. *Hamilton v. Green* (Civ. App.) 166 S. W. 97.

**Vacation and reformation of judgments.**—An action to set aside a judgment in partition, brought by one interested in the real estate more than four years after attaining full age, is barred by the four years' limitations, where the judgment as to the infant was at most voidable. *Holt v. Love* (Civ. App.) 168 S. W. 1018.

Where a judgment in partition with order of sale was at most only voidable, a party entitled to set aside the judgment and recover an interest in the real estate must sue therefor, before the running of limitations barring an action to set aside the judgment. *Id.*

Rev. St. 1911, art. 4648, does not apply to an equitable suit to vacate a judgment, the time for which is limited by article 5690. *Texas & P. Ry. Co. v. Miller* (Civ. App.) 171 S. W. 1069.

An attack on a judgment, rendered with jurisdiction, and known of by the parties, is barred by the four years' statute. *Bird v. Palmetto Lumber Co.* (Civ. App.) 176 S. W. 610.

Where a judgment and record in a divorce action affirmatively showed service and was only voidable, a suit to set it aside on ground that defendant was not properly served with citation was barred at expiration of four years after such defendant learned that divorce had been granted. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

A direct attack on a personal judgment, void for lack of service, is governed by the four-year statute of limitations. *Kimmell v. Edwards* (Civ. App.) 194 S. W. 168.

#### Art. 5691. [3359] Actions on foreign judgments barred, when.

In general.—This article is cumulative of the other articles of limitation. *Tourtlet v. Booker* (Civ. App.) 160 S. W. 293.

The full faith and credit clause of the federal Constitution does not restrict the right of a state to prescribe a reasonable limitation period for bringing actions upon judgments of sister states. *Id.*

The statute of limitations may be pleaded in an action upon a judgment of a sister state. *Id.*

This article held statute of limitation not available unless pleaded under article 5706. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

#### Art. 5692. [3360] Actions for specific performance.—Any action for the specific performance of a contract for the conveyance of real estate shall be commenced within four years next after the cause of action shall have accrued, and not thereafter. [Rev. St. 1911, art. 5692; Act Oct. 16, 1917, ch. 26, § 1.]

Explanatory.—The act amends art. 5692, Rev. Civ. St. 1911.

In general.—A suit seeking specific performance of an alleged contract and the right to recover thereunder a one-half interest in a tract of land is one for specific performance, and is not barred until 10 years after accrual. *Cubit v. Jackson* (Civ. App.) 194 S. W. 594.

#### Art. 5693. Time in which power of sale may be exercised.

Cited, *Adams v. Harris* (Civ. App.) 190 S. W. 245; *Key v. Jones* (Civ. App.) 191 S. W. 736.

Former statute.—Where plaintiff's claim was not barred under this article prior to amendment of 1913 shortening the period of limitation and allowing action to be brought within one year, plaintiff lost his claim by failure to sue in such time, although by subsequent act such statutes were amended to allow four years in which to sue. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

Constitutionality.—Amendment to this article shortening the period of limitation from 10 to 4 years is valid in so far as it curtails the period of limitation and permits suits for obligations otherwise barred to be brought one year from the enactment. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

This article held void and inoperative under Const. U. S. art. 1, § 10, and state Const. art. 1, § 16, when applied to a sale of land under a trust deed existing when the articles were enacted, their effect being to deprive trustee of any remedy for collection of his debt. *Womble v. Shirley* (Civ. App.) 193 S. W. 719.

#### Art. 5694. Rights under vendor's lien barred, when.

In general.—The right of a vendor who sold land in 1893 to enforce his vendor's lien is not destroyed by lapse of time, where the vendee, who held possession and paid taxes did not repudiate the vendor's title; this article not applying to conveyances made before 1905. *Hardy v. Wright* (Civ. App.) 168 S. W. 462.

An implied vendor's lien on land, not expressed in the deed or purchase-money notes, is lost when the notes are barred by limitations. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

Where the first vendor's lien note was barred by limitations, the holder lost his priority over the second lien note, and the revival of the first holder's lien did not restore his priority, but made it subordinate to that of the holder of the second note. *Spearman v. Connor Bros.* (Civ. App.) 175 S. W. 478.

Where vendor's lien is not expressly retained in warranty deed or purchase-money notes, held that though a lien be created it will cease when the notes are barred by limitation. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

Where vendor's lien is reserved in deed or purchase-money notes, vendor held to have superior title and entitled to recover land though debt is barred by limitations. *Id.*

The extension of a vendor's lien note, not recorded as required by *Vernon's Sayles'* Ann. Civ. St. art. 5695, does not authorize foreclosure after the expiration of the limitation period fixed by articles 5693, 5694, even as between the parties. *Adams v. Harris* (Civ. App.) 190 S. W. 245.

Where statutes of limitation, at no time left defendant entirely without remedy to either foreclose vendor's lien or recover land by superior right retained in deed, in action by his purchaser's grantees to cancel lien, it was properly sustained. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.



**Former statutes.**—Where plaintiff's claim was not barred under this article prior to amendment of 1913, shortening the period of limitation and allowing action to be brought within one year, plaintiff lost his claim by failure to sue in such time, although by subsequent act such statutes were amended to allow four years in which to sue. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

**Constitutionality.**—This article is not violative of Const. art. 1, § 16, as to obligation of contracts but is valid. *City of Laredo v. Salinas* (Civ. App.) 191 S. W. 190.

The statute undertaking to stipulate time within which a suit to recover land should be barred when superior title remains in vendor, is constitutional, and not violative of vested rights. *Key v. Jones* (Civ. App.) 191 S. W. 736.

Amendment to this article shortening the period of limitation from 10 to 4 years is valid in so far as it curtails the period of limitation and permits suits for obligations otherwise barred to be brought one year from the enactment. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

### Art. 5695. Contracts of extension, how made and construed; proviso.

Cited, *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747.

**Constitutionality.**—This article is not violative of Const. art. 1, § 16, as to obligation of contracts but is valid. *City of Laredo v. Salinas* (Civ. App.) 191 S. W. 190.

The statute undertaking to stipulate time within which a suit to recover land should be barred when superior title remains in vendor is constitutional, and not violative of vested rights. *Key v. Jones* (Civ. App.) 191 S. W. 736.

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**Construction and operation in general.**—This article is a statute of limitations for the protection of those who may deal with lands, against undisclosed liens against them. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

The extension of a vendor's lien note, not recorded as required by this article, does not authorize foreclosure after the expiration of the limitation period fixed by articles 5693, 5694, even as between the parties. *Adams v. Harris* (Civ. App.) 190 S. W. 245.

Under amendment to this article effective July 1, 1913, suit for land held commenced by filing of first amended petition July 7, 1913, or by second amended petition of January 5, 1914, and hence within one-year limitation of statute. *Smith v. Tipps* (Civ. App.) 191 S. W. 392.

Where vendor's lien notes executed December 10, 1883, were barred by statutes of 4 and of 10 years' limitation when this article took effect, holder could not, by virtue of this article, toll statute of limitation by filing a suit to foreclose his lien within 12 months. *Key v. Jones* (Civ. App.) 191 S. W. 736.

This article barring notes then four years past due and executed before 1905 as shown by the last record extension, bars such a note although it bore an unrecorded indorsement of extension dated in 1911. *Hoya v. Self* (Civ. App.) 193 S. W. 226.

Where statutes of limitation at no time left defendant entirely without remedy to either foreclose vendor's lien or recover land by superior right retained in deed, in action by his purchaser's grantees to cancel lien, it was properly sustained. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

**Former statute.**—Where plaintiff's claim was not barred under amendment to this article of 1913, shortening the period of limitation and allowing action to be brought within one year, plaintiff lost his claim by failure to sue in such time, although by subsequent act such statutes were amended to allow four years in which to sue. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

**Application to action between indorser and indorsee.**—Notwithstanding this article, a verbal extension of a note by the indorser while it was in his hands may be shown by the indorsee in proving his promptness in bringing suit. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

### Art. 5696. [3361] Judgment shall be revived, when.

**In general.**—This article held statute of limitation not available unless pleaded under article 5706. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

**Mandamus to enforce a judgment against a city by compelling the collection of a tax** is an execution within the 10-year statute of limitations. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

In analogy to this article, action to recover upon judgment on which execution issued within a year, brought more than 10 years after the issuance of such execution held barred by the 10-year statute of limitations. *Dupree v. Gale Mfg. Co.* (Sup.) 184 S. W. 184.

**Foreign judgment.**—Under this article an action upon a judgment of a foreign state, rendered more than 10 years prior to the commencement of the action, and upon which execution was never issued, and which was never revived, is barred. *Tourtlot v. Booker* (Civ. App.) 160 S. W. 293.

**Revival of judgment.**—Under this article, held, that revival of a judgment of partition was not an adjudication that those to whom land was partitioned had title they having dismissed their suit in trespass to try title. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

Judgment of a justice may be revived within 10 years of its rendition; the 4-year statute of limitations not applying. *Gallagher v. Teuscher & Co.* (Civ. App.) 186 S. W. 409.

#### Art. 5697. [3362] On motion for returning execution.

In general.—An action by assignee of judgment under arts. 3776, 3777, to recover the amount thereof from sheriff and his sureties for failure to levy and return execution thereon, was barred by five-year statute of limitations. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

## CHAPTER THREE

### GENERAL PROVISIONS

Art.		Art.	
5701.	Suspension of during late war.	5707.	Presumption of death, etc., when, etc.
5702.	Time of temporary absence not counted.	5708.	No limitation against infants.
5704.	Death of person, etc., against whom, etc.	5711.	One disability not tacked to another.
5705.	Acknowledgment must be in writing.	5713.	No agreement to shorten period of limitation valid.
5706.	Limitation must be pleaded, etc.	5714.	Notice of claims for damages; rule as to.

#### Article 5701. [3366] Suspension during late war.

**Former statute.**—The "close of the war" within the meaning of 6 Gam. Laws, p. 669, act approved December 14, 1863, providing that until six months after the "close of the present war" all laws authorizing the location of public land were suspended, held to date from May, 1865, when the war actually closed in Texas, and not from August 20, 1866, when the President issued a proclamation declaring it closed, notwithstanding Act Oct. 20, 1866 (Acts 11th Leg. c. 44). *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

Act April 1871 (Acts 12th Leg. c. 56), providing that all surveys properly made under valid land certificates which, with the certificates, were on file in the land office and not in conflict with a valid claim, should be valid, held not to validate a location made when the laws authorizing such locations were suspended. *Id.*

#### Art. 5702. [3367] Time of temporary absence not counted.

**Nonresidence.**—The fact that the judgment defendant had not resided in Texas for 10 years next before the bringing of an action upon the judgment of a foreign state does not prevent the operation of the statute of limitations where right of action accrued during his nonresidence. *Tourtelot v. Booker* (Civ. App.) 160 S. W. 293.

The departure from the state of a nonresident who had been temporarily present in the state did not suspend the running of limitations against a cause of action against him. *Pollard v. Allen* (Civ. App.) 171 S. W. 530.

**Departure after accrual of cause of action.**—Under this article, time when defendant was without the state must be deducted in determining whether plaintiff's action was barred by the five-year statute of limitations. *Sweeten v. Taylor* (Civ. App.) 184 S. W. 693.

#### Art. 5704. [3369] Death of person, etc., against whom, etc.

**"Administratrix."**—Under this article, a community administratrix authorized under articles 3595-3598 and 3592-3614, to manage community estate, held not an "administratrix," so that order for her management did not start running of statute. *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747.

**Corporations.**—In an action on a contract of sale brought against a corporation after its legal dissolution and against its president as its trustee under Rev. St. 1911, art. 1206, the limitation was not suspended until 12 months after such dissolution; the provision of article 5704 not applying. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

#### Art. 5705. [3370] Acknowledgment must be in writing.

**Extension of note.**—A note extended after it was barred by limitation under the statute of Texas, unless the extension was in writing and signed by the maker and contains an acknowledgment of the debt, as required by this article, is not provable against his estate in bankruptcy. *Wood v. Ledgerwood*, 210 Fed. 163, 127 C. C. A. 13.

The extension of a vendor's lien note signed by the party to be charged, as required by this article permits personal recovery on the note after the expiration of the limitation period from its original maturity, though not recorded so as to renew the lien. *Adams v. Harris* (Civ. App.) 190 S. W. 245.

**New promise.**—Promise of original debtor, whose debt plaintiff had paid, to reimburse plaintiff at some indefinite time, not acceded to by plaintiff, held not a contract or new promise, suspending the operation of the statute of limitations. *Yndo v. Rivas* (Sup.) 180 S. W. 96.

**Action upon new contract.**—Where mechanic's lien contract originally valid was extended by agreement for usurious interest, the suit brought after expiration of limitations as to the original contract but within the period as to the renewals held upon the renewal contract. *Cain v. Bonner* (Sup.) 194 S. W. 1098.

### Art. 5706. [3371] Limitation must be pleaded, etc.

**Pleading statute as defense.**—In a suit on promissory notes, it was error to admit evidence before the jury showing that some of the notes sued on were barred by the statute of limitations, where there was no such defense pleaded. *Holderman v. Reynolds* (Civ. App.) 159 S. W. 67.

Limitations not pleaded cannot be taken advantage of. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

Rev. St. 1911, arts. 5691, 5696, relative to time for actions on foreign judgments or decrees or to revive judgments, held statutes of limitation not available unless pleaded under article 5706. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

The issue of prescriptive right to take all the water of a lake for irrigation purposes is not raised, the answer alleging merely that defendant, incorporated three years before commencement of suit, claimed and exercised the sole right to pump water out of the lake. *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

In an action for shortage in a grant of land brought against both the original and intermediate grantors, held that the intermediate grantor who did not plead limitations and admitted the allegations of the petition could not take advantage of the bar of the statute. *Powell v. March* (Civ. App.) 169 S. W. 936.

Where prescriptive title to the use of the water of a stream as against other riparian owners is set up by a defendant in an injunction suit, it must be alleged and proved that none of the plaintiffs were under disability. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

Vendor's lien held enforceable notwithstanding the running of limitations against the debt as against defendants who did not plead the statute. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

In an action to recover land, with cross-bill by defendant pleading title by limitations evidence as to the long possession and use of the land sued for by defendant, was admissible. *Miller v. Meyer* (Civ. App.) 190 S. W. 247.

A plea of adverse possession of an entire tract and a specific portion thereof is insufficient to raise the question regarding another specific portion. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

Rev. St. 1911, arts. 5677, 5678, providing that possession of land shall not be adverse in certain cases, unless fenced, etc., constitutes matter in avoidance of the limitation statute which need not be negated by the party pleading limitations. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

Where four-year statute of limitation was not pleaded as a defense in trial court, it is not available on appeal. *Cubit v. Jackson* (Civ. App.) 194 S. W. 594.

**Trespass to try title.**—In trespass to try title, where defendants denied plaintiff's title and pleaded the statute of limitations, the issue as to whether plaintiff's right to recover rent collected by defendants was barred by limitations was presented. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

In trespass to try title, where plaintiff claimed alternatively for statutory amount of land by adverse possession as well as by metes and bounds, refusal to charge that plaintiff could recover no greater amount than shown by field notes describing the property by metes and bounds was proper. *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

**Demurrer or exception as raising defense.**—Petition filed January 6, 1909, in action by employé who quit defendant's services in 1904, for damages caused by blacklisting and circulating reports that he was unworthy and incompetent, held not demurrable as showing on its face that the cause of action was barred by limitation. *Beard v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 160 S. W. 633.

Where plaintiff's petition does not show on its face that the action is barred, the defense of limitation must be presented by plea and not by exception. *Id.*

Under this article limitations cannot be raised by a general demurrer. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

Under this article where the petition did not affirmatively show that the cause of action was barred, the defense of limitation could not be raised by exception, but only by specially pleading and proving facts showing the bar. *Osvald v. Giles* (Civ. App.) 178 S. W. 677.

Fact that petition discloses on its face that it is barred by limitation does not subject it to general demurrer. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

### Art. 5707. [3372] Presumption of death when, etc.

Cited, *McBride v. Loomis* (Civ. App.) 170 S. W. 825.

**Presumption of death—What raises.**—In an action on a benefit insurance certificate, evidence that insured left home stating that he would be back that night or the next day held to raise a presumption that he had died at some time within seven years after his disappearance. *Sovereign Camp Woodmen of the World v. Ruedrich* (Civ. App.) 158 S. W. 170.

In view of this article, a showing in an action for distribution that a legatee left home with a circus when between 17 and 21 years of age, and had never been heard of by his relatives for 58 years, warranted a finding that he was dead at the expiration of the 7 years following his leaving home. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

Where a husband and wife, making mutual wills, were frozen to death in the same snowstorm, with no evidence as to which died first, there was no presumption as to survivorship or simultaneous death. *Fitzgerald v. Ayres* (Civ. App.) 179 S. W. 289.

In a widow's action upon a benefit certificate, evidence held to sustain finding that insured was dead, and that he died at or about the time of his disappearance from home. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.

Evidence of character, habits, domestic relations, etc., making the abandonment of home and family improbable and showing the want of motive, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard of may be inferred without regard to the duration of such absence. *Id.*

— **Construction and operation of statute.**—By-law of fraternal beneficiary society declaring that member's disappearance should not be any evidence of his death, contravened this article and was invalid. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215; *Supreme Ruling of Fraternal Mystic Circle v. Hoskins* (Civ. App.) 171 S. W. 812.

Under this article, the presumption of death arises on proof of absence of a person from his home for seven years without showing that he has not been heard from during that time but may be destroyed by proof of his existence within that time. *Sovereign Camp Woodmen of the World v. Ruedrich* (Civ. App.) 158 S. W. 170.

Within this article "elsewhere" does not mean outside the state. *Supreme Ruling of Fraternal Mystic Circle v. Hoskins* (Civ. App.) 171 S. W. 812.

This article attaches no legal consequences to a person's absence or disappearance until the expiration of the seven years necessary to raise a presumption of death. *Id.*

The rule of evidence embodied in this article as to the presumption of death after absence of seven years, does not limit the presumption to an absence for seven years, but on proper evidence death before the expiration of such time may be inferred. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.

Where one has been absent or unheard of for seven years, the presumption arises that he is dead, but not that he died at any particular time, and, if important to establish death at any particular time, it must be done by evidence. *Id.*

#### Art. 5708. [3373] Limitation shall not run against infants, etc.

Cited, *Michaelis v. Nance* (Civ. App.) 184 S. W. 785.

**Persons of unsound mind.**—If federal Employers' Liability Act April 22, 1908, § 6, is a statute of limitation and could be tolled for want of some one who could sue upon right of a railroad employé rendered insane by injuries received in interstate commerce, employé having a mother who could sue as his next friend, a cause of action in his behalf accrued at date of injury. *Alvarado v. Southern Pac. Co.* (Civ. App.) 193 S. W. 1108.

Under federal Employers' Liability Act April 22, 1908, § 6, providing that no action shall be maintained under act unless commenced within two years from accrual of cause of action, held that, although a railroad employé was rendered insane by injuries received, his next friend could not bring suit under act more than two years after date of such injury. *Id.*

#### Art. 5711. [3376] One disability not tacked to another.

In general.—Under this article the appointment of a receiver of the owner of land did not stop the running of limitations in favor of an adverse claimant. *Houston Oil Co. of Texas v. Griffin* (Civ. App.) 166 S. W. 902.

#### Art. 5713. [3378] No agreement shortening period of limitation valid.

Cited, *Betka v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 532.

In general.—Under this article stipulation in a bill of lading that no action should be sustained unless begun before the expiration of two years from the accrual of the cause of action held invalid. *Texas & P. Ry. Co. v. Langbehn* (Civ. App.) 158 S. W. 244, denying second rehearing 150 S. W. 1188.

Under this article an agreement in a contract for the shipment of live stock, requiring action, if brought, to be brought within six months, is void. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

**Interstate commerce.**—State laws, declaring contracts invalid which require actions against a carrier for injuries to a shipment to be brought in less than the statutory period, were superseded, as to the interstate shipments, by the Carmack amendment to Act Feb. 4, 1887, § 20, which furnishes the exclusive rule on such subject. *Texas & P. Ry. Co. v. Langbehn* (Civ. App.) 158 S. W. 244, denying second rehearing 150 S. W. 1188.

Under the Carmack amendment to Act Feb. 4, 1887, § 20, prohibiting exemptions from liability imposed by that act, a stipulation in a bill of lading, requiring suits for loss or damage to be brought before the expiration of two years after the cause of action arose, held valid. *Id.*

Provision in written contract for interstate carriage of live stock that suit for injury be brought within 91 days is not unreasonable or invalid. *Kansas City, M. & O. Ry. Co. v. Hansard* (Civ. App.) 184 S. W. 329.

Contract for shipment of live stock providing that suit for damages must be instituted within six months after damage, and that failure to do so shall be conclusive evidence against validity of any claim, held valid as to interstate shipments, under law existing at date of shipment in February, 1913. *Atchison, T. & S. F. Ry. Co. v. White* (Civ. App.) 188 S. W. 714.

A written contract for interstate shipment of live stock requiring suit for damages to be instituted within six months, held valid under the Interstate Commerce Act and amendments. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

**Insurance policy.**—A provision in a fire insurance policy that suit thereon should be brought before the expiration of two years from the accrual of the cause of action held invalid. *Fire Ass'n of Philadelphia v. Richards* (Civ. App.) 179 S. W. 926.

#### Art. 5714. [3379] Notice of claims for damages; rule as to.

Cited, *Texas & P. R. Co. v. Langbehn* (Civ. App.) 158 S. W. 244; *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375; *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093; *Hefner v. Fidelity & Casualty Co.* (Civ. App.) 160 S. W. 330 (in dissenting opinion).

In general.—This article held not to apply to a contract entitling a surety to notice of his principal's default. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

A carrier held not to have waived a shipper's failure to present notice of claim of loss within stipulated time. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

Taking written statement of plaintiff's claim by agent of defendant employer waives a stipulation in the contract of employment barring the employe's action, unless written notice is given within 30 days. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Provisions of live stock shipment contract for notice of claim for damages, and that stock be not removed till three hours after notice are separable, so that any invalidity of the second does not invalidate the first. *Panhandle & S. F. Ry. Co. v. Bell* (Civ. App.) 189 S. W. 1097.

**Time for giving notice.**—A requirement in the bill of lading for a shipment of live stock for notice of damage held unreasonable and not binding under the circumstances of the case. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Civ. App.) 177 S. W. 543.

Under this article a contract of employment of the plaintiff switchman for defendant railway requiring notice to be given in 30 days after injury is void, and will not defeat the plaintiff's action in spite of failure to give notice. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Stipulation in written contract for carriage of stock that written notice detailing losses, injuries, delay, etc., for which damages were claimed and the amount thereof should be filed within 120 days with some traffic officer, station agent, etc., of the carrier, held reasonable. *Turner v. Henderson* (Civ. App.) 183 S. W. 51.

Whether limitation in a contract of live stock shipment of time to 91 days for notice of claim for damages is reasonable, and so valid, under this article is a question for the jury, unless only one inference can be drawn from the testimony. *St. Louis, B. & M. Ry. Co. v. Marcovich* (Civ. App.) 185 S. W. 51.

**Interstate commerce.**—As the federal and not the state statutes control in fixing a railroad company's liability on an interstate shipment, a provision in the contract of shipment requiring notice of damage within a certain time as a condition to suing therefor will be sustained if reasonable, not being prohibited by the federal statutes. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

This article held inapplicable to a contract for the transportation of interstate commerce. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 172 S. W. 1116.

Under the Carmack amendment held permissible to contract for any reasonable notice of claim for damages as a condition precedent to suit; the state law being superseded. *Id.*

Under Act Cong. Feb. 4, 1887, as amended by Hepburn-Carmack Act, a stipulation in a bill of lading, requiring notice of injuries to cattle to be served on the carrier's agent before removal, held unreasonable. *Hovey v. Tankersley* (Civ. App.) 177 S. W. 153.

The United States statutes and the decisions of the United States courts control the interpretation of contracts for interstate shipments. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Civ. App.) 177 S. W. 543.

Stipulation in contract for an interstate shipment limiting the time for presenting claims held valid notwithstanding the Carmack amendment. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

A written contract for interstate shipment of live stock requiring notice of claim for damages, held valid under the Interstate Commerce Act and amendments, the laws of Texas to the contrary notwithstanding. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

Where cattle are injured by negligence of the carrier, in an interstate shipment state statutes as to validity of carriage contracts have no application. *Betka v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 532.

Where a carriage contract was executed prior to Act March 4, 1915, amending the Hepburn Act, providing that no notice of claim or filing thereof shall be required as a condition precedent to recovery for damages to interstate shipments, but suit was brought after such enactment, such act did not apply. *Id.*

As regards a claim for shrinking of live stock in transit, provision of contract for interstate carriage for notice of claim before removal from destination is reasonable. *Panhandle & S. F. Ry. Co. v. Bell* (Civ. App.) 189 S. W. 1097.

Stipulations in contract for interstate shipment of live stock for written notice to agent of initial carrier of a claim for loss, injury, detention, or delay in transportation thereof and that the notice be given within one day as a condition precedent to recovery of damages held not unreasonable. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Civ. App.) 190 S. W. 833.

**Insurance companies.**—Under this article a stipulation in a fire insurance policy that proof of loss must be made within 90 days after fire was void. *Fire Ass'n of Philadelphia v. Richards* (Civ. App.) 179 S. W. 926.

Under this article a stipulation in a health insurance policy requiring notice within 90 days from the beginning of illness was void. *First Texas State Ins. Co. v. Hare* (Civ. App.) 180 S. W. 282.

Under this article provision of policy, insuring against sickness, requiring report from attending physician every 30 days, held void. *First Texas State Ins. Co. v. Herndon* (Civ. App.) 184 S. W. 283.

Under this article notice by insured of accident 16 days after it occurred held to satisfy the requirement of the policy for immediate notice. *United States Fidelity & Guaranty Co. v. Pressler* (Civ. App.) 185 S. W. 326.

Where an insurer absolutely denied its liability on an accident policy the beginning of an action without regard to the provisions of the policy relating to the time in which suit might be brought thereon was authorized. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615.

Allegation in suit on policy of life insurance that beneficiary complied with all of the provisions of the policy is sufficient allegation in the absence of special exception that proofs of death were duly furnished, in view of this article and art. 4733. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

**Pleading, evidence and burden of proof.**—In action for damages to shipment, letter written connecting carrier's claim agent held admissible to show that notice of the claim was given as required by the contract. *Galveston, H. & S. A. Ry. Co. v. Itule* (Civ. App.) 172 S. W. 1123.

A carrier sued for damages to a shipment not having sustained its burden, under this article, of showing it did not receive the notice of claim required by the contract, admitting a copy of a letter giving notice was harmless. *Gulf, C. & S. F. Ry. Co. v. Graham* (Civ. App.) 175 S. W. 472.

Under this article, proof that a shipper did not file notice of claim within the time fixed by contract is inadmissible, where failure was not specially pleaded under oath; it being conclusively presumed that notice was given. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

Under this article, a stipulation, in a contract for the shipment of live stock, requiring presentation of claim to be made within 91 days, is no defense, and cannot be relied on, unless its reasonableness be pleaded. *Id.*

Evidence in an action for damages to shipment of cattle held to sustain defense of the shipper's breach of stipulation in written contract of shipment requiring notice of loss, etc., within 120 days to some agent of the carrier, and declaring that failure of such notice should bar suit for damages. *Turner v. Henderson* (Civ. App.) 183 S. W. 51.

The carrier must under this article, plead and prove the reasonableness of the time stipulated in the contract of shipment for notice of claim of loss or injury. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Civ. App.) 185 S. W. 51.

Where notice of death and disability was alleged in the petition, and not denied by sworn answer as required by this article and not shown to have been given, it will be presumed that it was given. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

**Construction and performance of stipulation.**—Provision in bill of lading, requiring notice as condition precedent to an action, held not to apply to damages to live stock after they were placed in the shipping pens from failure to ship them at once, as agreed; this cause of action having accrued before the bill of lading was executed. *Wichita Valley Ry. Co. v. Boger* (Civ. App.) 167 S. W. 767.

Provision in bill of lading, requiring notice to carrier as condition precedent to action for damages to the stock, held sufficiently complied with by filing suit and serving citation 13 days after the damages accrued, though the bill of lading provided that the filing of a suit should not be a compliance therewith, and that its purpose was to enable the carrier to investigate before suit was instituted. *Id.*

A notice in writing to the freight claim agent of a connecting carrier of a shipper's claim for damages was a sufficient compliance with a provision of the contract with the initial carrier requiring such notice. *Galveston, H. & S. A. Ry. Co. v. Itule* (Civ. App.) 172 S. W. 1123.

The filing of a suit within 30 days was a compliance with a stipulation in a contract for the shipment of live stock, requiring the shipper to file a written claim of damages within 30 days after the injury. *Missouri, K. & T. Ry. Co. of Texas v. Neale* (Civ. App.) 176 S. W. 85.

Though the claim filed with the notice of damages to a shipment of cattle was less than the amount sued for, that is no defense; notice being given. *Pecos & N. T. Ry. Co. v. Holmes* (Civ. App.) 177 S. W. 505.

A claim for damages to freight held not made as required by bill of lading, precluding recovery for damages. *St. Louis Southwestern Ry. Co. of Texas v. Overton* (Civ. App.) 178 S. W. 814.

Where bill of lading required the shippers to serve notice of claim for injuries to live stock, the consignee, though he was part owner of the animals and joined in an action to recover for damages, need not serve such notice; it having been served by the shipper. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

Under a contract for shipment of live stock, held, that the shipper might recover

damages in excess of the amount claimed in written notice of injuries; the purpose of notice being to enable the carrier to investigate. *Id.*

In view of Interstate Commerce Act, § 1, damages occasioned by a delay at pens before an interstate shipment of cattle started the trip falls within terms of a contract of shipment requiring notice of claim for loss or injury by delay in "transportation" as a condition precedent to recovery. *Chicago, R. I. & G. Ry. Co. v. Whaley (Civ. App.)* 190 S. W. 833.

**Necessity for consideration.**—Stipulation in contract for an interstate shipment stipulating for presentation of claims within a specified time held not void for want of consideration. *Stevens & Russell v. St. Louis Southwestern Ry. Co. (Civ. App.)* 178 S. W. 810.

Stipulation, in bill of lading for interstate shipment, as to claims for loss, held valid notwithstanding Carmack amendment, though not supported by an independent consideration. *St. Louis Southwestern Ry. Co. of Texas v. Overton (Civ. App.)* 178 S. W. 814.

Independent consideration is not necessary to validity of stipulation of contract of shipment for notice of claim of damages within a certain time as a condition of right of action. *St. Louis, B. & M. Ry. Co. v. Marcofich (Civ. App.)* 185 S. W. 61.

## DECISIONS RELATING TO SUBJECT IN GENERAL

### I. NATURE, VALIDITY AND CONSTRUCTION OF LIMITATIONS IN GENERAL

1. **What law governs.**—Where an injury occurred in a foreign state and all of the parties since the injury resided in the state of the forum, held, that the foreign statute of limitations would not govern the action for damages. *Smith v. Webb (Civ. App.)* 181 S. W. 814.

1/2. **Power of Legislature to enact laws.**—As limitation laws relate to remedies only, the Legislature may increase or diminish the period of limitation, provided such change is made before the right becomes barred under the pre-existing statute. *Cathey v. Weaver (Civ. App.)* 193 S. W. 490.

4. **Persons who may rely on limitation.**—The duty of a county to make proper investments of the proceeds on a sale of its school lands, as required by Const. art. 7, § 6, is of a public nature and pertains to governmental affairs, within the rule that limitations are not available in such cases. *Comanche County v. Burks (Civ. App.)* 166 S. W. 470.

A minor who, with the consent of his father claimed and occupied, as his own, land adjoining that of his father, the father at no time asserting any claim thereto, could not be regarded as holding under his father, and hence his minority did not prevent him from acquiring title by limitation. *Houston Oil Co. of Texas v. Griffin (Civ. App.)* 166 S. W. 902.

The two-year statute of limitations does not begin to run in favor of a railroad corporation which had resumed possession of its property after receivership for torts of the receivers until the resumption of possession. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver (Civ. App.)* 191 S. W. 591.

Const. art. 1, § 17, providing that no personal property shall be taken for public use without adequate compensation first made, does not prevent a railroad from acquiring title to land by adverse possession. *Webster v. International & G. N. Ry. Co. (Civ. App.)* 193 S. W. 179.

5. **Estoppel to rely on limitation.**—Surety on contractor's bond, who mistakenly represented to materialman that he was liable for materials, held not estopped from pleading limitations in action for false representations. *Dean v. A. G. McAdams Lumber Co. (Civ. App.)* 172 S. W. 762.

Where delay in suing was due to promise of payment, based on forbearance to sue, defendant held estopped to plead limitations. *Freeman v. W. B. Walker & Sons (Civ. App.)* 175 S. W. 456, 1133.

6. **Meaning of action or suit.**—"Cause of action" is right claimed or wrong suffered by plaintiff and corresponding duty or delict of defendant. *Baker v. Gulf, C. & S. F. Ry. Co. (Civ. App.)* 184 S. W. 257.

### II. COMPUTATION OF PERIOD OF LIMITATION

#### (A) *Accrual of Right of Action or Defense*

7. **Causes of action in general.**—The statute of limitations begins to run from the entry of judgment, if no execution has been issued; and, if execution has been issued, it begins to run from the time of the issuance of the last execution within the time allowed by law. *Tourtelot v. Booker (Civ. App.)* 160 S. W. 293.

As a general rule, the statute of limitations begins to run from the time the right of action accrues. *Adams v. San Antonio Life Ins. Co. (Civ. App.)* 185 S. W. 610.

8. **Title to or possession of real property.**—A cause of action against one who entered upon land under an adverse claim accrued when the entry was made. *Hickman v. Ferguson (Civ. App.)* 164 S. W. 1085.

A vendor may retain title to land as against the vendee as security for the purchase money, and the vendee's possession is not ordinarily adverse, but, on repudiation by the vendee, adverse possession begins to run from that time, notwithstanding the title of the vendor. *First Nat. Bank of Wichita Falls v. Zundelowitz (Civ. App.)* 163 S. W. 40.

Will giving testator's wife life estate held not to affect her community title to one-half of certain land, and she did not surrender such title by accepting the life estate;

and hence, limitations ran in favor of an adverse occupant as to a one-half interest in the land, notwithstanding the suspension of remaindermen's right of action during the existence of the life estate. *Swilley v. Phillips* (Civ. App.) 169 S. W. 1117.

Where a state by legislative act granted land in 1858, but did not issue patent until 1887, the title passed at the former date, so that limitations might begin running in favor of an adverse possession. *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661.

**10. Contracts in general.**—Where plaintiff advanced money to defendant in contemplation of a partnership, limitations would not apply to his action to recover it, where it was invested in the partnership, but where no partnership was formed it did not begin to run until after a reasonable time in which to bring about the partnership agreement or its abandonment. *Look v. Bailey* (Civ. App.) 164 S. W. 407.

Where plaintiff's uncle received money from plaintiff, agreeing to deposit it on interest and return it when plaintiff wanted it, held, that limitations ran from the date of its receipt, or at least from the expiration of a reasonable time for making the agreed deposit. *Pollard v. Allen* (Civ. App.) 171 S. W. 530.

Limitations against actions on contracts to make a will in return for services begin to run from the death of the person for whom the services are rendered. *Dyess v. Rowe* (Civ. App.) 177 S. W. 1001.

Where defendant, exchanging his realty for plaintiff's assumed payment of a note for \$4,000 which was an incumbrance upon plaintiff's property, limitations did not run against defendant for breach of his agreement to pay such note until plaintiff paid the note to the holder. *Friedman v. Sampson* (Civ. App.) 181 S. W. 779.

There never having been acceptance of any renunciation by vendor of contract to convey and pay commissions, limitations do not, on the theory of anticipatory breach, commence to run against action for commissions till time fixed in contract for payment. *Leonard v. Kendall* (Civ. App.) 190 S. W. 786.

Where personal services are rendered during lifetime of a decedent under an express contract to pay therefor by will, limitations do not begin until after death of decedent. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**11. Covenants and conditions.**—Limitations against an action for breach of a covenant of warranty do not run until actual or constructive eviction under a superior outstanding title. *Hays v. Talley* (Civ. App.) 161 S. W. 429.

Where there was a conflict in title which required judicial determination, limitations against an action for breach of warranty began to run from the final judgment of the Supreme Court adjudging that the county had title as against plaintiff in such action. *Id.*

The statute of limitations does not begin to run in favor of the warrantors of a title, where the superior title was not asserted until action was brought by the grantee to clear his title, until the answer asserting such title was filed. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

Where plaintiff, the owner of a building adjoining a bank, upon demand of the bank, repudiated a covenant of his grantor to pay one-half the cost of a party wall, limitations began to run from the repudiation. *First Nat. Bank of Wichita Falls v. Zundelwitz* (Civ. App.) 168 S. W. 40.

**13. Implied contracts.**—The statute commenced to run against plaintiff's cause of action for the money paid by him for what purported to be a soldier's additional script, on notice that the federal General Land Office had rejected it as void. *Bostick v. Heard* (Civ. App.) 164 S. W. 34.

**14. Continuing contracts.**—A cause of action by a daughter for compensation for personal services rendered her deceased father during his life was upon a continuing promise and did not arise until his death, and limitations would only run from the death of the father. *Whitehead v. Rhea* (Civ. App.) 168 S. W. 460.

Though a contract to pay \$30 per month for care of one since deceased were proved, limitations of two years would begin to run as against the amount due each month at the end of the month, and the cause of action was not delayed until the death of deceased. *Lans v. Bristow* (Civ. App.) 188 S. W. 970.

**17. Torts.**—Where defendant's lessor laid its track in the street in front of plaintiff's residence, but plaintiff was not damaged until the track was leased by defendant, limitations did not begin to run until the beginning of the damage. *Houston Belt & Terminal Ry. Co. v. Ashe* (Civ. App.) 158 S. W. 205.

Where a permanent obstruction causing regular overflow of plaintiff's land is erected, the right of action for all damages for the permanent nuisance then accrues, and the statute of limitations begins to run. *Perry v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 162 S. W. 1185.

Limitations do not begin to run, because of a nuisance, from the time of the erection of an electric plant, but only from the time its operation constitutes a nuisance and causes an injury to plaintiffs' health. *Parsons v. Uvalde Electric Light Co.*, 106 Tex. 212, 163 S. W. 1, L. R. A. 1916E, 960.

Where defendant obstructed a natural water course so as to some years after cast flood waters on plaintiff's land, limitations began to run against plaintiff only from the time of the injury. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

When a life insurance agent, on refusal of the insurer to accept a risk, refused to return the applicant's premium note, and negotiated it, the right of action arose, and the statute of limitations began to run, barring action for the conversion after two years. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

Where a railroad constructed an embankment causing surface waters to overflow plaintiff's land, the two-year statute of limitations was not a complete bar as to injuries accruing during two years prior to the action, though the original building of the em-



bankment was done more than two years before the suit was brought. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 194 S. W. 662.

18. **Reimbursement or indemnity from person ultimately liable.**—Limitations would not run against an action by a bank receiving drafts for collection against another bank to which it sent them and which detached the bills of lading until it paid the judgment recovered against it by the drawer. *Collin County Nat. Bank v. Turner* (Civ. App.) 167 S. W. 165.

Where plaintiff gave his own personal negotiable note in settlement of decedent's debt, action for reimbursement accrued when the note was given. *Yndo v. Rivas* (Sup.) 180 S. W. 96.

The liability of the organizer of a corporation, under his contract to indemnify against all loss a subscriber to its stock who executed a note, did not begin, and was not intended to begin, until after the subscriber had suffered loss or damage because of the execution of the note to which the contract of indemnity related. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

19. **Liabilities created by statute or constitution.**—Limitations would run against a right of action to compel construction of a railroad through a county seat, as required by Const. art. 10, § 9, only from the time of the construction of the road, and not from the time the profiles were filed. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

Despite Rev. St. 1911, art. 1366, county treasurer cannot recover commissions accruing for a period more than two years before institution of the suit, for he might sue within a reasonable time after presentation of claim. *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

20. **Equitable actions and remedies.**—In trespass to try title, proof of an equitable claim by defendant in possession is not subject to limitation. *Gilmore v. O'Neil* (Sup.) 173 S. W. 203, reversing judgment (Civ. App.) 139 S. W. 1162.

Where maker gave chattel mortgage to surety, and transferred property to a corporation organized to take over his business, limitations did not run in favor of the corporation, by reason of its holding property, against the right of payee of note to enforce mortgage. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

Where equitable action of party induced by deceit to buy lands has not been barred by limitation, court will not apply differing standards of limitation to right to rescission and right to damages, but, upon establishment of plaintiff's right to rescind, will proceed to administer all relief, legal and equitable, to which plaintiff may show himself entitled. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

*Paschal's Dig.* art. 4616, barring certain equitable suits within two years, has been repealed by subsequent statutes. *Kimmell v. Edwards* (Civ. App.) 194 S. W. 168.

#### *(B) Performance of Condition, Demand and Notice*

22. **Demand.**—Where the relation of debtor and creditor existed between defendant bank and plaintiff by reason of plaintiff's general deposit, plaintiff had no cause of action upon the bank's implied contract to repay until after demand or notification from the bank that his claim would not be paid; and hence the statute of limitations did not begin to run until such demand or notice. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

The obligation of a corporation to pay a declared dividend to a stockholder is not subject to limitations until there has been a demand on the corporation and a refusal to pay. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

23. **Notice.**—Plaintiff has no cause of action on bank's implied contract to repay a general deposit until after demand or notification from the bank that his claim would not be paid; and hence the statute of limitations did not begin to run until such demand or notice. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

#### *(C) Ignorance, Mistake, Trust, Fraud and Concealment of Cause of Action*

25. **Ignorance of cause of action.**—The two-year limitations began to run against an action for personal injuries from the date of plaintiff's injuries, or from the time he had a third stroke of paralysis resulting from the injuries, when he discovered that the representations made to him by defendant that he was completely recovered were not true. *Texas Cent. R. Co. v. Hawkins* (Civ. App.) 163 S. W. 132.

Where defendant corporation, prior to July, 1909, had taken no affirmative steps to repudiate certain rights of plaintiff's ancestor under trust certificates which had been long lost, and plaintiffs had no knowledge of their ownership as heirs of the original owner until August, 1909, and brought suit to establish their rights in November following, the action was not barred by limitations. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

Where a grantor fraudulently misrepresented the number of acres conveyed, a purchaser from his grantee cannot toll the running of limitations against his action for deficiency by claiming that he relied upon the representations of the original grantor that the property had been surveyed and contained the number of acres represented. *Powell v. March* (Civ. App.) 169 S. W. 936.

The statute of limitations governing actions of conversion begins to run from the time when the owner of the property has notice or by reasonable diligence would know of the conversion. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 135 S. W. 610.

Evidence held to show that the holder of a right of action for conversion exercised no

diligence in the premises, so that his action was barred within the statutory period from the time of the conversion. *Id.*

Where an insurance agent, when the company declined the risk, refused to return the applicant's note, but negotiated it and appropriated the money, the refusal of the agent to return the note after notice to the applicant that his application was declined was sufficient notice of the conversion to start the running of the statute of limitations. *Id.*

Where cotton was shipped on through bill of lading from Texas via New Orleans to Liverpool and portion of it destroyed by fire while in defendant's possession, held, that statute of limitations did not begin to run until plaintiffs, not being negligent, actually learned of nondelivery. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Civ. App.) 187 S. W. 354.

Where a judgment and record in a divorce action affirmatively showed service and was only voidable, a suit to set it aside on the ground that defendant was not properly served with citation was barred at the expiration of 4 years after such defendant learned that divorce had been granted. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**26. Mistake as ground for relief.**—In case of mistake when the means of discovery are at hand, diligence must be exercised to discover the mistake, but the statute does not run until there is some circumstance or fact to arouse suspicion. *Smalley v. Vogt* (Civ. App.) 166 S. W. 1.

**27. Fraud as a ground for relief—In general.**—Where a grantee went into possession and dealt with the property as his own, the right of the grantors to sue to set aside the deed for fraud was barred by limitations, where the grantors took no action during their lifetime, though they lived more than five years, in the absence of anything to show that they did not know of the fraud at the execution of the deed. *Ryman v. Petruka* (Civ. App.) 166 S. W. 711.

**28. Discovery of fraud.**—A cause of action for fraud accrues at the time of the discovery of the fraud, or when it should have been discovered by the use of ordinary diligence, and limitations begin to run at that time. *Howell v. Bank of Snyder* (Civ. App.) 158 S. W. 574.

In cases of fraud when the means of discovery are at hand, diligence must be exercised to discover the fraud, but the statute does not run until there is some circumstance or fact to arouse suspicion. *Smalley v. Vogt* (Civ. App.) 166 S. W. 1.

Limitations held not to run against right of action by purchaser of note, falsely purporting to be secured by a vendor's lien, against agent through whom he purchased the note, until his discovery of the agent's interest in the proceeds of the sale thereof. *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

Limitations held to run against action to recover amount paid for note falsely pretending to be secured by vendor's lien only from the time that the purchaser, by exercising ordinary care and with information previously furnished him by his attorney, could have discovered the pretended vendor's lack of title. *Id.*

In an action to recover the amount paid for a note which falsely purported to be secured by a vendor's lien, evidence held insufficient to show beyond controversy that plaintiff had knowledge of the fraud more than two years prior to the filing of the suit. *Id.*

Where a grantor fraudulently misrepresented the number of acres conveyed, neither the two nor the four years statute of limitations will begin to run against an action for damages for shortage, until the fraud is discovered, or could have been discovered. *Powell v. March* (Civ. App.) 169 S. W. 936.

Surety on contractor's bond who mistakenly represented to materialman that he was liable for materials, held not estopped from pleading limitations in action for false representations, and limitations ran from the time the materialman saw or might have seen the bond. *Dean v. A. G. McAdams Lumber Co.* (Civ. App.) 172 S. W. 762.

In case of fraud, limitations do not run until the discovery of the fraud, or when it could have been discovered by reasonable diligence. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

Action to recover value of land conveyed by attorney under power of attorney for his own benefit held not barred by limitations, where fraud was not discovered until shortly before suit. *White v. Love* (Civ. App.) 174 S. W. 913.

In case of fraud the cause of action accrues when the fraud was, or by the use of reasonable diligence might have been, discovered, and the limitation begins then, and the right of relief is barred when the statutory period has expired. *Sowell v. Hoffman* (Civ. App.) 182 S. W. 1152.

When the fraud relied upon to prevent the running of limitation is unknown or is concealed, lapse of time will not be laches barring relief, unless such party has failed to use reasonable diligence to discover the fraud. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

In cases of fraud the statute of limitations begins running when fraud was discovered, or by reasonable diligence should have been discovered. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

In action against a part owner of property by wife of other owner, that plaintiff did not discover defendant's fraudulent misrepresentations until within two years is insufficient to toll limitations, where many years before she knew facts which should have led to discovery of any fraud. *Id.*

Limitations against action by principal against agent for false statements in a matter which it was his duty to report begins to run only from knowledge by principal of misrepresentation, the agency continuing till then. *Clark & Boice Lumber Co. v. Barker* (Civ. App.) 193 S. W. 371.

In an action to set aside a decree for division of community property in divorce action, evidence held to support a jury finding that plaintiff was not chargeable with lack

of due diligence in discovering her husband's fraud in concealing the amount of their community estate. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

Evidence held to support a jury finding on special issue submitted that plaintiff did not have knowledge, actual or constructive, of fraud of her husband in stating the amount of community property and promising to contribute to her future support, prior to four years before bringing the action. *Id.*

29. **Existence of trust—In general.**—If plaintiff gave money to his uncle on his promise to put it at interest for plaintiff and to return it when wanted, held that, if this created a trust, it was not a technical, continuing, or subsisting trust against which limitations would not run. *Pollard v. Allen* (Civ. App.) 171 S. W. 530.

30. **Repudiation or violation of trust.**—An action against a county to enforce the trust imposed on it by Const. art. 7, § 6, is not barred by limitations, though the county wrongfully diverted the proceeds, but did not repudiate the trust. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

Where parents, holding property in trust as common family property of all the children, conveyed it to a son, and the deed was duly acknowledged, delivered, and recorded, and the son entered into possession and dealt with the property as his own, a suit by the other children to set aside the deed, brought over nine years after the execution and recording of the deed, and the taking of possession by the son, was barred by limitations. *Ryman v. Petruka* (Civ. App.) 166 S. W. 711.

A corporation's relation to its stockholders is that of a trustee of a direct trust, concerning which limitations have no application until there has been a clear and unequivocal notice of repudiation to the *cestui que trust*. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

Where land bought with community funds was by mistake conveyed to the wife as a part of her separate property, a suit by the husband after the wife's death to correct the mistake was to enforce a resulting trust, and limitations did not begin to run until an adverse claim had been asserted to the land or the trust repudiated. *Strickland v. Baugh* (Civ. App.) 169 S. W. 181.

A corporation cannot plead limitation against its beneficiaries' demand until repudiation of the trust by it. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489. Certified questions answered by Supreme Court 167 S. W. 710, 106 Tex. 389.

A conveyance of land held to create a trust in favor of plaintiff, so that Rev. St. 1911, art. 5690, fixing a four years' limitation on suits to cancel conveyances, did not begin to run until plaintiff discovered defendant did not intend to reconvey. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

Where the director and officer of a legally dissolved corporation was sued on the corporation's contract as its trustee under Rev. St. 1911, art. 1206, limitations would run in his favor as against the creditor, although the trustee did not give notice of his repudiation of the trust. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

Limitations held not to commence to run against cause of action to establish trust till discovery of omission of plaintiffs' names from deed. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

31. **Concealment of cause of action.**—Where defendant's grantee who purchased the land in suit under a contract to discharge a vendor's lien thereon concealed his assumption of the debt so that plaintiff could not have discovered it by any diligence, the grantee's active fraud will prevent the running of the statute of limitations. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

To an action for the proceeds of a draft sent to defendant bank and by it indorsed, collected, and allowed to remain in the name of its president as trustee, who thereafter checked out the entire amount to his own use, which fact was purposely concealed from plaintiff by the bank, treated as an action for conversion, the statute did not begin to run until he learned the condition of the fund. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

A fraudulent concealment of a cause of action takes the case out of the statute, and limitations do not begin to run until the discovery of the right of action. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

Where a husband had turned community property into notes and money and falsely represented its amount to his wife to secure her assent to an agreement for division in a divorce action, and induced her to go to another state, there was such a concealment of fraud as would prevent limitations from running until fraud was discovered, or by reasonable diligence should have been. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

#### (D) Pendency of Legal Proceedings or Stay

34. **Pendency of appeal.**—The statute which commenced to run against plaintiff's cause of action for money paid by him for what purported to be a soldier's additional scrip, on notice that the federal General Land Office had rejected it as void, was not suspended by his appeal from such decision. *Bostick v. Heard* (Civ. App.) 164 S. W. 34.

35. **Stay of proceedings.**—Where plaintiff obtained an injunction restraining defendant from filing suit on a note, it was not barred by lapse of time during the injunction. *Yzaguirre v. Garcia* (Civ. App.) 172 S. W. 139.

In statutory action against sheriff and his sureties, to recover amount of a judgment for refusal to levy and return execution, judgment enjoining issuance and levy of execution on property of judgment debtor, held not to interrupt running of limitations. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

In statutory action against sheriff and his sureties to recover amount of judgment on ground of refusal to levy and return execution, acts of defendants in enjoining proceedings against sheriff, held to suspend limitations. *Id.*

*(E) Commencement of Action or Other Proceeding*

37. **Mode of computation of time limited.**—Where money was furnished by a bank April 27, 1910, and suit to recover same was instituted April 26, 1912, the action was brought within two years, and was not barred by limitations. *Uvalde Nat. Bank v. Brooks* (Civ. App.) 162 S. W. 957.

The rule that, when a new period of limitation is substituted, time which elapsed under repealed law will be counted against the demand in the ratio it bears to the whole period, does not apply where statutes prescribe precise rules. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

38. **Proceedings constituting commencement of action**—In general.—The fact that when plaintiff corporation sued on notes it was not legally entitled to sue under Rev. Civ. St. 1911, art. 7399, because it had not paid its franchise tax, would not cause the action to be barred by the four-year limitation, though before an amended petition was filed showing compliance with the statute more than four years had elapsed since maturity of the last note. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

Where a suit was brought against a corporation, which filed an answer in the corporate name, and subsequently an individual appeared and answered, alleging that she did business in the name of the corporation, and that there was no corporation, the commencement of the action stopped the running of limitations. *Pickering Mfg. Co. v. Gordon* (Civ. App.) 168 S. W. 14.

Where an action was brought against a corporation, but individuals forming a partnership having the name of the corporation appeared, stating the partnership and its members and answered by demurrer and general denial within two years from the time of the accrual of the cause of action, the action was pending from the time of the answer within the statute of limitations. *Law Reporting Co. v. Texas Grain & Elevator Co.* (Civ. App.) 168 S. W. 1001.

Petition susceptible of two constructions held to be construed so as to give the court jurisdiction of the suit, so that filing the petition would interrupt the running of limitations on the cause of action. *Pecos & N. T. Ry. Co. v. Rayzor*, 106 Tex. 544, 172 S. W. 1103, answer to certified questions conformed to (Civ. App.) 174 S. W. 916.

Petition susceptible of two constructions construed so as to give the county court jurisdiction, so that the filing of the petition suspended the statute of limitations. *Pecos & N. T. Ry. Co. v. Rayzor* (Civ. App.) 174 S. W. 916, decided in conformity to 172 S. W. 1103, 106 Tex. 544.

39. **Issuance and service of process.**—The fact that by the clerk's fault, citation was not issued before the running of limitations held not to bar the action. *Western Union Telegraph Co. v. Hill* (Civ. App.) 162 S. W. 332.

Where plaintiff, suing on a note, suppressed citation, and took no steps to procure issuance and service until four years from the maturity of the note, merely instructing the clerk after such date to issue in time for the next June Term, plaintiff's suit did not interrupt the running of limitations. *Estes v. McWhorter* (Civ. App.) 182 S. W. 387.

Plaintiff's suit on a note was barred where he suppressed citation and failed to procure its issuance and service before the elapse of four years from maturity of the note, so that the suit failed to interrupt limitations, though defendant in his original answer did not plead limitation. *Id.*

Where the citation was not sent to the sheriff for service until two months after it was issued, and after the right of action was barred, plaintiff must show a bona fide intention to have it served and a reasonable excuse for not having done so. *Panhandle & S. F. Ry. Co. v. Hubbard* (Civ. App.) 190 S. W. 793.

40. **Want of jurisdiction.**—Where the trial court has absolutely no jurisdiction of an action under the pleadings, the filing of the petition cannot interrupt the running of the statute of limitations on the cause of action. *Pecos & N. T. Ry. Co. v. Rayzor*, 172 S. W. 1103, 106 Tex. 544, answer to certified questions conformed to (Civ. App.) 174 S. W. 916.

42. **Defects or irregularities in pleadings or other proceedings.**—An original petition, though insufficient on general demurrer, prevents the running of limitations. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

A pleading bad on demurrer may be sufficient to stop the running of the statute. *Smith v. Tipps* (Civ. App.) 191 S. W. 392.

43. **Intervention or bringing in new parties.**—Where, in an action brought by one partner or joint owner, the petition was amended so as to make the other partner a party plaintiff, limitations did not run against the cause of action up to the date of such amendment. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546.

Where an amended petition charged defendants who were not charged in the original complaint with libelous statements made more than a year before the filing of the amended petition, the one-year statute of limitations applied. *Dickson v. Lights* (Civ. App.) 170 S. W. 834.

Action against receiver of railroad company, to which purchaser of railroad's property and franchises was made a party within two years after its purchase, held not barred by limitations as against it. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 456, 1133.

Amendment of complaint by intervention of administratrix and allegation of cause of action under federal Employers' Liability Act held not to state new cause of action barred by the two-year limitation in section 6. *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

Where new party plaintiff is added after time has run, action as to new plaintiff is barred by statute of limitations. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

44. **Effect as to persons not parties.**—Suit brought by A. does not toll the statute of limitations as to later suit on same cause by B., in absence of privity between A. and B. in the cause of action. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

45. **Amendment of pleadings—In general.**—Whether amended petition states new cause of action barred by limitation does not depend on whether new facts are alleged, but whether a different cause is stated. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

Courts will be liberal in allowing amendments to prevent bar of action by limitation, taking care not to deny defendant's right to bar simply because plaintiff is thereby denied trial on merits. *Id.*

Tests to determine identity of causes of action on question of toll of statute of limitations are: (1) Does recovery on original, bar recovery on amended petition; (2) would same evidence support both; (3) is measure of damages same; and (4) are each subject to same defenses? *Id.*

46. **Amendment restating original cause of action.**—Corporation's cause of action of notes not barred by four-year statute of limitations, though it was not legally entitled to sue at time suit begun because it had not paid its franchise tax, and more than four years had elapsed since maturity of last note before amended petition filed showing compliance with statute. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

In action on an agreement to divide a commission from a sale of property, amendment relating to the same transaction, and merely amplifying the original petition, held a continuation of the original suit. *Maple v. Smith* (Civ. App.) 166 S. W. 1196.

Where, in action against bank for detaching bills of lading from drafts sent it for collection, the original petition alleged the facts and was sufficient as against a general demurrer, cause of action held not barred by limitations, though amended petition making the allegations more specific was filed after the expiration of the period of limitation. *Collin County Nat. Bank v. Turner* (Civ. App.) 167 S. W. 165.

Under the original and amended petitions in an action to recover double the usurious interest paid, held that the suit throughout was against defendant as the sole owner of the company which made the loan, so that his plea of limitations was bad. *Cotton v. Barnes* (Civ. App.) 167 S. W. 756.

Where a widow of a railroad employé killed while engaged in interstate commerce instituted an action as widow under a state statute, it was not the beginning of a new action for her to file an amended petition as the personal representative of deceased seeking recovery under the federal Employers' Liability Act, and limitations did not apply. *St. Louis, S. F. & T. Ry. Co. v. Smith* (Civ. App.) 171 S. W. 512.

The filing of an amended petition, wherein plaintiff sued as administratrix so as to come within the federal Employers' Liability Act held not the beginning of a new suit, as affecting limitations. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729.

Where an action for tort was commenced before the action was barred, limitation could not be urged to an amendment stating results of injury more fully, filed when statute would bar suit then brought. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 173 S. W. 467.

Where the original, as well as the amended, petition described the same note, though the last alleged purchase before maturity, no new cause of action was stated, and limitations were tolled by the original suit. *McWhorter v. Estes* (Civ. App.) 175 S. W. 846.

In an action for delay of a shipment of mules, an amended petition held not to set up a new cause of action, within a stipulation in the contract of shipment requiring suit to be instituted within 91 days after injury. *Missouri, K. & T. Ry. Co. of Texas v. Neale* (Civ. App.) 176 S. W. 85.

In an action on a note against defendant on the ground that he had assumed payment of his son's debt, amendments to plaintiff's petition held not to have abandoned the cause of action, and hence were not barred by limitations. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

Amendment of complaint under Rev. St. 1911, arts. 4694, 4695, by alleging as ground for recovery negligence of fellow servant based on article 6640, held not to state new cause of action so as to bar recovery thereon under two-year statute of limitations. *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

An amended petition held not to set forth a new cause of action, alleged in the original petition, and an account attached thereto as an exhibit, and the cause of action set forth in the amended petition was not barred by limitations. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

Addition or subtraction of party plaintiff by amendment is not bringing of new suit barred by statute of limitations nor does it render statute of limitations available against remaining plaintiffs. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

Amending petition by joint owners for injury to property, after action would have been barred by limitation so as to take away a party plaintiff does not constitute new suit barred by statute of limitations. *Id.*

Under Rev. St. 1911, art. 1995, allowing judgments for or against one or several parties, amendment of petition by joint owners for injury to property so as to leave but one party plaintiff is immaterial, not subjecting suit as amended to bar of statute of limitations. *Id.*

Where two parties brought suit for injury to property, and, after action would have been barred by limitation, petition was amended, making one of them sole plaintiff, such amendment was not a new suit, barred by statute of limitations. *Id.*

Where two are jointly interested in a contract, but action for breach thereof was begun by only one, an amended petition joining the other as coplaintiff in the same cause of action is not the commencement of a new suit within the statute of limitations. *Jeffress v. Western Union Telegraph Co.* (Civ. App.) 187 S. W. 514.

Where a petition alleged that defendant railway agreed to install a crossing on plaintiff's farm three miles east of Melvin on Brady creek, containing 171 acres in school section 2, an amended petition, correctly changing the latter part of the description to 160 acres out of L. R. R. Survey No. 1, continues the original cause of action so far as the

limitation statute is concerned. *Malmstrom v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 188 S. W. 453.

Where petition to recover damages was filed within statute of limitation, amended petition filed more than four years later, alleging same and additional facts merely setting out entire contract, no new cause of action was stated, and statute of limitations could not be urged. *Silver Valley Horse Co. v. C. V. Evans & Co.* (Civ. App.) 190 S. W. 794.

In action for delay in shipping cattle, a trial amendment to the petition alleging that the cattle were on the cars for 43 hours, and plaintiffs were refused permission to unload, feed, and water them during that time, etc., did not set up a new cause of action, and was not barred by limitation. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

Where the petition as first brought by a materialman against a city was amended to set up assignments by the contractor to the materialman, the action was not barred on the theory that a new cause was stated. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

Where amendment to petition filed more than two years after breach of contract sued on does not show that recovery for such items was not sought in original petition, it does not show that recovery therefor is barred by two-year statute of limitation. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

47. **Amendment introducing new cause of action.**—Where plaintiff sought to recover demurrage from a carrier because of discrimination in the extension of credit and also because the carrier refused to accept checks during a financial panic for the payment of freight, an amended petition, filed four years later, seeking a recovery for want of sufficient notice of arrival of the cars, stated a new cause of action and was barred by limitations. *Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 402.

Where original counterclaim for breach of contract to furnish oil merely alleged damages amounting to the difference between the contract and market price, claim for damages sustained by shutting down factory because of failure to furnish oil, contained in amended answer filed more than two years after the breach, held barred by limitations. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

Where petition in broker's action for commissions alleged express contract, exceptions held properly sustained to paragraphs in amended petition filed after limitations had run alleging conduct inducing plaintiff to believe that defendant was employing him. *Prichard v. Foster* (Civ. App.) 170 S. W. 1077.

Where the petition was amended two years after accrual of a cause of action so as to declare in the alternative on an implied contract instead of an express contract to pay attorney's fees, the cause of action on the implied contract was barred by limitations. *G. R. Scott, Boone & Pope v. Willis* (Civ. App.) 194 S. W. 220.

48. **Amendment affecting form of action or relief.**—Cause of action is not changed by amendment relating to measure of damages. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

50. **Set-offs and counterclaims.**—If, when plaintiff filed his suit, defendant owned a subsisting counterclaim, which was not barred by the two-year limitations, that the bar was completed before the counterclaim was pleaded will not prevent defendant from setting off the counterclaim at any time pending suit, though, if he did not assert it until after two years from its accrual, he could not recover any excess over plaintiff's demand. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

Cost of repairing pavement on contractor's refusal to do so held not a payment on the contract price but an offset against which limitations ran. *Nelson v. San Antonio Traction Co.* (Sup.) 175 S. W. 434, reversing judgment (Civ. App.) 142 S. W. 146.

Set-offs accruing four years before suit or after the suit was instituted, but more than four years before the plea of set-off was filed, but not those accruing within four years before suit, held barred by limitations. *Id.*

51. **New action after nonsuit or dismissal.**—A suit voluntarily dismissed without a trial on the merits held not to interrupt the running of limitations. *Mitchell v. Thomas* (Civ. App.) 172 S. W. 715.

### III. OPERATION AND EFFECT OF BAR BY LIMITATION

53. **Nature and extent of bar.**—Where the full period of limitation has elapsed and a pre-existing right has become barred, the Legislature cannot revive it. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

There can be no right gained in the running of statute of limitations until the prescribed period is complete. *McCutcheon & Church v. Smith* (Civ. App.) 194 S. W. 831.

56. **Persons to whom bar is available.**—No one except defendant can plead limitations. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

As defendant alone could rely on limitations to defeat his associate's recovery against him for crop loss, sellers of irrigating machinery whose breach of contract caused the loss could not defeat defendant's recovery of that amount of damages on a plea of limitations. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

57. **Persons barred.**—The assignee of one holding a right of action for conversion occupies no better position than the assignor, and is subject to the same rule as to limitation of his action. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

58. **Waiver of bar.**—Where suit on a note was barred because plaintiff failed to procure citation before the elapse of four years from maturity of the note, so that the running of the statute was not interrupted, the subsequent filing by defendant of a waiver of citation did not remove the bar of the statute. *Estes v. McWhorter* (Civ. App.) 182 S. W. 887.

## TITLE 88

## LOCAL OPTION

Art.		Art.	
5715.	Order for election.	5723.	Order when against prohibition.
5716.	When not prohibited.	5724.	Second election, when.
5717.	Where voting to take place.	5726.	Second election in subdivisions.
5719.	Form of ballot, etc.	5727.	Penalty, etc.
5720.	How election to be held.	5728.	Election, how contested.
5721.	Session for counting votes, when.	5730.	District judge to give in charge to grand jury, what.
5722.	Result to be declared.		

**Article 5715. [3384] Commissioners' courts may order elections.**

Cited, *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

2½. **Construction and operation in general.**—The local option law is penal, and, unless its provisions are strictly followed, an election thereunder is void. *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.

Where a city at a special election adopted a charter provision prohibiting sale of liquor in certain districts, such charter provision was not in violation of Const. art. 16, § 20, authorizing the people to adopt prohibition by a vote. *Le Gois v. State* (Cr. App.) 190 S. W. 724.

3. **Where local option elections may be held.**—Under Const. 1876, art. 16, § 20, as amended in 1891, and this article, an election may include territory comprising several school districts, though included in different justice's precincts. *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000.

Where Jim Wells county was, by Acts 32d Leg. c. 140, carved out of Nueces county, a precinct of the new county might put the existing prohibition law into effect, even though it included only part of a subdivision of the original county, wherein the prohibition law was in effect, and, having done so, the present prohibition law governs, and the state cannot elect to prosecute under the old one. *Sandaval v. State* (Cr. App.) 162 S. W. 1148.

Arts. 5715, 5726, held not to prohibit the holding of a local option election in a commissioners' precinct composing part of a justice's precinct, or in any other local option district once established. *Holmgreen v. Perkins* (Civ. App.) 166 S. W. 8.

9. **Petition for election—Number of signers.**—Under this article when the commissioners' court orders a local option election on a petition only, it must be signed by the requisite number of legal voters to give jurisdiction to make the order. *Canales v. Mullen* (Civ. App.) 185 S. W. 420.

**Art. 5716. [3385] When not prohibited.**

**Note.**—Act Oct. 12, 1917, amends this article and Art. 598 of the Penal Code so that each of such articles shall read as set forth in section 1 of the amendatory act. As the act as amended is essentially criminal in its nature, it is set forth under Art. 598 of the Penal Code in this supplement, without duplication here.

**Art. 5717. [3386] Where voting to take place.**

**Date of election.**—The provision that a local option election shall be held not less than 15 nor more than 30 days from the date of the order, is mandatory, and an election held at a later date than that prescribed is void. *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000.

**Art. 5719. [3388] Form of ballot, etc.**

**Statute mandatory.**—Rev. St. 1911, art. 5719, prescribing form of local option election ballots, is mandatory. *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.

**Duty of clerk of county court.**—Under Rev. St. 1911, art. 5719, requiring clerk of county court to furnish local option ballots, and prohibiting use or counting of any except official ballots, term "official ballots" refers to those furnished by the clerk. The duty to furnish local option ballots cannot be delegated by the clerk to another. *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.

**Form of ballots.**—Rev. St. 1911, art. 5719, requiring local option ballots to bear words "Official Ballot," "For Prohibition," and "Against Prohibition," requires three-line, not five-line, ballot, especially where it also requires voters to draw "a line" through one of last two phrases. *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.

**Art. 5720. [3389] How election to be held.**

**Election how determined.**—Under Const. art. 16, § 20, and Rev. St. 1911, arts. 3062, 5720, 5723, held that result of an election on question of prohibition is determined by a majority of qualified voters voting. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Art. 5721. [3390] To hold session for counting votes, when.**

**8. Order declaring result of election—Time of making order.**—Under the provision that after a local option election the county commissioners' court shall meet on or after the eleventh day after the election and count the votes and declare the result, the declaration of the result at a meeting only nine days after the election is wholly void. *Walker v. State* (Cr. App.) 163 S. W. 71.

**21. Changes in precinct after election.**—Where the prohibition law has been put in force in any subdivision of a county, that territory cannot be changed by the commissioners' court so as to affect the law in any part thereof, and it continues in force until repealed by that same identical subdivision. *Sandaval v. State*, 72 Cr. R. 368, 162 S. W. 1148.

**Art. 5722. [3391] Result to be declared.**

Cited, *Cleveland v. State* (Cr. App.) 190 S. W. 177.

**Necessity of legal publication.**—Prohibition did not go in force, in the precinct in which an election had been held, until publication of the order was made by the judge. *Rhodes v. State*, 75 Cr. R. 659, 172 S. W. 252.

**Evidence.**—In a prosecution for pursuing occupation of selling intoxicants in dry territory, only such orders of commissioners' court as evidence that prohibition has been legally adopted need be introduced in evidence. *Vance v. State* (Cr. App.) 190 S. W. 176.

**Art. 5723. [3392] Order when against prohibition.**

See *Marsden v. Troy* (Civ. App.) 189 S. W. 960; note under art. 5720.

**Art. 5724. [3393] Second election, when.**

Cited, *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000.

**Art. 5726. [3395] May hold second election in subdivision.**

**Election in precinct constituting part of larger district.**—Arts. 5715, 5726, held not to prohibit the holding of a local option election in a commissioners' precinct composing part of a justice's precinct, or in any other local option district once established. *Holmgreen v. Perkins* (Civ. App.) 166 S. W. 8.

**Election in precinct as affecting county election.**—An election under the local option law in three of the four precincts of a county is not an election for the whole county, though the fourth precinct has only a few voters, and the fact that an election for the whole county was held less than two years before the election in the three precincts does not invalidate the last election. *Mitchell v. State*, 71 Cr. R. 241, 158 S. W. 815.

**Art. 5727. [3396] Penalty.**

**Evidence of adoption of prohibition.**—The putting in force of prohibition within the territory may be proved either by the minute book, where the orders are entered in the minutes of the commissioners' court, or by properly certified copies thereof. *Howard v. State*, 72 Cr. R. 624, 163 S. W. 429.

**Art. 5728. [3397] Election, how contested.**

Cited, *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000.

**7. Procedure in general.**—Under this article, objection to notice of local option election must be made by contest and cannot be made on prosecution for selling intoxicating liquors in prohibition territory. *Miller v. State* (Cr. App.) 161 S. W. 128.

**12. — Scope of inquiry.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5728, the court on a local option election contest must, on proper pleadings, inquire into the qualification of the signers of the petition, on which election was ordered. *Canales v. Mullen* (Civ. App.) 185 S. W. 420.

**23. Presumption where election not contested.**—Where the time had elapsed in which to contest a prohibition election, the court must conclusively presume that all steps taken were legal, and will not pass on the questions as to whether or not the orders were sufficient. *Rhodes v. State*, 75 Cr. R. 659, 172 S. W. 252; *Nobles v. State*, 71 Cr. R. 121, 158 S. W. 1133; *Thompson v. State*, 72 Cr. R. 6, 160 S. W. 685; *Sasser v. State*, 166 S. W. 1160, 73 Tex. Cr. R. 539; *Longmire v. State*, 75 Cr. R. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; *Jackson v. State* (Cr. App.) 178 S. W. 521.

**26. Conclusiveness of decision of court of criminal appeals.**—Under this article held, that indictment for illegal sale of intoxicating liquor need not allege that notice of result of election for prohibition was published. *Cleveland v. State* (Cr. App.) 190 S. W. 177; *Dupree v. State* (Cr. App.) 190 S. W. 181.

**Art. 5730. [3399] District judges to give in charge to grand juries.**

Cited, *Cartwright v. Canode*, 106 Tex. 502, 171 S. W. 696; *Canales v. Mullen* (Civ. App.) 185 S. W. 420.



## TITLE 89

## MANDAMUS

Art. 5731. No mandamus on ex parte hearing.	Art. 5732. Mandamus, etc., not to issue against officer of executive department, except by supreme court.
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**Article 5731. [1450] No mandamus on ex parte hearing.**

**As civil suit.**—The statutory remedy denominated a writ of mandamus is a civil suit, the common-law prerogative features of the writ having been modified. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

**Art. 5732. [4861] Mandamus, etc., not to issue against officer of executive department, except by supreme court.**

**Jurisdiction of district court.**—This article does not deprive the district court of the power and authority to restrain the performance of an illegal or unconstitutional act by a state officer. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367; *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

**Duty of comptroller.**—Within this article it is the duty of the State Comptroller, under the law, to recognize plaintiff as collector of delinquent taxes under his contract with the commissioners' court of a county joined in by the State Comptroller, as authorized by article 7707, on behalf of the state. *Lane v. Mayfield* (Civ. App.) 158 S. W. 223.

## DECISIONS RELATING TO SUBJECT IN GENERAL

## I. NATURE AND GROUNDS IN GENERAL

**2. Existence and adequacy of other remedy in general.**—Though the refusal of a district court to permit the filing of a motion for a new trial and to hear the same could not be adequately presented on appeal, it would furnish cause for direct proceeding to set aside the judgment. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

Mandamus held not to lie to compel sheriff to levy execution issued upon money judgment, as adequate remedy is provided by *Vernon's Sayles' Ann. Civ. St. 1914, art. 3776*, by action against sureties. *Seagraves v. Scarborough* (Civ. App.) 190 S. W. 1154.

Plaintiff's remedy to determine whether or not a judgment in his favor ordering return of property has been satisfied in accordance with its terms is by suit between parties, and not by mandamus to compel sheriff to levy execution. *Id.*

**3. Remedy by appeal, writ of error or certiorari.**—Abuses of discretion on part of trial court, held not open to correction by mandamus where the defendant had an adequate remedy by appeal or writ of error. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

**4. Nature and existence of rights to be protected or enforced.**—Whether mandamus should issue to compel an officer to perform an official duty must depend on a petitioner's allegation and proof of all facts showing an affirmative right to the relief sought, and not on the officer's failure to set up a valid defense. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

Transfer of stock on the books of a corporation cannot be compelled by mandamus if the petition fails to allege an official or legal duty to make the transfer. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

**5. Nature of act to be commanded.**—In mandamus to compel railroad companies to comply with an order of the Railroad Commission commanding them to file plans and specifications for the construction of a union passenger depot, the court may issue a writ of mandamus commanding the filing of such plans and specifications; its power not being confined to the issuance of a writ commanding the construction and maintenance of such a depot. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192.

Mandamus will not lie to compel action by the courts unless the duty to act is plain. *Coultress v. City of San Antonio* (Sup.) 179 S. W. 515.

**6. Demand and default.**—Where application for mandamus to require a clerk of court to approve and file a supersedeas bond does not show the clerk refused to perform his duty, the writ will not issue. *Wigwam Bowling & Athletic Club v. Escajeda* (Civ. App.) 187 S. W. 972.

**7. Mandamus ineffectual or not beneficial.**—Where a receiver has been appointed for a railroad company, so that it is legally impossible for it to comply with mandamus from a district court, requiring it to construct a line through a county seat and maintain a depot therein, enforcement should be suspended until conditions so change as to put it in the power of the corporation to obey. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

8. **Persons entitled to relief.**—Resident citizens of Dunn county who are qualified voters and owners of property therein held entitled to apply for mandamus to compel the commissioners' court of Duval county to divide Dunn county into precincts as provided in the act creating that county. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

Under the Enabling Act, giving a prescribed number of voters the right to demand an election by petition, one or more of the petitioners could apply for, and, under proper circumstances, obtain, a writ of mandamus compelling the calling of the election. *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

In the absence of any statute on the subject, an action by the treasurer and superintendent of schools of a county, and officers of independent school district of the county, and citizens in their individual right against the county and the commissioners' court to ascertain the amount of proceeds of school lands which have been diverted and to enforce the trust imposed on the county, is maintainable. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

## II. SUBJECTS AND PURPOSES OF RELIEF

9. **In what cases mandamus will issue in general.**—The purpose of mandamus is to require some inferior court or officer, etc., to do some particular thing specified in the writ which appertains to their office or duty in aid of jurisdiction of court issuing the writ. *Ætna Club v. Jackson* (Civ. App.) 187 S. W. 971.

11. **Acts and proceedings of courts, judges and judicial officers—Matters of discretion in general.**—The exercise of judicial discretion is not subject to control by mandamus. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

12. — **Specific acts.**—Under the facts, mandamus held not to issue to compel a sheriff to levy an execution. *Wilson v. Dearborn* (Civ. App.) 174 S. W. 296, rehearing denied 179 S. W. 1102.

19. — **Proceedings for review.**—Under Acts 32d Leg. c. 119, art. 2071, it is the duty, compellable by mandamus, of a judge of a county court, who found that plaintiff had filed sufficient affidavit of inability to pay the costs of appeal, to order the special stenographer to transcribe his notes without charge. *Otto v. Wren* (Civ. App.) 184 S. W. 350.

A court stenographer may be compelled by mandamus to transcribe his shorthand notes of proceedings in court taken by him by virtue of his appointment. *Id.*

21. — **Criminal prosecutions.**—Where mayor or other officer refuses to approve sufficient bond of person appealing from mayor's court, mandamus held to be the proper remedy. *Ex parte Hunt*, 72 Cr. R. 124, 161 S. W. 457.

23. **Acts and proceedings of public officers or boards and municipalities—Ministerial acts in general.**—The distinction between ministerial and judicial acts is that, where the law prescribes the duty to be performed with such certainty as to leave nothing to the exercise of judgment or discretion, the act is a "ministerial act," but where the act involves the exercise of discretion or judgment in determining whether the duty exists it is a "judicial act." *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

24. — **Matters of discretion.**—Under the Enabling Act, requiring the governing authority of any city upon petition of 10 per cent. of the qualified voters to call an election, held, that the number and qualification of the petitioners was a judicial act for determination by the city council, which would not be reviewed by mandamus in the absence of fraud or unfairness. *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

Mandamus lies to compel the performance of official duties which are imperative and unaccompanied with an element of discretion, and courts will extend relief to compel the holding of a municipal election where the duty is clearly obligatory and has been disregarded. *Id.*

In view of Const. art. 12, § 6, and *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1126-1128, held that, act of secretary of state in issuing a corporate charter being discretionary, and not purely ministerial or imperatively required by law, he cannot be required by mandamus to issue charter where he has not received satisfactory evidence that provisions of article 1126 have been complied with. *Beach v. McKay* (Sup.) 191 S. W. 557.

Whether corporate stock had been subscribed in good faith, and 50 per cent. thereof had been paid in cash or equivalent as required by *Vernon's Sayles' Ann. Civ. St.* 1914, art. 1126, held questions of fact to be determined by secretary of state in exercise of his discretion under article 1128 and not coercible by mandamus. *Id.*

Under Acts 34th Leg. c. 36, giving county school trustees general control of public free schools in each county, held, that county school trustees have a broad discretion, and trustees of a district could not prevent proposed abolishment of district and its annexation to other districts by writ of mandamus. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

25. — **Specific acts.**—A citizen of a county held entitled to mandamus to compel the proper officers to permit him to inspect county records to discover a misapplication of funds. *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

To entitle taxpayers to mandamus to obtain inspection of county records, held, that it need not be shown that the county attorney agreed to sue in accordance with *Rev. St. art. 366*, for any sums found due the county. *Id.*

31. — **Issuance of warrants and payment of claims.**—Mandamus lies to compel clerk of commissioners' court to return deposit made with original petition for the es-

establishment of a drainage district, in accordance with the provisions of the statute. *Jefferson v. McFaddin* (Civ. App.) 178 S. W. 714.

Mandamus held not to lie against clerk of commissioners' court to compel return of deposit made as required by art. 2602, on the filing of petition for drainage districts where the signers of the petition, at whose request plaintiff made the deposit, were not parties respondent. *Id.*

A judgment directing the payment of the amount by a county out of any funds of a contractor, without disposing of the issue as to the existence of such funds raised by the pleading, is not final so as to be payable under Rev. St. 1911, art. 1368, and cannot be enforced by mandamus. *Culberson County v. Groves Lumber Co.* (Civ. App.) 191 S. W. 165.

32. — **Assessment and levy of taxes.**—Where poll taxes are tendered to the collector before the time for payment has expired, performance of the collector's duty to issue a tax receipt may be compelled by mandamus. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

Mandamus lies to compel a city to levy taxes to pay a judgment against it. *City of Clarendon v. Betts* (Civ. App.) 174 S. W. 958.

Mandamus is a proper remedy for persons injuriously affected by a discriminatory system or plan of taxation. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

34. **Acts and proceedings of private corporations and individuals—Exercise of corporate franchises and powers.**—Where a railroad company fails and refuses to perform its constitutional and statutory duty to construct a line through a county seat and maintain a depot therein, the district court may award a writ of mandamus. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

Mandamus or mandatory injunction is a proper remedy to prevent a railroad company from abandoning a part of its road after completion. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

Where a Texas railroad company wrongfully refused to exchange business with a foreign company, it may be required to discharge its duties by mandamus or injunction. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

### III. JURISDICTION, PROCEEDINGS AND RELIEF

36. **Jurisdiction In general.**—Federal court's appointment of a receiver for a railroad, vesting him with the right to possession of its property, while not allowing the state to interfere with such possession, held no obstacle to a mandamus from a state court, requiring the railroad to construct a line through a county seat according to state Constitution and statutes. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

39. **Time to sue and leave of court.**—Since it would not be presumed in advance that when judgment was rendered for a teacher against the school district for her salary that the district would refuse to pay it, mandamus for payment would not ordinarily be awarded at the same time the judgment was rendered. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

40. **Parties.**—Under the Enabling Act, giving a prescribed number of voters the right to demand an election by petition, where one or more of the petitioners obtained a writ of mandamus, compelling the calling of the election, the suit could be prosecuted in the name of the state or of the relator. *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

In mandamus to compel a city to levy a tax to satisfy a judgment rendered against its dissolved predecessor, the receiver of the dissolved city is not a necessary party. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

In mandamus proceedings against a county commissioner, ex officio road commissioner for his precinct, to compel him to open a road, landowners affected and county are necessary parties, so that county commissioners are proper interveners. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

Mandamus will not issue, where it appears it will affect persons not before the court whose rights have not been determined in a previous suit. *Id.*

Mandamus cannot issue against the members of the county court to compel them to pay a judgment, where the proceedings were against the county as such. *Culberson County v. Groves Lumber Co.* (Civ. App.) 191 S. W. 165.

43. **Scope of inquiry.**—In mandamus to vacate receivership as to certain property, the court will not inquire whether the order appointing the receiver was providently made. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

## TITLE 90

## MEDICINE—PRACTICE OF

## CHAPTER ONE

## PHYSICIANS AND SURGEONS

<p><b>Art.</b> 5733. Medical board established. 5736. Physicians required to keep register. 5738. Reciprocal arrangements with other states. 5739. Examination of applicants; qualifications of applicants; application;</p>	<p><b>Art.</b></p>	<p>fee; obstetricians; second examination. 5745. Who regarded as practicing medicine. 5747. Malpractice, cause for revoking license.</p>
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**Article 5733. Medical board established.**

Cited, *Teem v. State* (Cr. App.) 183 S. W. 1144.

**Art. 5736. Physicians required to register.**

Validity of act.—The medical practice act is not unconstitutional. *Hyroop v. State* (Cr. App.) 179 S. W. 878.

The Legislature had the power and authority to enact Acts 30th Leg. c. 123, regulating the practice of medicine. *Gay v. State* (Cr. App.) 184 S. W. 200.

**Art. 5738. Reciprocal arrangements with other states.**—The Board of Medical Examiners may, at its discretion, arrange for reciprocity in license with the authorities of other states and territories having requirements equal to those established by this law. License may be granted applicants for license under such reciprocity on payment of fifty (\$50.00) dollars. [Acts 1907, p. 224, § 6; Act March 20, 1915, ch. 63, § 1.]

Took effect March 20, 1915.

**Art. 5739. Examination of applicants; qualifications of applicants; application; fee; obstetricians; second examination.**—All applicants for license to practice medicine in this State, not otherwise licensed under the provisions of law, must successfully pass an examination before the Board of Medical Examiners established by this law. Applicants, to be eligible for examination, must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character, and graduates of bon fide, reputable medical schools. Such schools shall be considered reputable within the meaning of this law, whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of twenty-five (\$25.00) dollars; except when an applicant desires to practice obstetrics alone, the fee shall be five (\$5.00) dollars. Such applicant shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, upon proper application, shall be examined by the Board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the public as so practicing. In case any applicant, because of failure to pass exam-

ination, be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee. [Acts 1907, p. 224, § 7; Act March 20, 1915, ch. 63, § 1.]

Took effect March 20, 1915.

#### Art. 5745. Who regarded as practicing medicine.

**Practicing medicine—In general.**—Under this article it is not necessary to complete the offense that the defendant shall have held himself out as practicing medicine. *Hyroop v. State* (Cr. App.) 179 S. W. 878.

— **Masseur treatment.**—Evidence of methods of treatment of disease by one claiming to be a masseur held admissible in a prosecution of such person for unlawfully practicing medicine. *Hyroop v. State* (Cr. App.) 179 S. W. 878.

Under this article one professing to be a masseur is yet a "physician," where he professes to cure diseases or disorders. *Id.*

#### Art. 5747. Malpractice cause for revoking license.

**Negligence or malpractice.**—Where a child 11 years old was taken to surgeon by her adult sister for an adenoid operation, and the child died during an operation, the surgeon was liable to the parents, in the absence of proof that they had authorized the daughter to have the operation performed. *Rishworth v. Moss* (Civ. App.) 159 S. W. 122.

A physician impliedly contracts that he possesses that degree of knowledge, skill and care which physicians, practicing in similar localities, ordinarily possess, but does not impliedly warrant success. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

Where a physician specially employed to attend upon a patient sends a substitute, he must select a physician possessing that degree of knowledge skill, and care which physicians ordinarily possess, and, for failure, he is liable for all damages proximately resulting therefrom. *Id.*

A physician is responsible for an injury done to a patient through want of proper skill and care in his apprentice or assistant. *Id.*

A physician may be held liable in damages for increased pain and suffering consequent upon his unwarranted abandonment of a case at a critical period. *Id.*

Surgeon held not under duty to follow patient who left his sanitarium against his wishes, and is not further liable for due care of her wound. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

**Employment and compensation.**—The employment of plaintiff physicians by defendant to treat his injured employé continued while the case demanded their services or till they were discharged by defendant, so that he not having discharged them, but merely informed them, while treating the employé, that he would not pay them, as he had not employed them, he was liable for their further treatment of the employé up to the time he was in condition to be dismissed from further treatment. *Gray v. Lumpkin & Thomas* (Civ. App.) 159 S. W. 880.

Where a physician responds to the call of a patient, he thereby becomes engaged, in absence of special agreement, to attend to the case as long as it requires attention, unless he gives notice to the contrary or is discharged. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

## TITLE 91

## MILITIA

Chap.

1. General provisions.
3. National guard.

Chap.

4. State naval militia.

## CHAPTER ONE

## GENERAL PROVISIONS

Art.

5767a. Appropriation for expenses of military forces of state; pay of adjutant general, chief clerk, etc.

Art.

5767b. Expenditures, how made.

**Article 5767a. Appropriation for expenses of military forces of state; pay of Adjutant General, Chief Clerk, etc.**—That as a measure of national and State preparedness, there is hereby appropriated out of the general revenue of the State of Texas, Seven Hundred and Fifty Thousand Dollars, or so much thereof as may be necessary for the purpose of affording protection or relief to the State of Texas, by providing for the pay, transportation, subsistence, and all other expenses of the military forces of the State, when ordered on duty or when mobilized for instruction, or in recruiting or organizing any or all troops, required under the National Defense Act, or when ordered on any other military duty; for pay, transportation and all other expenses of officers while on active duty or while serving on military courts or boards or on other details; for mileage, per diem and other expenses of witnesses appearing before military courts and board which mileage and per diem shall be the same as that prescribed by the statutes of this State for witnesses attending the District Courts of this State in felony cases; for providing adequate and suitable storage and armory facilities for all headquarters and organizations of the military forces of this State; for the purpose of training, organizing, mobilizing, transporting, subsisting, paying, equipping, preparing for muster into and out of federal service, and for paying, subsisting, transporting and all other expenses of troops on and after muster out of federal service; for pay, transportation, subsistence and all expenses in organizing and maintaining schools of instruction for officers or enlisted men and for the purchase or manufacture of text-books and blank forms; and for the necessary clerical assistance and labor in storage, rooms, arsenals, armories or headquarters; and for the transportation and storage of military stores and supplies; and for the laundry and repair of uniforms and equipment; and for the hire, purchase, transportation and subsistence of animals; and for printing, stationery, postage, telephoning, telegraphing; and for the purchase of military stores, supplies, uniforms, arms and equipment; and all other military expenses of whatsoever character; for the maintenance of the Adjutant General's Department, as follows:

Pay of [the Adjutant General, \$3600.00 per year; pay of chief clerk \$1800.00 per year;] one stenographer at \$1200.00 per year; pay of porter \$480.00 per year; and for such additional clerical force not to exceed six clerks who shall draw salaries not exceeding \$1200.00 per year each, said clerks to be only retained for such times as their services may be absolutely necessary; and for stationery, postage, telegraphing, telephon-

ing and all other expenses as may be necessary; provided that none of the funds herein appropriated shall be expended for equipment, training, organizing, mobilizing, transporting, subsisting, paying, purchasing equipment for, and mustering into the Federal service of, any additional State troops until the Units are designated to the proper State authorities by the proper authorities of the Federal Government, and provided further, that no part of the amount herein appropriated shall be in any wise spent for the ranger service. [Act May 14, 1917, 1st C. S., ch. 5, § 1.]

**Note.**—The appropriation made hereby is reduced to \$400,000 by Acts 1917, 3d C. S., ch. 23.

**Explanatory.**—Became a law May 14, 1917. The provision as to the salaries of the adjutant general and his chief clerk, being the words in brackets, is superseded by Act June 5, 1917, ch. 48, set forth post as arts. 7085a-7085e.

**Art. 5767b. Expenditures, how made.**—Any and all amounts that may be expended as provided by this Act shall be paid only on itemized accounts sworn to by the party expending the same and showing the time, purpose and for what said amount was expended and by whom, which said itemized accounts shall be approved by both the Adjutant General and the Governor of Texas before their payment; provided that no part of the amount herein appropriated shall be paid out for any purpose other than as herein specifically provided; and provided further, that no deficiency shall be created, nor shall any warrants be issued or obligations incurred in excess of the amount herein appropriated and the Comptroller of Public Accounts shall not issue warrants upon the State Treasury for any moneys expended under this Act until said itemized accounts have been filed in the Comptroller's office. [Id., § 2.]

## CHAPTER THREE

### NATIONAL GUARD

<p><b>Art.</b> 5782. Military organizations deemed to be bodies corporate, etc.</p>	<p><b>ORGANIZATION</b></p> <p><b>ADJUTANT GENERAL</b></p> <p>5787. Term of office and salary of adjutant general.</p> <p><b>ASSISTANT QUARTERMASTER GENERAL</b></p> <p>5801. Assistant quartermaster general.</p> <p><b>COMMISSIONED OFFICERS</b></p> <p>5802. Officers to be commissioned by the governor; term.</p> <p>5804. Qualifications of officers.</p>	<p><b>Art.</b> 5804a. Same; citizenship; age; oath; physical examination.</p> <p><b>NON-COMMISSIONED OFFICERS AND ENLISTED MEN</b></p> <p>5820-5823. 5823a. Term of and requirements for enlisted men.</p> <p><b>COURTS MARTIAL</b></p> <p>5885. Jurisdiction presumed.</p> <p><b>GENERALLY</b></p> <p>5890. Unlawful disposition or use of arms, uniform, etc.; discrimination against persons in military service.</p>
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### ORGANIZATION

#### Article 5782. Military organizations deemed bodies corporate, etc.

**Agency of captain for members of company.**—The captain of a National Guard company held the agent of one of the members whose ticket he presented on the trip to the encampment, and the member was liable for the captain's negligence in failing to give him the contract portion of the ticket on his return trip. Missouri, K. & T. Ry. Co. of Texas v. Luster (Civ. App.) 162 S. W. 11.

### ADJUTANT GENERAL

#### Art. 5787. Term of office and salary of adjutant general.

**Note.**—The provision as to salary is superseded by Act June 5, 1917, ch. 48, 1st C. S., post, arts. 7085a-7085e.

## ASSISTANT QUARTERMASTER GENERAL

**Art. 5801. Assistant quartermaster general.**

**Note.**—By Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, the salary of the "Quartermaster" is fixed at \$2,000.

## COMMISSIONED OFFICERS

**Art. 5802. Officers to be commissioned by governor; term.**—All officers of the National Guard of Texas shall be appointed and commissioned by the Governor, and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignations, disability or for cause to be determined by a court martial or an efficiency board legally convened for that purpose. [Acts 1905, p. 167, § 34; Act May 8, 1917, 1st C. S., ch. 3, § 1.]

**Explanatory.**—Sec. 5 repeals arts. 5802 and 5804, Rev. St. 1911, and all other laws and parts of laws in conflict. Sec. 6, the emergency clause, declares the immediate necessity of passing a law to conform to the requirements of the National Defense Act, approved June 3, 1916, in order that the state may participate in the federal appropriations for the maintenance and support of the national guard of the various states. Became a law May 8, 1917.

**Art. 5804. Qualifications of officers.**—Staff officers, including officers of the pay, inspection, subsistence and medical departments, hereafter appointed shall have had previous military experience and vacancies among said officers shall be filled by the appointment from the officers of the militia of the State of Texas. All other officers of the National Guard of Texas shall be selected from the following classes:

Officers and enlisted men of the National Guard, officers on the reserve or unassigned list of the National Guard: officers, active or retired, and former officers of the United States Army, Navy and Marine Corps; graduates of the United States Military and Naval Academies, and graduates of schools, colleges and universities where military science is taught under the supervision of an officer of the Regular Army, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein. [Acts 1905, p. 167, § 36; Act May 8, 1917, 1st C. S., ch. 3, § 2.]

See note under art. 5802.

**Art. 5804a. Same; citizenship; age; oath; physical examination.**—All officers of the National Guard of Texas shall be citizens of the United States, over twenty-one and under sixty-four years of age, and shall take and subscribe the oath of office, and shall have successfully passed the physical examination as prescribed by the laws of the United States. [Act May 8, 1917, 1st C. S., ch. 3, § 3.]

See note under art. 5802.

## NON-COMMISSIONED OFFICERS AND ENLISTED MEN

**Arts. 5820–5823.**

See arts. 5802, 5804, and 5804a, ante.

**Art. 5823a. Term of and requirements for enlisted men.**—The term of, and requirements for enlistment and the qualifications of enlisted men in the National Guard shall be that which is now or may hereafter be prescribed by the laws of the United States. [Id., § 4.]

See note under art. 5802.



## COURTS MARTIAL

**Art. 5885. Jurisdiction presumed.**

**Effect of decisions.**—A decision of a military court of Texas existing under reconstruction laws is not binding authority. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

## GENERALLY

**Art. 5890. Unlawful disposition or use of arms, uniform, etc.; discrimination against persons in military service.**—Any person who shall secrete, sell, dispose of, offer for sale, purchase, retain after demand made by a commissioned officer of the active militia of this State, or in any manner pawn or pledge any arms, uniforms, equipment, or other military property issued under the provisions of this chapter, or of the military regulations of this State, and any person who shall wear any uniform or part thereof, or device, strap, knot, or insignia of any design or character used as a designation of grade, rank or office, such as are by law or by general regulations duly promulgated, prescribed for the use of the active militia of this State, or similar thereto, except members of the army of the United States or the active militia of this State, or any other State; and provided further that every person who shall subject or cause to be subjected any other person to the deprivation of any rights, privileges or immunities usually enjoyed by the public on account of membership in the army, navy, marine corps or revenue cutter service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service or custom, on account of his wearing such uniform or of his being in such service, shall deprive any other person of the full and equal enjoyment of any advantages, facilities, accommodations, amusement or transportation, subject only to the limitations established by law and applicable alike to all persons, or who on account of such membership or the wearing of such uniform shall make or cause to be made such discrimination, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, and in addition thereto shall forfeit to this State one hundred (\$100.00) dollars for each offense, to be sued for in the name of the State of Texas by a judge advocate, district or county attorney. All money recovered by any action or proceeding under this Article shall be paid to the Adjutant General, who shall apply the same to the use of the active militia of this State. [Acts 1905, p. 167, § 72; Act May 17, 1917, 1st C. S., ch. 15, § 1.]

**Explanatory.**—The act amends art. 5890, ch. 3, tit. 91, Rev. Civ. St. 1911. Took effect 90 days after May 17, 1917, date of adjournment.

## CHAPTER FOUR

## STATE NAVAL MILITIA

**Article 5893a. Texas Naval Board created; duties.**—That a board to be styled “Texas Naval Board” be, and is hereby, created, consisting of the Governor of the State of Texas, and one other to be appointed by him, which board shall have power and be and is hereby authorized to make, adopt and promulgate all such rules, orders and regulations as may be advisable and necessary for the creating and maintaining of an efficient naval militia, and is further empowered to co-operate with the Secretary of the Navy of the United States in putting into effect in the State of Texas, the provisions of an Act passed by the Sixty-third Congress, entitled: “An Act to promulgate the efficiency of the naval militia, and for other purposes.” [Act March 22, 1915, ch. 71, § 1.]

**Explanatory.**—The act is entitled “An act to create a State Naval Militia.” The act took effect 90 days after March 20, 1915, the date of adjournment of the Legislature.

## TITLE 93

## MINES AND MINING

Chap.

1. Mining claims, permits and leases.

Chap.

2. State Mining Board and coal mining regulations.

## CHAPTER ONE

## MINING CLAIMS, PERMITS AND LEASES

Art.		Art.	
5904.	Lands open to prospecting for minerals.		alty to state; books, etc., open to inspection; mode of operation.
5904a.	Persons entitled to prospect for minerals; rules.		OTHER MINERALS
5904b.	Application for right to prospect for petroleum oil and natural gas in surveyed lands; amount and location of lands.	5904m.	Number of acres in claims; what minerals may be mined.
5904c.	Permit to prospect for petroleum and gas in unsurveyed lands; number of acres.	5904n.	Proceedings to acquire claim; shape of claim; separate tracts to be contiguous; number of tracts that may be acquired by one person.
5904d.	Issuance of permit to prospect for oil and gas.	5904o.	Issuance of permit; lease; conditions; royalty to state; commutation.
5904e.	Development work for petroleum and gas; filing statement in general land office; forfeiture; removal of product before obtaining lease, prohibited.		GENERAL PROVISIONS
5904f.	[Repealed.]	5904p.	Definitions and requirements; abandonment or relinquishment.
5904g.	Lease of area for development of petroleum or natural gas; conditions of lease.	5904q.	Disposition of proceeds.
5904h.	Compensation to surface owners.	5904r.	Sale or other disposition of permit or lease; registration; sublease.
5904i.		5904s.	Forfeiture of rights under permit or lease.
5904j.	Association applying to file statement of membership; permit; lease.	5904ss.	Use of timber and occupancy of surface; compensation to surface owner.
5904k.	[Repealed.]	5904t.	Sale of surface without minerals.
	COAL AND LIGNITE	5904tt.	Prevention of pollution of water.
5904l.	Coal, lignite, and sulphur may be prospected for and mined; notice; application; survey and field notes.	5904u.	Discovery of mineral substance other than that included in permit; preference right to file claim.
5904ll.	Conformity to posted notice; lines of previous surveys; compensation to surface owners.	5904uu.	Owners of claims acquired under previous law may accept provisions of this act.
5904lll.	Issuance of permit; development; annual statement; lease; termination of rights under permit; roy-	5904v.	Commutation and acceptance of patent.
		5904vv.	Administration of act; rules.
		5904w.	Rights subject to taxation.
		5906-5917a.	[Repealed.]
		5919-5920j.	[Repealed.]

**Article 5904. [3498a] Lands open to prospecting for minerals.**—All public school, University and Asylum land and other public lands, fresh water lakes, river beds and channels, islands, bays, marshes, reefs and salt water lakes belonging to the State and all lands which may hereafter be so owned and all of said lands which have heretofore been sold or disposed of by the State or by its authority with a reservation of minerals or mineral rights therein as well as all lands which may hereafter be sold with the reservation of minerals or mineral rights therein, and lands purchased with a relinquishment of the minerals therein, shall be included within the provisions of this Act and shall be open to the prospecting for and the development of the minerals and substances known as gold, silver, cinnabar, lead, tin, copper, zinc, platinum, radio-active

minerals, tungsten, ores of aluminum, coal, lignite, iron ore, kaolin, fire clays, barite, marble, petroleum, natural gas, gypsum, nitrates, asbestos, marls, salt, onyx, turquoise, mica, guano, bismuth and bismuth bearing minerals, asphalt, potash compounds, sulphur, granite, magnesia, fuller's earth and molybdenum and molybdenum bearing minerals upon the terms and conditions provided in this Act. [Acts 1913, p. 409, § 1; Act March 16, 1917, ch. 83, § 1.]

**Explanatory.**—The act amends ch. 173, regular session 33rd Legislature, approved April 9, 1913. Sec. 28 of the act repeals said chapter 173 and all other laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.  
Cited, *Plummer v. McLain* (Civ. App.) 192 S. W. 571.

**Art. 5904a. Persons entitled to prospect for minerals; rules.**—Any person or association of persons, corporate or otherwise, being a citizen of the United States or having declared an intention of becoming such, desiring to obtain the right to prospect for and develop the minerals and substances named above that may be in any of the areas, included herein may do so under the provisions of this Act together with such rules and regulations as may be adopted by the Commissioner of the General Land Office relative thereto and necessary for the execution of the purposes of this Act. [Acts 1913, p. 409, § 2; Act March 16, 1917, ch. 83, § 2.]

**Art. 5904b. Application for right to prospect for petroleum oil and natural gas in surveyed lands; amount and location of lands.**—One desiring to obtain the right to prospect for and develop petroleum oil and natural gas that may be in any of the surveyed areas included herein shall file with the county clerk an application in writing giving a designation of same sufficient to identify it. The county clerk shall, upon receipt of one dollar as a filing fee, file and record the application and note the same on his record of surveys opposite the entry of the proper survey, giving the time of filing. When one has obtained four sections or that equivalent eligible to be embraced in one permit such applicant shall not obtain any more land within two miles thereof, but if one obtains less than four sections eligible to be embraced in one permit such one may obtain such additional area within two miles of the other area as will equal four sections. One shall not obtain more than one thousand acres within one mile of a well producing petroleum. [Acts 1913, p. 409, § 3; Acts 1913, S. S., p. 26, § 1; Act March 16, 1917, ch. 83, § 3.]

**Art. 5904c. Permit to prospect for petroleum and gas in unsurveyed lands; number of acres.**—One desiring to obtain the right to prospect for and develop petroleum and natural gas in any of the State's unsurveyed areas named in this Act shall file with the county surveyor an application in writing for each area applied for, giving a designation of same sufficient to identify it, but such area shall not exceed 2560 acres. Upon receipt of one dollar filing fee the surveyor shall file and record the application. [Acts 1913, p. 409; Acts 1913, S. S. p. 26, § 2; Act March 16, 1917, ch. 83, § 4.]

**Art. 5904d. Issuance of permit to prospect for oil and gas.**—When the Commissioner receives an application that was filed with the county clerk or an application that was filed with the surveyor and the field notes and plat, one dollar filing fee and ten cents per acre for each area applied for and a sworn statement by the applicant showing what interest he has in other permit, lease or patent issued under this Act and in good standing, he shall file same, and if upon examination the application or the application and field notes are found correct and the area applied for is within the provisions of this Act the Commission shall is-

sue to the applicant or his assignee a permit conferring upon him an exclusive right to prospect for and develop petroleum and natural gas within the designated area for a term not to exceed two years. [Acts 1913, p. 409, § 5; Act March 16, 1917, ch. 83, § 5.]

**Art. 5904e. Development work for petroleum and gas; filing statement in General Land Office; forfeiture; removal of product before obtaining lease, prohibited.**—Before the expiration of twelve months after the date of the permit the owner thereof shall in good faith begin actual work necessary to the physical development of said area and if petroleum or natural gas is not sooner developed in commercial quantities the owner or manager shall, within thirty days after the expiration of one year from the date of the permit file in the General Land Office a sworn statement supported by two disinterested credible persons that such actual work was begun within the first twelve months aforesaid and that a bonafide effort to develop the said area was made during the twelve months preceding the filing of the statement and showing what work was done and expenditures incurred and whether or not petroleum or natural gas had been discovered in commercial quantities. A failure to file the statement herein provided for within the time specified or the filing of a statement untrue or false in material matters shall subject the permit to forfeiture and the termination of the rights of the owner. The owner of a permit shall not take, carry away or sell any petroleum or natural gas before obtaining a lease therefore: provided, such quantity as may be necessary for the continued development of the area before obtaining a lease may be used without accounting therefor. [Acts 1913, p. 409, § 6; Act March 16, 1917, ch. 83, § 6; Act March 31, 1917, ch. 170, § 1.]

*Explanatory.*—The act amends sec. 6 of an act passed by the present session of the 35th Legislature relating to the development of minerals in the public free school land, etc., approved March 16, 1917. The amendment consists in changing the period for commencement of development from six months to twelve months. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 5904f.**

Repealed, and subject-matter carried into art. 5904e, ante.

**Art. 5904g. Lease of area for development of petroleum or natural gas; conditions of lease.**—If at any time within the life of a permit one should develop petroleum or natural gas in commercial quantities the owner or manager shall file in the General Land Office a statement of such development within thirty days thereafter, and thereupon the owner of the permit shall have the right to lease the area included in the permit upon the following conditions:

1. An application and a first payment of two dollars per acre for a lease of the area included in the permit shall be made to the Commissioner of the General Land Office within thirty days after the discovery of petroleum or natural gas in commercial quantities.

2. Upon the payment of two dollars per acre for each acre in the permit a lease shall be issued for a term of ten years or less, as may be desired by the applicant, and with the option of a renewal or renewals for an equal or shorter period, and annually after the expiration of the first year after the date of the lease the sum of two dollars per acre shall be paid during the life of the lease, and in addition thereto the owner of the lease shall pay a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum. The owner of a gas well shall pay a royalty of one-tenth of the value of the meter output of all gas disposed of off the premises.

3. The royalties shall be paid to the State through the Commissioner of the General Land Office at Austin, monthly during the life of the lease. All payments shall be accompanied by the sworn statement of the owner or manager or other authorized agent showing the amount produced since the last report and the market value of the output and a copy of all pipe line receipts, tank receipts, guage of all tanks into which petroleum may have been run, or other checks and memoranda of amount put out or into pipe lines or tanks or pools. The books and accounts, the receipts and discharges of all pipe lines, tanks and pools and gas lines and gas pipes and all other matters pertaining to the production, transportation and marketing of the output shall be open to the examination and inspection at all times by the Commissioner of the General Land Office or his representative or any other person authorized by the Governor or Attorney General to represent the State. The Value of any unpaid royalty and any sum due the State under this Act upon any lease shall become as prior lien upon all production produced upon the leased areas and the improvements situated thereon to secure the payment of any royalty and any sum due the State arising under the operation of any portion of this Act.

4. The permit or lease shall contain the terms upon which it is issued including the authority of the Commissioner to require the drilling of wells necessary to offset wells drilled upon adjacent private land, and such other matters as the commissioner may deem important to the rights of the applicant or the State. [Acts 1913, p. 409, § 8; Act March 16, 1917, ch. 83, § 7.]

**Art. 5904h. Compensation to surface owners.**—In the event the surface of an area included within the operations of this Act has heretofore been or may hereafter be acquired by one prior to the filing of an application under the provisions herein such area shall nevertheless be subject to prospect and lease as provided herein but the owner of the permit or lease shall pay to the owner of the surface annually in advance during the life of the permit or lease, ten cents per acre and the sum so paid and accepted by the surface owner shall be full compensation for all damages to the surface. [Acts 1913, p. 409, § 9; Act March 16, 1917, ch. 83, § 8.]

**Art. 5904i.**

*Note.*—Sec. 10 of the repealed act was amended by Acts 1913, 1st called session, p. 26, § 3. The amendatory act is not expressly repealed, but it is, no doubt, superseded by section 2 of the new act, set forth ante as art. 5904b, limiting the amount of land that can be embraced in one permit within a given locality.

**Art. 5904j. Association applying to file statement of membership; permit; lease.**—Every person or association of persons, corporate or otherwise, applying for a permit, lease or patent shall file with the application a sworn statement showing what interest the applicant has in any other permit or lease issued by the State and in good standing at the date of the statement. [Acts 1913, p. 409, § 11; Act March 16, 1917, ch. 83, § 9.]

**Art. 5904k.**

Repealed, and its subject-matter carried into sec. 6 of the new act, ante, art. 5904e.

## COAL AND LIGNITE

**Art. 5904l. Coal, lignite, and sulphur may be prospected for and mined; notice; application; survey and field notes.**—Any person, association of persons, corporate or otherwise, that may desire to acquire

the right to prospect for and mine coal, lignite or sulphur may do so by complying with the following conditions, namely:

1. Post up a notice to the effect that the applicant has located a coal, lignite or sulphur mine, stating the area desired not to exceed 2560 acres or four sections of 640 acres each, more or less, and give the approximate courses and the approximate distances that the lines shall extend from the point at which the notice is posted and date the notice.

2. Within thirty days after the date of such posting the applicant shall file an application for a survey of the claim and accompany it with one dollar as a filing fee. The application shall state when the claim was first posted; provided, if an applicant files on whole tracts or upon eighty acres or multiples thereof of surveyed land the application shall be filed in the office of the clerk of the proper county with one dollar as a filing fee and after being recorded by the clerk shall be filed in the General Land Office without field notes within thirty days after being filed with the county clerk and accompanied with one dollar as filing fee.

3. Within ninety days from the filing of the application the surveyor shall survey the area in substantial compliance with the posted notice, record the field notes and make a plat of the survey. The application, field notes and plat shall be filed in the General Land Office within one hundred days after the application was filed with the surveyor, accompanied by one dollar as a filing fee and ten cents per acre for each acre included within the area embraced in the field notes or in the application if no field notes are required, and accompanied by a sworn statement by the applicant showing what interest he has in any other permit, lease or patent issued under this Act and in good standing. [Acts 1913, p. 409, § 13; Act March 16, 1917, ch. 83, § 10.]

**Art. 5904II. Conformity to posted notice; lines of previous surveys; compensation to surface owners.**—The application and survey shall not differ so materially from the original posted notice as to defeat the rights of subsequent locators. Lines of previous surveys need not be regarded by an applicant unless he may desire to do so. When the surface is owned by another than the applicant the applicant shall pay to the surface owner ten cents per acre in advance each year during the life of the owner's claim. [Act March 16, 1917, ch. 83, § 11.]

**Art. 5904III. Issuance of permit; development; annual statement; lease; termination of rights under permit; royalty to state; books, etc., open to inspection; mode of operation.**—When the conditions imposed relating to coal, lignite and sulphur have been complied with and the application, field notes and plat have been approved by the Commissioner of the General Land Office, and the area found to be within the provisions hereof, the said Commissioner shall issue to the applicants or his assignee a separate permit for each area, according to the applicant's application, conferring upon the owner an exclusive right to prospect for, develop and put out coal, lignite and sulphur within the designated area for a term not to exceed five years. Before the expiration of one year after the date of the permit the owner thereof shall in good faith begin actual work necessary to the physical development of the area in each permit and if coal lignite or sulphur is not sooner developed in commercial quantities the owner or manager shall, within thirty days after the expiration of each year, except the fifth, from the date of the permit, file in the General Land Office a sworn statement supported by two disinterested credible persons that such actual work was begun within the required time and that a bona fide effort to develop the said

area was made during each preceding year of the permit and showing what work was done and expenditures incurred and whether or not coal or lignite had been discovered in commercial quantities. If the Commissioner is satisfied that the owner has been diligent and has made a bona fide effort to develop the area such owner shall have the right to prospect the area for another year. Within thirty days after coal, lignite or sulphur has been found in commercial quantities the owner shall apply for a lease of the area included in the permit and such lease may be granted for a term not to exceed ten years with the right of renewal or renewals for the same or a less term. If coal, lignite or sulphur should not be developed in commercial quantities and a lease applied for within five years after the date of the permit the rights of the owner shall terminate and the area be again subject to prospect and development by another than the forfeiting owner. For every ton of coal mined the owner shall pay to the State a royalty of ten cents, and for every ton of lignite mined the owner shall pay to the State a royalty of seven cents, and for every ton of sulphur mined the owner shall pay to the State a royalty of twenty-five cents, said payments to be made monthly through the Commissioner of the General Land Office at Austin and the remittances shall be accompanied by the sworn statement of the owner or manager showing the number of tons mined and to whom sold and the selling price. All the books, accounts, weights and wage contracts, correspondence and other papers in any way pertaining to the operation of any mine under this Act shall be open to the inspection of the Commissioner of the General Land Office or his representative and any other representative of the State appointed by the Governor or Attorney General. All coal and lignite mines shall be kept in reasonably continuous operation, and shall be operated in conformity with rules and regulations prescribed by the State Inspector of Mines and the General Statute relating thereto. [Id., § 12.]

#### OTHER MINERALS

**Art. 5904m. Number of acres in claims; what minerals may be mined.**—A mining claim upon any mineral or other substance mentioned in this Act except petroleum, natural gas, coal or lignite and sulphur shall not exceed eighty acres, and such claim shall be of unlimited depth and bounded by four vertical planes. The locator shall be entitled to all the minerals and substances in the area that are named in this Act except petroleum, natural gas, coal, lignite and sulphur and shall have the exclusive right to prospect for, develop and put out the minerals and substances upon the terms and conditions imposed by the provisions of this Act. [Id., § 13.]

**Art. 5904n. Proceedings to acquire claim; shape of claim; separate tracts to be contiguous; number of tracts that may be acquired by one person.**—One desiring to file on any area for any mineral or other substance included within the operation of this Act except petroleum, natural gas, coal, lignite and sulphur shall proceed in the manner provided for under coal, lignite and sulphur and the terms and conditions prescribed therein shall be the procedure and required in all other cases except for petroleum and natural gas. The length of no claim nor combination of claims shall exceed twice the width. If an area applied for in one application is composed of two or more tracts of not more than eighty acres each nor more than five tracts all of such areas shall be contiguous. When one has obtained five claims eligible to be embraced in



one permit such applicant shall not obtain any more claims within one mile thereof, but if one obtains less than five claims eligible to be embraced in one permit such one may obtain such additional area within one mile of the other as will equal five full claims of eighty acres each. [Id., § 14.]

**Art. 5904o. Issuance of permit; lease; conditions; royalty to state; commutation.**—When the application, field notes and plat have been filed in the General Land Office together with a sworn statement by the applicant showing what interest he had in any other permit, lease or patent issued under this Act and still in good standing, and the papers have been approved by the Commissioner, the applicant or his assignee shall be entitled to the right to prospect for, develop and put out all the minerals and substances named in this Act that may be found in the area, except petroleum, natural gas, coal, lignite and sulphur for a period of five years and upon the terms and conditions provided herein, and as evidence of such right, the Commissioner shall issue to the applicant or his assignee a permit for the term of five years upon the same terms, conditions and requirements that are provided for permits for coal, lignite and sulphur so far as applicable. And leases shall be applied for and issued within the five years upon the same terms, conditions and requirements that are provided for leases for coal, lignite and sulphur so far as applicable. In all reports of development work the kind of mineral or other substances found shall be given. So far as applicable every provision and requirement relating to coal, lignite, and sulphur shall apply to the applicant and the State in the matter of other minerals and substances except petroleum and natural gas unless otherwise provided herein. In full payment to the State for the right to take from any mining claim for any mineral or substance included in this Act except petroleum, natural gas, coal, lignite of sulphur, the owner shall pay to the State through the Commissioner of the General Land Office at Austin a royalty equivalent to five percentum of the value of the total gross production sold or disposed of from such mining claim or one hundred dollars per acre as provided in this Act. [Id., § 15.]

#### GENERAL PROVISIONS

**Art. 5904p. Definitions and requirements; abandonment or relinquishment.**—The general provisions in this and the following section shall apply to all the foregoing provisions so far as applicable.

Surveyed land within the meaning of this Act shall include all tracts for which there are approved field notes on file in the General Land Office and eighty acre tracts and multiples thereof of such surveys.

Unsurveyed areas within the meaning of this Act include all areas for which there are no approved field notes on file in the General Land Office.

All applications for surveyed land shall be filed with the clerk of the county in which the tract or a portion thereof is situated or with the clerk of the county to which such county may be attached for judicial purposes and accompanied by one dollar filing fee, and it shall be filed in the General Land Office within thirty days after it was filed with the county clerk and accompanied by one dollar filing fee.

All applications for unsurveyed areas shall be filed with the county surveyor, or his deputy, of the county in which the area or a part thereof is situated, accompanied by one dollar filing fee, but if such county has no surveyor then the application shall be filed with the clerk of the

proper county and by him recorded in the surveyor's records, and in that event the area may be surveyed by the surveyor of the nearest county as now provided by law. The area shall be surveyed within ninety days and the application, field notes and plat shall be filed in the General Land Office, accompanied by a filing fee of one dollar, within one hundred days after the date of the filing of the application.

The payment per acre required to be made before the issuance of a permit shall be paid annually thereafter during the life of the permit or lease.

A separate written application shall be made for the area desired in a permit. No permit, lease or patent shall embrace the area in two or more applications.

No application, permit, lease or patent shall embrace a divided area.

Whole tracts of surveyed land may be applied for as a whole or in eighty acre tracts or multiples thereof without furnishing field notes therefor.

A duplicate of every permit and lease shall be kept in the General Land Office.

The area in each permit shall be developed independently of other areas.

When one desires a lease or patent any one or more whole tracts in the permit may be abandoned by relinquishment filed in the General Land Office as herein provided and thereupon obtain a lease or patent upon the remaining area; provided such remaining areas is in a solid body.

An owner may relinquish a permit or lease at any time by having the deed of relinquishment acknowledged, recorded by the proper county clerk and filed in the General Land Office accompanied by one dollar filing fee. The Commissioner of the General Land Office shall mail notice to the proper county clerk of the filing of the relinquishment and when said notice has had time through due course of mail to reach said clerk the area shall be subject to applications as in the first instance. [Id.. § 16.]

**Art. 5904q. Disposition of proceeds.**—The proceeds arising from the activities under this Act which affects land belonging to the permanent Public Free School Fund, the permanent University Fund and the permanent funds of the several asylums shall be credited to the permanent funds of said institutions, and the proceeds arising from the activities affecting other areas shall be credited to the general revenue. [Act March 16, 1917, ch. 83, § 17; Act Oct. 16, 1917, ch. 21, § 1.]

*Explanatory.*—The act amends sec. 17, ch. 83, of act approved March 16, 1917.

**Art. 5904r. Sale or other disposition of permit or lease; registration; sublease.**—The owner of a file or permit or lease under any provision of this Act may sell same and the rights secured thereby at any time, also fix a lien of any kind thereon to any person, association of persons, corporate or otherwise, who may be qualified to receive a permit or lease in the first instance; provided, the instrument evidencing the sale or lien shall be recorded in the county where the area or part thereof is situated or in the county to which such county may be attached for judicial purposes and same shall be filed in the general Land Office within sixty days after the date thereof accompanied with a filing fee of one dollar, and if not so filed the contrace evidenced by said instrument shall be void and the obligations therein assumed shall not be enforceable; provided further, a sublease contract need not be filed in the General Land office. [Act March 16, 1917, ch. 83, § 18.]

**Art. 5904s. Forfeiture of rights under permit or lease.**—If a permit or lease should be issued upon a statement by the applicant which is false or untrue in material matters, or should the owner of a permit fail or refuse to begin in good faith the work necessary to the development of the area within the time required, or should the owner of a permit fail or refuse to proceed in good faith and with reasonable diligence in a bona fide effort to develop an area included in his permit after having begun the development, or should the owner of a permit fail or refuse to apply for a lease within the prescribed time, or should the owner of a lease fail or refuse to proceed in good faith and with reasonable diligence and in a bona fide effort to develop, operate and put out the mineral or other substance at any time during the life of the lease, or should the owner of a lease fail or refuse to make proper remittances in payment of royalty or other payments or fail or refuse to make the proper statement, or fail to furnish the required evidence of the output and market value and material matters relating thereto when requested, or fail to make the annual payment on the area when requested so to do the permit or lease, as the case may be, shall be subject to forfeiture, and when the Commissioner is sufficiently informed of the facts which subject the permit or lease to forfeiture he may declare same forfeited by proper entry upon the duplicate permit or lease kept in the General Land Office. When forfeiture has been declared a notice of that fact shall be mailed to the proper county clerk and the area shall be subject to the application of another than the forfeiting owner when the notice has had time to reach the county clerk through due course of mail; provided, the Commissioner may exercise large discretion in the matter of requiring one to develop gas wells, and provided further, that all forfeitures may, within the discretion of the Commissioner be set aside and all rights reinstated before the rights of another intervene. [Id., § 19.]

**Art. 5904ss. Use of timber and occupancy of surface; compensation to surface owner.**—An owner of any claim for any mineral or substance included in this Act may fell and remove for building or mining purposes any timber upon any of the unsold areas included within this Act, and shall also have the right to occupy within the limits of his application, permit or lease, so much of the surface thereof as may be necessary for the development of the minerals and substances therein, and shall have the right of ingress to and from the area embraced in the file, permit, lease or patent. Ten cents per acre shall be paid to the owner of the surface and when accepted by the owner, it shall be deemed full compensation for such damages as may be occasioned to the surface through the occupancy and operation by the owner of the permit, lease or patent. [Id., § 20.]

**Art. 5904t. Sale of surface without minerals.**—Neither the filing of an application under any provision of this Act nor the issuance of a permit or lease on any of the unsold land included herein shall prevent the sale of the surface without the minerals and in case of such sale subsequent to the posting of any notice or the filing of an application the purchaser shall not be entitled to the ten cents per acre that is provided for owners of the surface at the time of filing nor shall such owner be entitled to any damages that may be occasioned by the working of any area. [Id., § 21.]

**Art. 5904tt. Prevention of pollution of water.**—All development in water or on islands, marshes, reefs or river beds and channels shall be done under such regulations as will prevent the pollution of the water

and for the prevention of such pollution the Commissioner of the General Land office may call upon the Game, Fish and Oyster Commissioner for assistance in the adoption and enforcement of rules and regulations for the protection of the waters from such pollution. The Commissioner of the General Land Office may cancel a claim, location, file, permit or lease or patent for a failure or refusal of the owner to comply with such rules and regulations as may be adopted. [Id., § 22.]

**Art. 5904u. Discovery of mineral substance other than that included in permit; preference right to file claim.**—Should any mineral or substance within the provisions of this Act, other than those included in the permit or lease under which one is operating, be discovered while the area is being worked for the minerals and substances embraced in such permit or lease, the owner thereof shall have a preference right for sixty days after such discovery in which to file on the area allowed one for such mineral or other substance by complying with the provisions of this Act relating to the mineral or substance so discovered but shall not be required to pay either of the additional ten cents per acre to the State or the owner of the surface, and the remaining portion of said area shall be subject to the application of others in the same manner as if there were no pre-existing file thereon. [Id., § 23.]

**Art. 5904uu. Owners of claims acquired under previous law may accept provisions of this act.**—If the owner of a claim upon any mineral or other substance named in this Act, other than petroleum and natural gas which has been acquired under any previous statute, should desire to accept the provisions of this Act and operate hereunder he may do so by filing a declaration to that effect in the General Land Office together with the payment required in the particular instance and obtain a permit or lease by complying with the provisions hereof relating thereto. The rights under such acceptance shall begin from the date the declaration is filed and the owner shall have the same rights thereafter as is accorded those who make original filings under this Act. [Id., § 24.]

**Art. 5904v. Commutation and acceptance of patent.**—At any time during the life of a permit but prior to accepting a lease upon any area for any mineral or other substance included within the provisions of this Act, except petroleum and natural gas, the owner of a permit may elect to pay one hundred dollars per acre for the area embraced in his permit and obtain, under the rules governing the issuance of patents to land, a patent for all the minerals that may be in such area except petroleum and natural gas in lieu of the payment of the royalty as provided in this Act; provided, however, one shall pay the prescribed royalty on all minerals and substances put out and disposed of while developing the area prior to obtaining a lease or patent. [Id., § 25.]

**Art. 5904vv. Administration of act; rules.**—The Commissioner of the General Land Office shall have the general supervision of all matters necessary for the proper administration of this Act and he is authorized to adopt rules and regulations and to alter or amend them from time to time as he may deem necessary for the protection of the interests involved and not inconsistent with the provisions herein. [Id., § 26.]

**Art. 5904w. Rights subject to taxation.**—Rights acquired under this Act shall be subject to taxation as is other property. [Id., § 27.]

**Arts. 5906-5909.**

Repealed by act March 16, 1917, ch. 83, § 28. See arts. 5904-5904w, ante.

**Arts. 5910-5916.**

Repealed. See note under art. 5904.

**Patent to mineral land.**—In an action of trespass to try title to lands claimed by plaintiffs under mineral land patents from state, plaintiff's claim to land could not be defeated by a collateral attack upon validity of the application pursuant to which such patents were issued. *Plummer v. McLain* (Civ. App.) 192 S. W. 571.

If mineral land patents issued to plaintiffs embrace lands in defendants' possession, although patents contain erroneous calls for courses and distances, defendants would be charged with notice of true boundary lines. *Id.*

**Arts. 5917, 5917a, 5919-5920j.**

Repealed by act March 16, 1917, ch. 83, § 28. See arts. 5904-5904w, ante.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Sale of minerals in general.**—A contract by several persons for the purchase of all minerals in and under described land is, as between the purchasers, joint and several, and each is liable for the contract price. *Whited v. Johnson* (Civ. App.) 167 S. W. 812.

A contract of sale of all the oil, gas, coal, sulphur, and other minerals, in and under a described tract, that may be found by drilling and mining operations which may be conducted on the land, is a valid contract of sale, which the purchaser may not destroy by failing to drill or mine. *Id.*

A contract of sale of oil, gas, coal, sulphur, and other minerals in and under described land sufficiently identifies the minerals. *Id.*

**Conveyances of mineral lands.**—Instruments held to be present conveyances of the fee in oil and gas in the ground, if such minerals are capable of ownership and conveyance. *Texas Co. v. Daugherty* (Sup.) 176 S. W. 717, affirming judgment (Civ. App.) 160 S. W. 129.

In conveyance of oil and gas under land, a reservation of title to one-eighth thereof is a covenant running with the land. *Pierce Fordyce Oil Ass'n v. Woodrum* (Civ. App.) 188 S. W. 245.

**Contracts for development of oil and gas lands.**—Where oil and gas contract amounts to defeasible conveyance of interest in fee, assignee, who does not specially assume burdens therein is not bound. *Pierce Fordyce Oil Ass'n v. Woodrum* (Civ. App.) 188 S. W. 245.

— **Options.**—A lease or contract giving an oil company the right to bore for oil, or to pay quarterly rentals, the acceptance of which would extend the lease for another quarter, or to surrender the grant at any time upon payment of \$5 to the owner or lessor, held a mere "option." *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

While the failure to have a time limit upon a contract or lease for the prospecting and development of oil wells is a ground upon which it might be declared to be void, a limit of ten years during which the lease might be extended by the payment of rentals from quarter to quarter at the option of the lessor, will not establish the validity of such a contract. *Id.*

— **Leases.**—Where a lessee of the oil and gas rights in land developed a well within the time specified, from which oil was pumped, and on which royalties were paid, he became vested with the right to exploit the land for 20 years, and did not forfeit the lease by a failure to continue development after two other wells had proved failures. *McAfee v. Grubb* (Civ. App.) 164 S. W. 925.

Under a contract between an owner of oil lands giving an oil company the right to bore for oil, or to pay a quarterly rental, or to surrender the grant at any time upon the payment of \$5 to the owner, the company, though without notice that the owner would refuse one of the quarterly rental payments, held not to have a reasonable time after such refusal to begin boring a well. *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

Under a lease or contract giving an oil company the right to drill a well, or to extend the time therefor by the payment of quarterly rentals, or to surrender it on payment of \$5, held, that the company had 12 months within which to complete a well, and that the provision for extension was to enable it to complete a well already begun within that time. *Id.*

A lessor, by permitting the lessee to expend large sums of money in developing oil property, may waive his right to declare a forfeiture provided by the lease. *Id.*

Contracts in which land is leased for development for oil are to be construed most favorably to the lessor, and, in order to preserve its rights, the lessee must begin within a reasonable time the performance of his part of the contract and continue performance with reasonable diligence. *Id.*

Lessors in a preliminary oil lease held to have the right to cancel the lease on the failure of any driven wells to come up to the contract specifications, though they produced a paying quantity of oil. *McLean v. Kishi* (Civ. App.) 173 S. W. 502.

Where plaintiffs sued to prevent defendant from interfering with their possession of oil land, they are not entitled to show that defendant, who had a lease from the owner, had forfeited his rights; that being a matter concerning the owner alone. *Moore v. Decker* (Civ. App.) 176 S. W. 816.

Where defendant disclaimed any intention of interfering with plaintiffs' rights in wells opened, and plaintiffs made no effort to have the jury determine how much land

was necessary for their operation, they cannot complain of a judgment which merely awarded so much land as was necessary. *Id.*

"Abandonment," with reference to oil contracts and leases, is the relinquishment of a right resting on the intention of the parties, while "forfeiture" does not rest upon an intent to release the premises, but is an enforced release. *Fisher v. Crescent Oil Co.* (Civ. App.) 178 S. W. 905.

Evidence, in a lessor's suit to cancel his lease of oil lands on the ground of the lessees' abandonment, held to make the intent to abandon a question of fact and to sustain a finding that there was no such intention. *Id.*

Lease of oil lands with right to operate held, after discovery of oil within specified time, to vest a term of 25 years, but to require the lessees to continue operations during such term to avoid a forfeiture. *Id.*

Upon failure to pay rentals due on an oil lease contract, held, the lessor, under its terms, might have canceled it or sued for the rent, but he was not entitled to both remedies. *Clemenger v. Flesher* (Civ. App.) 185 S. W. 304.

A lessor demanding either the rent or release of an oil lease, and after not receiving either taking no steps to cancel the lease, cannot be held as a matter of law to have elected to cancel the lease. *Id.*

Lease of oil and gas, for which lessees pay \$1 an acre and agree to begin operations or pay rental, held not void as being unilateral. *Pierce Fordyce Oil Ass'n v. Woodrum* (Civ. App.) 188 S. W. 245.

An oil and gas lease of 19 quarter sections held separate leases of each quarter section, requiring the sinking of a well on each to avoid forfeiture. *Producers' Oil Co. v. Snyder* (Civ. App.) 190 S. W. 514.

CHAPTER TWO

STATE MINING BOARD AND COAL MINING REGULATIONS

Art. 5930. Inspector to enforce law; salary and expenses.	Art. 5946j. Bathing facilities for coal miners; separate accommodations for negroes.
MINING REGULATIONS	5946k. Employer not liable for loss or destruction of property.
5933. Mine shafts, how constructed and equipped.	5946l. Time act takes effect. 5946m. Duties of commissioner of labor.

**Article 5930. Inspector to enforce law; salary and expenses.**

Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, fixes the salary of the inspector at \$2,000.

MINING REGULATIONS

**Art. 5933. Mine shafts, how constructed and equipped.**

See *Texas & Pacific Coal Co. v. Choate* (Civ. App.) 159 S. W. 1058.

Note.—Acts 1903, ch. 76, p. 103, providing for openings or outlets for mines, was omitted from the revised civil statutes of 1911, but was carried into the revised Penal Code as arts. 1592 and 1593.

**Art. 5946j. Bathing facilities for coal miners; separate accommodations for negroes.**—It shall be the duty of the operator, owner, lessees or superintendent of any coal mine in this State employing ten or more men to provide a suitable building convenient to the principal entrance of such mine, for the use of persons employed in and about said mine, for the purpose of washing themselves and changing their clothing when entering or leaving the mine. Such building shall be provided with proper light and heat, with a supply of hot and cold water and shower baths, and with properly constructed individual lockers for the use of such employes. The employes shall furnish their own towels, soap and locks for their lockers, and shall exercise control over and be responsible for all property by them left in such house. The baths and lockers for negroes shall be separate from those for whites, but may be in the same building. [Act March 8, 1915, ch. 51, § 1.]

**Art. 5946k. Employer not liable for loss or destruction of property.**—Any operator, owner, lessee or superintendent or company, its officers

or agents maintaining such a bath house at his or its mine, as required in Section 1 hereof [Art. 5946j], shall not be liable for the loss or destruction of any property left at or in said house. [Id., § 2.]

**Note.**—Sec. 3 makes it a misdemeanor to fail to comply with the act, and is set forth in Vernon's Pen. Code 1916 as art. 1606l.

**Art. 5946l. Time act takes effect.**—This Act shall take effect and be in force from and after September 1, 1916. [Id., § 4.]

**Art. 5946m. Duties of Commissioner of Labor.**—It shall be the duty of the Commissioner of Labor Statistics of the State of Texas to enforce the provisions of this Act. [Id., § 5.]

## TITLE 94

## MINORS

## DECISIONS RELATING TO SUBJECT IN GENERAL

1. **Constitutionality of certain statutes.**—Cited, *Long v. Smith* (Civ. App.) 162 S. W. 25.

7. **Custody—Right to custody in general.**—A husband was not bound by his wife's attempted deathbed disposition of his child to her parents. *Long v. Smith* (Civ. App.) 162 S. W. 25.

Where a father seeks to regain the custody of minor children, placed, with his consent, in the custody of a relative, the court must consider the interest and welfare of the children as the paramount question, though, in the absence of the father's unfitness, his paramount right to the custody of the children cannot be disregarded. *Kirkland v. Matthews* (Civ. App.) 162 S. W. 375.

Where the father of minor children was able and willing to provide for and educate them, and worthy to be intrusted with their care and not shown to have neglected them, he was entitled to their custody as against relatives of his first wife with whom he had agreed to leave them. *Williford v. Richards* (Civ. App.) 169 S. W. 1139.

That the father of children is not so well able to give them comforts and advantages as relatives of their deceased mother is no ground for depriving him of their custody. *Kirkland v. Matthews* (Civ. App.) 174 S. W. 830.

There is a presumption that the best interest of a child will be subserved by placing it in the custody of its father, but in such cases the paramount consideration is the welfare and best interest of the child. *Id.*

That minor children preferred to live with their maternal relatives, while entitled to some weight, is not conclusive as to the right to the custody of the children. *Id.*

9½. — **Trial and determination.**—In suit by aunt and uncle of minor children against their father and stepmother for their custody, a verdict that defendants were not and plaintiffs were proper persons to have the custody, and that the best interest of the children were subserved by being in plaintiffs' custody, warrants a decree for plaintiffs. *Matthews v. Kirkland* (Civ. App.) 186 S. W. 423.

10. **Conveyances and contracts in general.**—A father may make a valid gift to his minor son in the absence of complaint by an existing creditor, without reference to whether the son has been emancipated. *Burns & Bell v. Lowe* (Civ. App.) 161 S. W. 942.

A minor's contract is not void by reason of his minority but is voidable only at his instance, where he acts within a reasonable time after reaching his majority. *Sands v. Curfman* (Civ. App.) 177 S. W. 161.

A father was not liable on a note and mortgage executed by his minor son in payment for a buggy, where he did not authorize the execution of such instruments and received no part of the consideration. *Cox v. W. A. Chanslor & Son* (Civ. App.) 181 S. W. 560.

An action for wages earned by an infant cannot be maintained where his mother is living, and there is no pleading or proof that plaintiff was emancipated when he performed such labor. *Trinity County Lumber Co. v. Conner* (Civ. App.) 187 S. W. 1022.

A widowed mother, or a mother whose husband is imprisoned or has deserted her, is entitled to the services and earnings of a minor child to the same extent as the father would be if living. *Id.*

11. **Necessaries.**—A minor's contract, except for necessaries, is not binding, unless made so by such conduct as will create an estoppel, or by a ratification after he reaches majority, such contracts not being absolutely void, as they may be ratified. *Fletcher v. A. W. Koch Co.* (Civ. App.) 189 S. W. 501.

12. — **Liability of parent.**—It is the duty of a father to support his minor children out of his own estate, though they have some property of their own. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

14. **Ratification.**—Minor's failure to repudiate purchase of lot sooner than 8 months after reaching majority, not resulting in injury to the seller, held not to create presumption that he intended to ratify. *Fletcher v. A. W. Koch Co.* (Civ. App.) 189 S. W. 501.

If minor, after reaching majority, with knowledge of fact that his previously made contract is not binding, declares to the other party that he intends to abide by it, such conduct is a ratification, without a specific promise to perform. *Id.*

Ratification of a minor's contract means that he, knowing the contract is not binding on account of his minority when he made it, determines to waive the defect and adopt the contract, and signifies his intention by words or conduct. *Id.*

Unless a minor's words or acts after reaching majority make it clearly and distinctly appear that he intends to ratify his previously made contract, they are not sufficient proof of ratification. *Id.*

Letter of minor purchaser of land to seller relative to payment of taxes, written 2½ months after purchaser attained majority, held not a ratification of his contract to buy, made during minority. *Id.*



That four months elapsed between time a minor attained his majority and when he wrote a letter claimed to constitute a ratification of his previously made contract did not justify a finding that he knew that the contract was not binding on him when he wrote the letter. *Id.*

**17. Avoidance of conveyances or contracts.—Time of disaffirming.**—Where an infant who was a party to a verbal partition desires to disaffirm on reaching his majority, he must disaffirm within a "reasonable time," which is such time as a person of ordinary diligence would require under the circumstances. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 181 S. W. 756.

**21. Injuries to minors.**—Where a father consented to the employment of his minor child for one kind of work, the employer, changing the work without the consent of the father to a more dangerous work, was responsible to the father for loss of the services of the child and expenses incurred following from the changed employment. *Southwestern Telegraph & Telephone Co. v. Coffey* (Civ. App.) 167 S. W. 8.

One who employs a minor in a dangerous service without the consent of his parent is liable to the parent for any loss of the minor's services due to the employment, without reference to whether the loss resulted from negligence of the master, or was due to the ordinary risks of the employment, or to the minor's contributory negligence. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

Though the parent of a minor consents to his employment in a dangerous service, he being injured therein through the negligence of the master, she may recover for his diminished earning capacity during his minority. *Id.*

That the evening before plaintiff's minor son was injured in defendant's employment he advised plaintiff, his mother, that he would not return home that night, because he was employed by defendant to run his gin, is insufficient to raise the issue of her having consented to his employment. *Id.*

As between the employer of a minor in a dangerous service and the minor's parent, the parent's knowledge of, and acquiescence in, the employment amounts to consent thereto. *Id.*

Though a minor is employed in a dangerous service without the parent's consent, and is injured therein, the master, sued by the minor's parent for the loss of his services, may show that he did not know of the servant's minority, and, if the jury believe he thought he was of age the parent cannot recover, without regard to the questions of negligence, contributory negligence, and assumption of risk. *Id.*

At common law a parent could recover for loss of a child's services caused by injuries not resulting in death or for expenses incurred and loss of services between the injuries and the death. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

## TITLE 96

## NAVIGATION DISTRICT

Art.  
5982. Tax to pay interest and create sinking fund; maintenance tax.

Art.  
5988. County treasurer to give special bond; additional bond.

**Article 5982. Tax to pay interest and create sinking fund; maintenance tax.**—Whenever such Navigation District bonds shall have been voted, the Commissioners' Court shall levy and cause to be assessed and collected improvement taxes upon all property within said Navigation District, whether real, personal, mixed or otherwise, and sufficient in amount to pay the interest on such bonds, together with an additional amount to be annually placed in a sinking fund sufficient to discharge and redeem said bonds at their maturity, and in all such Navigation Districts which have heretofore been created or may hereafter be created, the Commissioners' Courts of the respective counties wherein said districts may be created, shall be and are hereby authorized to levy and cause to be assessed and collected for the maintenance, operation and up-keep of such Navigation District and the improvements constructed by said district, an annual tax not to exceed ten cents on the one hundred dollar valuation upon all property within such Navigation District, whether real, personal, mixed or otherwise. [Acts 1909, p. 32, § 23; Act Feb. 23, 1917, ch. 40, § 1.]

**Explanatory.**—The act amends art. 5982 of title 96, Rev. Civ. St. 1911, so as to read as above. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 5988. County Treasurer to give special bond; additional bond.**—The County Treasurer shall execute a good and sufficient bond, payable to the Navigation and Canal Commissioners of such District, in a sum equal to twice the amount of funds he will have in his hands as Treasurer of such District, at any time as estimated by said Navigation and Canal Commissioners, such bond to be conditioned for the faithful performance of his duty as Treasurer of such District and to be approved by said Navigation and Canal Commissioners; provided, whenever any bonds are voted by such Navigation District the County Treasurer before receiving the proceeds of the sale thereof shall execute additional good and sufficient bond payable to the Navigation and Canal Commissioners of such District in the sum equal to twice the amount of bonds so issued, which bond shall likewise be conditioned and approved as aforesaid, but such additional bond shall not be required after such Treasurer shall have properly disbursed the proceeds of such bond issue; and the County Treasurer shall be allowed such compensation for his services as Treasurer for such Navigation District as may be determined by said Navigation and Canal Commissioners not exceeding the same per cent as is now authorized by law for his services as County Treasurer. [Acts 1909, p. 32, § 28; Act Feb. 23, 1917, ch. 40, § 2.]

**Explanatory.**—Sec. 3 repeals all laws in conflict. The act amends art. 5988 of title 96, Rev. Civ. St. 1911 so as to read as above. Took effect 90 days after March 21, 1917, date of adjournment.

## TITLE 97

## NOTARIES PUBLIC

Art. 6002.	Governor shall appoint; tenure; ad- ditional notaries; proviso.	Art. 6008.	Their powers.
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**Article 6002. Governor shall appoint; tenure; additional notaries; proviso.**

**Notary under 21 years.**—An affidavit for garnishment is not insufficient because the notary before whom it was executed was under 21 years of age. *Freeman v. Port Arthur Rice & Irrigation Co.* (Civ. App.) 188 S. W. 444.

**Art. 6008. [3509] Their powers.**

**Disqualification by interest.**—Acknowledgment of a deed of trust by a married woman before an officer financially interested in the consummation of the transaction is void. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

Evidence held to show that an agent was aware that the officer who took a married woman's acknowledgment to a deed of trust was financially interested in the transaction. *Id.*

## TITLE 97 A

## NOTICE

Art. 6016½.	Publication in newspaper of notice required to be posted; exception.	Art. 6016½b.	Where no newspaper in county.
6016½a.	Duration of publication.	6016½c.	Publication fee.

**Article 6016½.** **Publication in newspaper of notice required to be posted; exception.**—That whenever by law notice is required to be given of any act or proceeding, whether public or private, or relating to a judicial, executive, or legislative matter, which notice is now authorized by law or by contract, to be made by posting notices in one or more public places, such notices shall hereafter be given by publication thereof, in a newspaper of general circulation, which has been continuously and regularly published for a period of not less than one year, in the county in which said act or proceeding is to occur; provided, that nothing in this act shall be construed to require the publication of any general election notice, public road notices nor probate notices, when the appraised value of the estate in which same is issued is less than one thousand dollars, (\$1,000.00) and provided further, that the provisions of this Act shall not apply to sales made under a written contract wherein it is provided that notice of sale thereunder may be posted. [Act April 2, 1917, ch. 179, § 1.]

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

**Art. 6016½a.** **Duration of publication.**—All notices published under the provisions of this Act shall be printed at least once each week, for the period of time now required for posting such notices. [Id., § 2.]

**Art. 6016½b.** **Where no newspaper in county.**—In the event no paper should be published in the county where such notice is required to be given, then such notice may be posted as now provided by law. [Id., § 3.]

**Art. 6016½c.** **Publication fee.**—The price to be paid for all publications required by this Act shall be not more than one dollar (\$1.00) per square of one hundred (100) words for first insertion, and not more than fifty cents per one hundred (100) words for each subsequent insertion, said publication fee to be taxed as other costs in the case. [Id., § 4.]

## TITLE 98

## OFFICERS—REMOVAL OF

Chap.

1. Removal of state and certain district officers.

Chap.

2. Removal of county and certain district officers.

## CHAPTER ONE

## REMOVAL OF STATE AND CERTAIN DISTRICT OFFICERS

Art.

6017. Officers removable by impeachment; remedy cumulative.

6017a. Power of impeachment vested in house; exercise at regular session; special sessions, how called; com-

Art.

pensation of members; quorum, powers, and procedure.

6017b. Trial by senate; powers and procedure; sessions; convening senate as impeachment court; compensation of members.

**Article 6017. [3518] Officers removable by impeachment; remedy cumulative.**—The Governor, Lieutenant Governor, Secretary of State, Attorney General, State Treasurer, Commissioner of the General Land Office, Comptroller of Public Accounts, Commissioner of Agriculture, Commissioner of Insurance and Banking, Judge of the Supreme Court, of the Court of Criminal Appeals, of the Courts of Civil Appeals, of the District Courts, of the Criminal Districts courts of Galveston and Harris and of other counties which have criminal district courts, and all other state officers and heads of state departments or institutions of any kind, and all members, regents, trustees, commissioners having the control of management of any State Institution or enterprise, shall be removable from office or position by impeachment in the manner provided in the Constitution and in this Act, the remedy by impeachment as herein provided for being cumulative of all other remedies with respect to the impeachment or removal of public officers. [Const. art. 15, §§ 1, 2; Act Aug. 21, 1876, p. 226, § 26; Act Oct. 18, 1917, ch. 34, § 1.]

**Note.**—The act supersedes art. 6017, Revised Civil Statutes 1911.

**Art. 6017a. Power of impeachment vested in House; exercise at regular session; special sessions, how called; compensation of members; quorum, powers, and procedure.**—The power of impeachment shall be vested in the House of Representatives. If the House of Representatives shall be in session at a regular or called session of the Legislature when it is desired to present articles of impeachment, or when it is desired to make any investigation pertaining to a contemplated impeachment, it may proceed without further call or action at its pleasure and may continue to meet and proceed for such purposes until such time as the matters under consideration, pertaining to impeachments, may be disposed of by it. And if the House of Representatives shall be in session, at a regular or called session of the Legislature, at the time it desires to undertake, and does undertake, any investigation pertaining to an impeachment, or impeachments, and the legislative session shall expire by limitation, or it shall, in conjunction with the Senate, decide to adjourn in so far as legislative matters are concerned, before said investigation has been completed and before such impeachment matters have been finally disposed of by it, it may continue such investigation through committees, or by itself, and may continue in session for such purposes,

or may adjourn the House to such time as it may desire for reconvention for the final disposition of such matters, and, in the meantime, it may continue such investigations through committees or agents. The members of such committees and the members of the House of Representatives and Senate, when the House or Senate shall be sitting for impeachment purposes, and when not in session for legislature purposes, shall receive the per diem fixed for members of the Legislature during legislative sessions, to be paid out of the appropriations made for the per diem pay of the members of the Legislature or out of the contingent funds of the respective Houses, and the agents of the House or Senate or of such committees shall be paid as may be provided in the resolutions providing therefor, out of said contingent funds.

If the House of Representatives be not in session when the cause for impeachment may arise or be discovered, or when it is desired to institute any investigation pertaining to a contemplated impeachment, the House may be convened for the purpose of impeachment in the following manner:

- (a) By proclamation of the Governor; or
- (b) By proclamation of the Speaker of the House, which proclamation shall be made only when petitioned in writing by not less than fifty (50) members of the House; or
- (c) By proclamation in writing signed by a majority of the members of the House.

Such proclamation shall be published in at least three daily newspapers of general circulation, and a copy thereof shall be furnished in person or by registered mail to each member of the House who may be within the State and accessible, by the Speaker of the House, or under his direction, or, in case the same is issued under the authority of subparagraph "(c)" as above, by the members signing the same or some one or more of them designated by such signers for such purpose. And such proclamation shall in general terms, state the cause for which it is proposed to convene the House, and shall fix the time for the convention thereof. Two-thirds of the members of the House, upon such convention, shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members. The House, when so convened, may proceed in the manner, and shall have all the powers, pertaining to impeachments and investigations with respect thereto given it by the Constitution and by the terms of this Act. The members of the House when so convened, shall receive the same mileage and per diem pay as is provided for members of the Legislature when in legislative session, and the members of the committees of the House, when so convened and serving upon such committees when the House itself is not in session, shall receive the said per diem pay, to be paid out of the appropriations then existing, or which thereafter may be made, for the per diem pay of members of the Legislature, and the agents of the House so convened or of such committees acting when the House itself is not in session shall receive such pay as may be provided for in the resolutions of such House out of the appropriations then existing, or thereafter to be made, to defray the contingent expenses of the House or to pay the mileage and per diem of members.

The House, at any time when considering impeachment matters or making investigations pertaining thereto, shall have the power itself, or through committees, to send for persons and papers and to compel the giving of testimony, and to punish for contempt, to the same extent as the district courts of the State. And any committee of the House, acting under the terms of this Act, shall have and exercise all of the powers

which may be conferred upon it by the House, and at any time shall have all the powers conferred upon committees of either House of the Legislature by Chapter 3 of Title 82 R. S. 1911, whether the Legislature be in session for Legislative purposes or not, or by any other law pertaining to the subject matter. [Act Oct. 18, 1917, ch. 34, § 2.]

**Art. 6017b. Trial by Senate; powers and procedure; sessions; convening Senate as impeachment court; compensation of members.**—All officers, agents or employes against whom articles of impeachment may be preferred by the House of Representatives shall be tried by the Senate sitting as a court of impeachment in the manner provided by Article XV of the Constitution of Texas.

If the Senate be in session, at a regular or called session of the Legislature, when articles of impeachment are preferred against any officer, agent or employé by the House of Representatives, it shall receive such articles from the House of Representatives and as soon as practicable, organize as a court of impeachment and dispose of such matters. If the session in which such articles are preferred and presented shall, for legislative purposes, expire by limitation, or by adjournment in so far as legislative purposes are concerned, before the matters presented by such articles shall have finally been disposed of by the Senate, the Senate shall continue in session, for such purpose, so long as may be necessary to dispose of such matters, or may adjourn to some day certain, when it shall reconvene for the purpose of disposing of such matters and thereupon such matters shall be considered and disposed of as expeditiously as possible.

If the Senate be not in session at a regular or called session of the Legislature when articles of impeachment may be preferred by the the House of Representatives, the House of Representatives shall cause a certified copy of such articles of impeachment to be delivered, by personal agent or registered mail, to the Governor and each member of the Senate who may be within the State and accessible, and a copy thereof shall be delivered to the Lieutenant Governor and the President Pro Tempore of the Senate. Thereupon the Senate shall be convened for the purpose of considering and disposing of such articles of impeachment in the following manner:

(a) By proclamation of the Governor; or if the Governor shall fail to issue such proclamation within ten days after such articles of impeachment are preferred by the House of Representatives, then, in that event,—

(b) By proclamation of the Lieutenant Governor; or if the Lieutenant Governor shall fail to issue such proclamation within fifteen days from the date upon which articles of impeachment were preferred by the House of Representatives, then, in that event,—

(c) By proclamation of the President Pro Tempore of the Senate; or, if the President Pro Tempore of the Senate shall fail to issue such proclamation within twenty days from the date upon which such articles of impeachment were preferred by the House of Representatives, then, in that event,—

(d) By proclamation in writing signed by a majority of the members of the Senate.

Such proclamation, in either case, shall be in writing, shall state in general terms the purpose for which the Senate is to be convened, shall fix the date for the convening thereof for such purposes, which shall not be later than 20 days from the issuance of the proclamation, and shall be filed in the office of the Secretary of State as a public record. Such

proclamation, in either case, shall be published in at least three daily newspapers of general circulation, and a copy thereof shall be sent by registered mail to each member of the Senate by, or under the direction of, the author or authors thereof. Upon the day fixed for the convening of the Senate for such purposes it shall be the duty of each member of the Senate to be in attendance thereupon, and upon such date the Senate shall convene. Two-thirds of the members of the Senate, upon such convention, shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members, and the Senate at such a session may compel the attendance of any absent member whether a quorum is present or not.

The Senate so convened shall continue in session until such matters are finally disposed of, or it may, from time to time, adjourn to a day certain when the consideration of such matters shall be resumed and disposed of.

The Senate, at any time, shall have and exercise all of the powers itself, or through committees or agents, which have been or may be conferred upon it by law as in other cases when it is in session. It shall have the power to send for persons and papers, records, books, etc., and to compel the giving of testimony, and to punish for contempt to the same extent as the district courts. And its committees shall have and exercise all of the powers conferred upon them by resolution and in addition shall have all of the powers conferred upon committees of either house of the Legislature, when in legislative session, by Chapter 3, Title 82, Revised Statutes of 1911, or any other law touching the subject matter.

Members of the Senate, when so convened, and the Lieutenant Governor, when acting, shall receive the same mileage and per diem as is provided for members of the Legislature; the same, together with the pay of all agents, appointees, employes and other expenses incident to such impeachment trial, shall be paid from such appropriations as shall have been or shall be made from the contingent expenses of the Legislature or for the mileage and per diem of members. [Id., § 3.]

## CHAPTER TWO

### REMOVAL OF COUNTY AND CERTAIN DISTRICT OFFICERS

Art. 6030. Officers removable by the district judge, etc.	Art. 6041. Proceedings, how commenced and by whom.
	6042. Requisites of petition.

#### **Article 6030. [3531] Officers removable by the district judge.**

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

#### **Art. 6041. [3542] Proceedings, how commenced, and by whom.**

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

#### **Art. 6042. [3543] Requisites of the petition.**

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

#### DECISIONS RELATING TO OFFICERS IN GENERAL

**State officer defined.**—In a popular sense a "state officer" is one whose jurisdiction is coextensive with the state, while in a more enlarged sense a "state officer" is one who receives his authority under the laws of the state. *Ex parte Preston*, 72 Cr. R. 77, 161 S. W. 115.



## TITLE 100

## PARDON ADVISERS—BOARD OF

Chap.

1. Powers and duties of board.

Chap.

2. Paroles, suspended and indeterminate sentences, etc.

## CHAPTER ONE

## POWERS AND DUTIES OF BOARD

**Article 6086.** [3582a] **Governor shall appoint; salary.**—The Governor is hereby authorized to appoint two qualified voters of the State of Texas, and who shall perform such duties as may be directed by him consistent with the constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as "The Board of Pardon Advisers," and shall be paid out of any money in the treasury not otherwise appropriated a salary of two thousand five hundred dollars each per annum on monthly vouchers approved by the governor. [Acts 1905, p. 68; Act May 18, 1917, 1st C. S., ch. 21, § 1.]

**Explanatory.**—The act amends art. 6086, Rev. Civ. St. Took effect 90 days after May 17, 1917, date of adjournment.

## CHAPTER TWO

## PAROLES, SUSPENDED AND INDETERMINATE SENTENCES, ETC.

Art.

6095c. Suspended sentence.

Art.

6095d. Testimony as to defendant's reputation and criminal history.

**Article 6095c. Suspended sentence.**

See notes under Code Cr. Proc. art. 865b.

**Operation and effect of pardons.**—See notes under art. 1051, Code Crim. Proc.

**Art. 6095d. Testimony as to defendant's reputation and criminal history.**

See notes under Code Cr. Proc. art. 865c.

## PARDONS

**Power in general.**—The right to pardon offenders is given to the President of the United States and the Governors of the several states. Ex parte Rice, 72 Cr. R. 587, 162 S. W. 891.

**Encroachment on pardoning power.**—Statutes, under which district attorney and district judge may grant immunity to witness in respect to matters about which he may testify, held not to violate constitutional provision giving pardoning power to Governor. Ex parte Muncy, 72 Cr. R. 541, 163 S. W. 29.

**Conditional pardon.**—A conditional pardon cannot be revoked because after-discovered evidence leads the Governor to believe that clemency was ill advised. Ex parte Rice, 72 Cr. R. 587, 162 S. W. 891.

The power to grant absolute pardons carries with it the power to grant conditional pardons and to make the pardon contingent upon any conditions, not illegal, that the pardoning power desires to impose. Id.

**Revocation of pardon.**—The power to grant pardons does not carry with it the right to revoke them, and an unconditional pardon, once accepted and acted upon, is irrevocable unless it was procured by fraud. Ex parte Rice, 72 Cr. R. 587, 162 S. W. 891.

A pardon once granted will not be revoked merely upon allegations that it was secured by fraud, but the fraud must be judicially ascertained. Id.

## TITLE 101

## PARTITION

Chap.  
1. Partition of real estate.

Chap.  
3. Miscellaneous provisions.

## CHAPTER ONE

## PARTITION OF REAL ESTATE

Art.		Art.	
6096.	Joint owner or claimant may compel partition.	6101.	Decree of the court, and appointment of commissioners.
6097.	Petition for, and what it shall contain.	6111.	When property is incapable of division, same shall be sold.
6100.	Court shall determine, what.	6115.	Decree of court shall vest title.

**Article 6096. [3606] Joint owner or claimant may compel partition.**—Any joint owner or claimant or any real estate or of any interest therein or of any mineral, coal, petroleum, or gas lands, whether held in fee or by lease or otherwise, may compel a partition thereof between the other joint owners or claimants thereof in the manner provided in the succeeding articles of this chapter. [R. S. 1879; Act March 28, 1917, ch. 105, § 1.]

**Explanatory.**—Became a law March 28, 1917. The act amends art. 6096, ch. 1, title 101, Rev. Civ. St.

**Property and estates therein subject to partition.**—Client holding a one-fourth interest in land as the attorney's trustee entitles the attorney to maintain partition. *Porterfield v. Taylor* (Civ. App.) 171 S. W. 793.

**Art. 6097. [3607] Petition for and what it shall state.**

**Equitable remedy.**—This article, providing a statutory mode of partition, is not exclusive, and does not deprive the courts of their equitable power of partition. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

**Parties—In general.**—In partition, parties having no interest in the property should not be made parties to the suit. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

— **Necessary parties.**—All persons interested in the estate must be parties to a partition suit. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

— **Effect of defect of parties.**—Unless all persons having an interest in the land are parties to a suit for its partition, the judgment will not bind any one. *McDade v. Vogel* (Civ. App.) 173 S. W. 506.

**Petition—Sufficiency in general.**—Under the direct provisions of this article, subd. 3, a petition for statutory partition is insufficient when not giving an estimate of the value of the premises. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

A petition for equitable partition need not state the estimated value of the property. *Id.*

Petition, in suit for partition and accounting, alleging that defendants had wrongfully cut quantity of valuable timber, held not subject to general demurrer because not stating estimated value of land, and not alleging that defendants cut timber on all the land and left insufficient for plaintiffs' pro rata share. *Stuart v. Teagarden* (Civ. App.) 193 S. W. 416.

**Sufficiency of evidence.**—In a proceeding for the partition of real estate, the question of value should govern more than the item of quantity, and a judgment rendered without any evidence of value cannot be supported. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

**Art. 6100. [3610] Court shall determine, what.**

**Questions to be determined in general.**—Though plaintiff failed to establish defendant's abandonment of her homestead right, and hence was not entitled to partition, it was proper for the court to determine the issue of defendant's asserted title to all the property, so that a judgment decreeing title to each of the parties, but denying plaintiff's right to partition so long as defendant might occupy it as a homestead, was proper. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

In suit for partition and accounting and for cancellation of vendor's lien notes, held, that court, though title to defendant's one-fourth of land was not put in issue, could ren-

der judgment assessing injury to land from defendants having cut timber and decreeing all land to plaintiffs; defendants' part being of less value than damage assessed against them. *Stuart v. Teagarden* (Civ. App.) 193 S. W. 416.

**Adjustment of claims and equities—Manner of division in general.**—Where, in a partition suit by the children of a deceased husband and his surviving wife, the wife selected a homestead, the part of the homestead allotted to the heirs must be awarded subject to the wife's use and occupation, and the value of that use must be considered in determining the rights of all the children in making an equitable division. *Meyers v. Riley* (Civ. App.) 162 S. W. 955.

It is the court's duty to set apart plaintiffs' interest to them jointly in partition proceedings if they desire it. *James v. James* (Civ. App.) 164 S. W. 47.

Where, in the partition of land, the facts show that it was the intention of the parties that their entire interest should pass to one of them, or there could have been no other reasonable purpose, the law will carry out such intent, whether fully expressed in words or not. *Scott v. Watson* (Civ. App.) 167 S. W. 268.

— **Grantee of specific portion.**—On partition by cotenants against grantee of their cotenant who sells without their consent, purchaser has right to have lands described in his deed set apart to him, where it can be done without injury to rights of plaintiffs. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

— **Improvements.**—Where plaintiff in partition had no right to possession of his one-half interest, and hence no right to partition, the issue of defendant's improvements in good faith could not be determined in the suit. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

Tenant in common having property improved held not entitled to contribution, where he had not paid the cost of improving the property, and limitations had run against it. *Stephenson v. Luttrell* (Sup.) 179 S. W. 260.

In suit for partition among heirs, value of improvements placed on land, held properly allowed as charge against land divided. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

— **Rents and profits.**—Defendant in partition having been charged with \$829.98 as plaintiff's part of the rents and profits collected, the court properly decreed a lien for such sum on defendant's part of the property. *Wauhup v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

— **Debts of estate.**—In suit for partition among heirs, debts of estate paid by party after death of intestate held properly charged upon land divided. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

### Art. 6101. [3611] Decree of the court and appointment of commissioners.

**Determination as to divisibility.**—Under the express provisions of articles 6101, 6111, it is the duty of the court in partition to determine in the first instance whether the land was susceptible of partition or not before judgment is entered and before commissioners are appointed, and hence the leaving of that question for the commissioners' determination was error. *Newman v. Newman* (Civ. App.) 160 S. W. 655.

### Art. 6111. [3621] When property is incapable of division, same shall be sold, etc.

**Petition—Sufficiency in general.**—Where there was a plea for partition of land it was not necessary to allege that the property was incapable of partition, since under the express provision of this article, it devolved upon the court to determine whether or not the land could be partitioned. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

**Questions to be determined in general.**—Under the express provisions of articles 6101, 6111, it is the duty of the court in partition to determine in the first instance whether the land was susceptible of partition or not before judgment is entered and before commissioners are appointed, and hence the leaving of that question for the commissioners' determination was error. *Newman v. Newman* (Civ. App.) 160 S. W. 655.

**Power to order sale.**—Regardless of statute, the district court has jurisdiction to order the sale of lands for partition. *Oliver v. Oliver* (Civ. App.) 181 S. W. 705.

**Title acquired by purchaser.**—While, if citation was not served upon minor defendants in partition, the judgment would be invalid on direct attack as to the parties to the judgment, bona fide purchasers from such parties will be protected where the judgment recites service, though the judgment be invalid for want of service. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

Where heirs joined in suit to partition ancestor's land part being omitted by mistake from original pleadings, to establish a mutual mistake sufficient to authorize relief to successor in title of purchaser on partition sale, it was necessary to prove that the original purchaser was a party to the mistake. *Darden v. Vanlandingham* (Civ. App.) 189 S. W. 297.

Where purchaser of land on partition sale could not have urged, as ground for claim of title to land omitted from original pleadings in partition suit, that the omission was by mistake, no subsequent purchaser claiming under him can do so. *Id.*

Where joint owners of land failed to include all in their petition for partition, the purchaser on partition sale could not claim title to land consequently omitted from the commissioner's deed to him, on the ground that the tract was omitted by mistake from the original pleadings. *Id.*

Where purchaser of land at partition sale paid for more land than he got, the partitioning heirs receiving more money than they were entitled to, any remedy against the heirs is confined to the purchaser, the party with whom they dealt, and is based on right of reimbursement for the excess paid. *Id.*

Whatever equities purchaser of land on partition sale might have asserted against plaintiffs by reason of mistake in failing to include a tract of land in the suit was personal to him, and could not be asserted by any subsequent purchaser under a conveyance not purporting to cover the omitted tract. *Id.*

**Review.**—Where there was no objection thereto in the trial court, the part of a judgment which adjudged land incapable of partition and decreed a sale of the same will not be considered on appeal. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

**Presumptions.**—Where a tenant in common asked no finding as to whether the land could be partitioned, it will be presumed that a decree of partition was founded upon sufficient evidence. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

### Art. 6115. [3625] Decree of court shall vest title.

**Final decree—In general.**—A judgment in partition that plaintiff take nothing and that defendants go hence, etc., held final. *Banks v. Blake* (Civ. App.) 171 S. W. 514.

— **Conclusiveness.**—Since, under this article, a judicial partition finally adjudicates the rights of the parties, a partition judgment would be valid and conclusive even on direct attack as against a bona fide purchaser of the property from the party who bought at the partition sale, though the judgment was procured by the fraudulent representations of another interested with respect to the property partitioned. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

A judgment in partition on a remand of the case for trial on a single issue held conclusive on both parties as to a matter of a claim of one party which could have been ascertained on the retrial. *Hanrick v. Hanrick* (Sup.) 173 S. W. 211, reversing judgment *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

In trespass to try title, plaintiff held not bound by prior survey in partition proceedings where decree in such proceedings disregarded survey and was in conflict therewith. *McGuire v. Blair* (Civ. App.) 193 S. W. 185.

— **Persons bound.**—Minors interested in the land who were not parties to a partition proceeding were not bound by the decree. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

— **Estoppel by participation or acquiescence.**—Where plaintiff was a plaintiff in a former action of partition, in which a part of the land in controversy was partitioned between her and others, to whom, and plaintiff, the land was devised, plaintiff cannot claim in the present action that the land was not subject to partition because the devise was in trust, being bound by her election to have partition. *Skaggs v. Mudd* (Civ. App.) 162 S. W. 371.

In a suit to partition decedent's estate, plaintiffs could not insist that the court had no jurisdiction to provide for the payment of a debt against deceased in favor of defendants, since, by the institution of the suit, plaintiffs virtually asserted that there were no debts against the estate and no necessity for administration. *Whitehead v. Rhea* (Civ. App.) 168 S. W. 460.

## CHAPTER THREE

### MISCELLANEOUS PROVISIONS

Art.	Art.
6122. Provisions of this title shall not affect, what.	6123. Rules of pleading, practice and evidence.
	6125. Costs to be adjudged, how.

### Article 6122. [3632] Provisions of this title shall not affect, what.

**Original equitable jurisdiction.**—Under the direct provisions of this article, the procedure prescribed by statute for partition does not preclude partition being made in any other manner authorized by the rules of equity. *James v. James* (Civ. App.) 164 S. W. 47.

**Partition by act of parties—What constitutes.**—See art. 1103, note 5.

Where land was deeded jointly to two persons upon consideration that each would pay his proportionate part of the purchase price, the subsequent division of the land by such grantees in that proportion, each agreeing to pay his part of the price, which was done, was a valid partition binding upon the parties and their heirs. *Harlo v. Harlo* (Civ. App.) 166 S. W. 674.

Where R., W., and S. sold land, reserving a vendor's lien, and R. and S. orally agreed with W.'s widow that she should have the notes and their two-thirds interest in the land for her one-third interest in another tract, in pursuance of which the notes were delivered to her, and she signed a deed for the other tract, the transaction constituted a parol partition. *Scott v. Watson* (Civ. App.) 167 S. W. 268.

Where a joint owner consents to sale of common property by his cotenant, there is a parol partition estopping consenting tenant from disturbing purchaser. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Where interested parties for nearly 50 years recognized and ratified partition of land irregular because of a defect in proceeding in probate court, such conduct on their part established the equivalent of an oral partition of the land. *Adams v. Adams* (Civ. App.) 191 S. W. 717.

A power of attorney from one owning an undivided interest in property to the other part owner, in which the grantor described himself as the owner of a certain part thereof, is insufficient to establish a partition, where it is not shown the power was accepted or acted on. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

— **Acquiescence.**—Where parents, in anticipation of the death of one of them, made a partition of land among their children and each child and the mother and father pursuant to the agreement took possession of their respective interests and improved the property, and continued so to do for several years after the mother's death, the partition would be enforced in equity. *Suggs v. Singley* (Civ. App.) 167 S. W. 241.

Plaintiffs, who did not join in the conveyance of property to a mortgagee of their father's estate, having consented to a partition of the remaining land, held estopped to question the conveyance, which was to satisfy the mortgage. *Ramirez v. Lasater* (Civ. App.) 174 S. W. 706.

**Evidence.**—In an action of trespass to try title, where it appeared that interested parties had by recognition and ratification of a defective partition of the land by the probate court established equivalent of an oral partition, proceedings of probate court may be examined in connection with such conduct of parties as evidence of such oral partition. *Adams v. Adams* (Civ. App.) 191 S. W. 717.

### Art. 6123. [3633] Rules of pleading, practice and evidence.

**Sufficiency of evidence.**—In suit for partition between heirs, evidence exclusive of that erroneously admitted held sufficient to support a verdict for plaintiff with an award of a one-half interest in certain tracts to a defendant as partnership land of himself and the deceased. *Peil v. Warren* (Civ. App.) 187 S. W. 1052.

### Art. 6125. [3635] Costs to be adjudged, how.

**Application.**—This article relating to costs in partition, held inapplicable to costs in trespass to try title, where partition was ordered between the parties. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

**Apportionment.**—If defendants contest title or right of successful plaintiffs in partition suit, they are liable for costs incurred thereby. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

**Lien for costs.**—In suit for partition among heirs, court costs incurred in administration of estate of intestate held properly allowed as charge on lands divided. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

## TITLE 102

## PARTNERSHIPS AND JOINT STOCK COMPANIES

Chap.

1. Partnerships—Limited.

Chap.

2. Unincorporated joint stock companies—  
Permitting suit in company name.

## CHAPTER ONE

## PARTNERSHIPS—LIMITED

## DECISIONS RELATING TO PARTNERSHIPS IN GENERAL

## I. CREATION AND EXISTENCE OF RELATION

1. **Partnership distinguished from other relations.**—A contract with a foreign corporation for the sale of goods and their resale by the buyer in the state held not a partnership but a sale. *Dr. Koch Vegetable Tea Co. v. Malone* (Civ. App.) 163 S. W. 662.

2. **Creation and existence of relation in general.**—An express or implied contract is necessary to constitute a partnership between the parties for carrying out a land transaction, and the intention of the parties to form such contract is to be determined from the evidence. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

To constitute a partnership contract, competency of the parties, consideration, the subject-matter, and the meeting of the minds of the parties are essential elements, as in case of other contracts. *Id.*

An agreement that one of the parties thereto would furnish the money to purchase horses would not of itself constitute a partnership between the parties. *Coody v. Shawver* (Civ. App.) 161 S. W. 935.

A partnership is at an end when the particular transaction or venture for which it was organized is concluded. *Roberts v. Nunn* (Civ. App.) 169 S. W. 1086.

Transaction between plaintiff, defendant, and other independent cotton buyers to bulk their cotton, where there were no losses, and the profits were satisfactorily divided, held not a partnership. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

As regards liability of the others for the contract or representation of one, defendants agreeing to buy and conduct a business as partners, do not become partners till the purchase is made and the business delivered. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

Lessors of ice plant under contract for share of net profits with lessees held lessees' partners, and liable, as such, to plaintiff workman injured while repairing boiler in plant, through lessees' negligence. *Fink v. Brown* (Civ. App.) 183 S. W. 46.

5. **Community of interest in profits and losses—In general.**—Persons contributing labor, material, and cash to driving an oil well under agreement to incorporate and issue stock in proportion to their contributions, if the well comes in, otherwise each to lose what he puts in, are partners. *Roberts v. McKinney* (Civ. App.) 187 S. W. 976.

9. **Subject-matter and purpose.**—A partnership may be formed for carrying out a single transaction in land, as by buying or selling a single tract for profit. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

10. **Capacity of parties.**—The fact that intervener, who formed a partnership with defendant for land and cattle transactions and agreed to advance the capital, was president of the bank which made the loans for that purpose would not make the partnership agreement illegal, though some of the bank directors did not know that the intervener was a partner and that certain overdrafts bore 6 per cent. interest. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

11. **Fraud or misrepresentations.**—Where citizens of Texas organized a corporation under the laws of Arizona to do a general mining business, the mines being located in Mexico, their acts were not a fraud upon the laws of Texas so as to render them liable as copartners merely because the charter of the corporation authorized corporate meetings in the state of Texas, for the Texas laws allow incorporation for the same purpose. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

12. **Creation of partnership as to third persons.**—In a suit in Texas to recover one-half the proceeds of a sale of an interest in an Ohio corporation operating mines in Mexico, under a partnership between plaintiff and defendant, it was no defense that the contract of partnership was illegal in Mexico. *Hutchinson v. Murray* (Civ. App.) 169 S. W. 640.

19. **Defective corporations.**—If defendant reciprocal insurance association was not organized under Acts 33d Leg. c. 109 [Vernon's Sayles' Civ. St. 1914, art. 4972a], and issued a policy without authority, those acting in its name might be personally liable, and should be sued individually at their places of residence as partners. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

**21. Evidence to show relation—Weight and sufficiency.**—An agreement to share the profits and losses of a venture is merely prima facie evidence of partnership, and may be rebutted by proof of another agreement. *Roberts v. Nunn* (Civ. App.) 169 S. W. 1086.

Evidence held to show that from the time plaintiff began negotiations for the acquisition of a drug business, and an agent who was to run it for his benefit was placed in charge, he and defendant were partners. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

In action on guaranty, evidence held to sustain finding that defendant and his son sued as partners were liable as such. *Gembler v. Baker* (Civ. App.) 194 S. W. 1015.

### III. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF PARTNERS

**27. Construction of articles of partnership in general.**—A written contract of partnership, though not ambiguous, should be considered, in view of the circumstances surrounding its execution and the subsequent acts of the parties, to discover their intention. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

**29. Interests of partners in firm property.**—Where deed conveyed property to H. & Bro. as a firm, in the absence of proof that they were not equal partners, each acquired an undivided one-half interest. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

Deed to C. R. H. & Co. held to place title in C. R. H. in trust for the firm or partnership. *Gauss-Langerberg Hat Co. v. Allums* (Civ. App.) 184 S. W. 288.

**31. Accounting as to firm business.**—That partner invested money in partnership to defeat his creditors held not to prevent a partition and accounting from the other partner. *Freidenbloom v. McAfee* (Civ. App.) 167 S. W. 28.

Where partnership profits had been divided, and the items not collected had been abandoned, one of the partners could sue at law his copartner to settle a claim growing out of a transaction remaining unsettled. *Hutchinson v. Murray* (Civ. App.) 169 S. W. 640.

**34. Dealings between partners.**—Under agreement between alleged partner in defunct bank and depositors, by which such partner assumed bank's liabilities, other partners, who were depositors, held entitled to the benefits of such assumption of liability. *Grove v. Keeling* (Civ. App.) 176 S. W. 822.

**36. Individual profits or benefits from firm business.**—A purchase by one partner at a judicial sale of land sold on foreclosure of a partnership lien does not inure to the benefit of the partnership. *Evans v. Carter* (Civ. App.) 176 S. W. 749.

**40. Contribution between partners.**—Where plaintiff advanced money to defendant in contemplation of a partnership which was not consummated, and it was agreed that wells on defendant's property should be sunk at the cost of each of them, which was done, and paid for by defendant, plaintiff was chargeable with one-half of the cost of such wells, less one-half of the beneficial use or improvement to defendant's property. *Look v. Bailey* (Civ. App.) 164 S. W. 407.

**41. Actions between partners.**—A partner who expended his individual funds to repair damage to the firm's property seized under a writ of sequestration by a bank, and damaged in consequence of the bank president's direction to the officer to handle them negligently, could recover against the bank, though its president was a member of the firm. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

**43. — Evidence.**—In a suit against plaintiff's partner to recover an interest in a patent issued to the defendant, evidence held to sustain a finding that the attorney's fees for obtaining the patent were not paid by the partnership under an agreement that the patent right should become the property of the firm. *Kuehn v. Meredith* (Civ. App.) 187 S. W. 386.

### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS

**45. Representation of firm by partner—Powers of partners in general.**—A partner has the right ordinarily to direct how the account of a partnership shall be kept in a bank, and it is the duty of the bank to obey such directions when it has no notice to the contrary. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

A partner while the general agent of the firm and his copartners cannot bind the firm by unauthorized acts. *Munday Trading Co. v. J. M. Radford Grocery Co.* (Civ. App.) 178 S. W. 49.

**46. — Commercial character of partnership.**—Power of a partner to bind the firm by contract exists in the case of a nontrading as well as a trading partnership. *Dobie v. Southern Trading Co. of Texas* (Civ. App.) 193 S. W. 195.

**47. — Scope of firm business.**—Regarding a firm being bound by contract of a partner, purchase of a sawmill is fairly within the purposes and objects of a partnership organized for the express purpose of manufacturing and furnishing railroad ties. *Dobie v. Southern Trading Co. of Texas* (Civ. App.) 193 S. W. 195.

**48. — Limitations on liability.**—Limitation in partnership articles on authority of partner, without written consent of copartners, to bind the firm, is not binding on third persons without notice dealing with him in a matter fairly within the scope of the partnership business. *Dobie v. Southern Trading Co. of Texas* (Civ. App.) 193 S. W. 195.

Regarding a firm's liability to third persons on contract of a member, the members may by their course of conduct waive the limitation in the articles on the power of a member to bind the firm by contract without written consent of the others. *Id.*

50. — **Individual credit or interest of partner in general.**—If a secured note and mortgage executed by one partner to a bank was intended to cover and discharge an amount paid by the intervener, the other partner, for the purchase of partnership lands, with the intention that the maker of the note should assume sole liability to the bank, the intervener's previous partnership agreement to furnish the capital to buy the partnership land was thereby canceled. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

53. — **Contracts in general.**—To bind a firm by a contract, it is not essential that the contract is signed by all the partners or in the firm name; and where it is signed by a partner having authority to bind the firm, and the contract is so accepted and credit is extended thereon, the firm is bound thereby. *Miller v. McCord* (Civ. App.) 159 S. W. 159.

54. — **Purchases and sales.**—Where one, holding legal title to land exchanged, covenanted to pay notes secured by vendor's lien on the land, and took title to land received in exchange in name of third person, agreement to discharge notes held binding upon third person whether made as agent or partner. *Rhoads v. Harris* (Civ. App.) 194 S. W. 621.

55 $\frac{1}{2}$ . — **Deeds.**—A deed signed by partners, reciting that it conveyed all of the property and assets of the company, includes only the partnership property and not the partners' individual estate. *Dye v. Livingston Lumber Co.* (Civ. App.) 161 S. W. 53.

57. — **Payment of individual debts with partnership funds.**—A partner in a firm owing plaintiff a balance for goods sold and which turned over its stock of goods, accounts, etc., to plaintiff to be applied generally to the payment of its debts, had no right to direct, nor had plaintiff the right to make, the application of his half interest in the firm to the payment of his individual debt, to the exclusion of the firm's creditors. *Moore Grocery Co. v. McCan* (Civ. App.) 169 S. W. 191.

A partner is competent to show that he had authority to use the partnership funds to pay his individual debts, although that is not one of his implied powers. *Munday Trading Co. v. J. M. Radford Grocery Co.* (Civ. App.) 173 S. W. 49.

58. — **Borrowing money.**—Where partners in a firm formed to undertake city work agreed that a partner should have the entire financial management of the firm business, and it was necessary to borrow money and give security therefor, the partner could borrow money and give security therefor, and bind the firm thereby. *Miller v. McCord* (Civ. App.) 159 S. W. 159.

The members of a trading firm have authority to borrow money in the firm name for firm purposes, and to pledge firm property, but the members of a nontrading firm have no implied authority to borrow money. *Id.*

A partner in a trading firm who borrows money professedly for the firm, and executes therefor a negotiable instrument in the firm name, thereby binds all the partners whether the borrowing was for the firm, and whether he misapplied the funds provided the lender was not cognizant of the intended fraud. *Id.*

59. — **Negotiable instruments.**—Where one, who had a claim against a partnership for goods sold, agreed to accept in full settlement thereof a note signed by only one of the partners, the other partner is not liable on the note. *Switzer Lumber Co. v. Clements* (Civ. App.) 166 S. W. 438.

Where a managing partner was requested by other partners to secure funds and had express consent to "act unrestricted" in all matters pertaining to interests of company, he had sufficient authority to execute a note. *Hill v. First State Bank of Oakwood* (Civ. App.) 189 S. W. 984.

62. — **Wrongful acts.**—Partners in the practice of medicine are all liable for an injury resulting from the negligence of any partner within the scope of their partnership business. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

63. — **Estoppel to deny partner's authority.**—Surviving brother of two composing partnership operating a hotel, the deceased brother having ordered plans for an addition, and the survivor not having objected, held liable for the charge. *Snaman v. Lane* (Civ. App.) 184 S. W. 366.

64. — **Ratification.**—Acceptance and use of a mill by a firm is a ratification of a partner's prior purchase thereof for it, even if not within his authority, as regards firm's liability under contract. *Dobie v. Southern Trading Co. of Texas* (Civ. App.) 193 S. W. 195.

71. **Application of assets to liabilities in general.**—The proceeds of vendor's lien notes pledged to a bank to secure a partnership account in defendant's name, as well as defendant's individual overdraft, should be applied first to the amount due the bank by the partnership and to defendant's individual indebtedness to the bank, if it has a lien therefor, and the remainder of the proceeds divided between the partners according to their interests, and the defendant should not be charged with the face value of the vendor's lien notes for the purpose of giving his partner his profits under the partnership transaction. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

77. **Actions by or against firms or partners—Parties.**—A firm cannot be sued by its firm name, but the action must be against the partners composing it. *Law Reporting Co. v. Texas Grain & Elevator Co.* (Civ. App.) 168 S. W. 1001.

A partnership may not sue in its firm name independently of the partners composing the firm. *Houston & T. C. R. Co. v. Corsicana Fruit Co.* (Civ. App.) 170 S. W. 849.

An ordinary partnership is not a legal entity, and can neither sue nor be sued in the firm name. *Style v. Lantrip* (Civ. App.) 171 S. W. 786.



Actions by or against a partnership must be conducted in the names of the partners. *Western Grocery Co. v. K. Jata & Co.* (Civ. App.) 173 S. W. 518.

Subject to the power of the Legislature to otherwise provide, all members of a partnership must be made parties to authorize a judgment against the partnership and its property. *American Express Co. v. North Ft. Worth Undertaking Co.* (Civ. App.) 179 S. W. 908.

Partnerships are not recognized either by the common or statutory law as constituting separate and distinct legal entities, and there is no right to sue or be sued in partnership name; but litigation by or against partnerships must be in name of individual members, and not in partnership name. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

**80. — Sufficiency of evidence.**—In an action by a bank on a note executed by defendant, in which another intervened praying for a partnership accounting under an alleged partnership contract for dealing in land, where it was claimed that the note was intended to replace an amount agreed to be advanced by the intervener for purchasing land, whether there was a waiver of the intervener's agreement to contribute to the purchase held not determinable as a matter of law under the evidence. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

In an action by a bank on a note for \$12,000, executed by defendant to it, secured by a lien on vendor's lien notes, in which another intervened for an accounting under a partnership contract with defendant, evidence held to sustain a finding that the \$12,000 note was to cover an amount advanced by the intervener for the purchase of the partnership land and as between defendant and intervener discharged such amount. *Id.*

Evidence in an action against a partnership held insufficient to show that a partner who paid out firm moneys in discharging his own debts was authorized. *Munday Trading Co. v. J. M. Radford Grocery Co.* (Civ. App.) 178 S. W. 49.

In an action against a surviving partner for services as an architect in drawing plans for an addition to the firm's hotel, evidence held sufficient to show the deceased partner employed plaintiff to draw the plans. *Snaman v. Lane* (Civ. App.) 184 S. W. 366.

**83. — Execution and enforcement of judgment.**—Where an action was brought in a firm name without any allegation showing the individuals composing it, and the firm answered in the same name, a judgment against it in that name was sufficient to support an execution against the firm property. *Houssels v. Coe & Hampton* (Civ. App.) 159 S. W. 864.

#### V. RETIREMENT AND ADMISSION OF PARTNERS

**85. Transfer of partner's interest to copartner.**—Where a partner in a real estate firm obtaining an exclusive contract to procure a purchaser brought about a sale with knowledge of the owner he is entitled, on purchasing his copartner's interest, to recover the commissions. *Adams & Garrett v. Randle* (Civ. App.) 171 S. W. 256.

**90. Obligations of old firm—Liabilities of continuing partners or new firm.**—On the issue of liability of a remaining partner on a note executed by a withdrawing partner, whether \$5.50 of the proceeds thereof was used to pay firm debts was immaterial; it appearing that the note was known by the partners at time of dissolution to be part of the firm indebtedness. *Keels v. Ashworth* (Civ. App.) 187 S. W. 1008.

**92. Assumption of obligations of old firm.**—A partner, who sold out to his two partners, who assumed a partnership indebtedness, but whom the creditor did not release, was bound on the note, and the creditor was entitled to a judgment against him. *Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

A dissolution agreement, obligating the remaining partner to pay all the firm debts, held to obligate him to pay a note, although signed by the partner who had retired. *Keels v. Ashworth* (Civ. App.) 187 S. W. 1008.

**94. Actions after change of membership.**—In action for commissions, evidence held to sustain a finding that there had been no dissolution of the defendants' firm when the contract of sale was made. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

**96. — Presumptions, burden of proof and admissibility of evidence.**—A partnership, which actually carried on a business of securing timber and making ties in mills owned by them, and sale of such ties, held, both in its formation and management, a trading partnership. *Hill v. First State Bank of Oakwood* (Civ. App.) 189 S. W. 984.

#### VI. DISSOLUTION, SETTLEMENT AND ACCOUNTING

**101. Causes of dissolution—Death of partner.**—The death of one member of a firm dissolves the partnership and casts upon the survivors the duty to wind up its affairs. *Roberts v. Nunn* (Civ. App.) 169 S. W. 1086.

**107. Rights, powers and liabilities after dissolution—Rights and liabilities of survivor as to estate of deceased.**—A surviving partner is entitled to all the assets of the firm as trustee to pay the debts of the partnership, and to account to the estate of the deceased partner for his share. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

Surviving brother of two owning a hotel, who probated decedent's will making him independent executor and sole legatee and disposed of all the property, held personally liable for the amount due architect from decedent for preparing plans for an addition to the hotel. *Snaman v. Lane* (Civ. App.) 184 S. W. 366.

**109. — Actions by or against partners after dissolution.**—A surviving partner is entitled to sue and recover the entire value of the property. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

The rule that one partner cannot sue another, except for dissolution of the partnership and for a general accounting held to have no application to a suit between former partners after dissolution by consent. *Reeves v. White* (Civ. App.) 161 S. W. 43.

In action by former member of partnership for share in commissions on a deal completed after the dissolution, evidence held to support findings in his favor. *Daniel v. Lane* (Civ. App.) 179 S. W. 906.

119. **Actions for dissolution and accounting—Charges and credits.**—In partner's suit for dissolution and accounting, two cash items, one representing attorney's fees paid in garnishment suit against defendant partners individually, the other representing traveling expenses of defendant on individual business, held not chargeable against partnership funds. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

## CHAPTER TWO

### UNINCORPORATED JOINT STOCK COMPANIES—PERMITTING SUIT IN COMPANY NAME

Art. 6149.	May sue or be sued in its company name.	Art. 6153.	Effect of judgment where individual stockholders are also cited.
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#### Article 6149. May sue or be sued in its company name.

See *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 192 S. W. 1095.

#### Art. 6153. Effect of judgment where individual stockholders are also cited.

**Validity of judgment.**—In an action against a joint-stock association and certain of its members individually, the fact that the judgment did not formally read that the property of the association should be exhausted before executions against the property of individual members, held not to vitiate it, in view of this article. *Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran* (Civ. App.) 171 S. W. 294.

**Personal judgment against members.**—Under this article, facts held to authorize personal judgment against members of joint-stock company. *Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran* (Civ. App.) 171 S. W. 294.

### DECISIONS RELATING TO UNINCORPORATED ASSOCIATIONS IN GENERAL

**Certificate of membership.**—Issuance of a certificate is not essential to constitute membership in a joint-stock company. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

**Minutes of proceedings.**—Under the by-laws of a joint-stock association, the selection of plaintiff to act as a trustee in the place of his father, since deceased, by the two remaining trustees, and the recital of the fact in the minutes of the meeting without the signing, execution, and record of a declaration to that effect, held insufficient to constitute plaintiff a trustee. *McFadden v. Wiess* (Civ. App.) 168 S. W. 486.

**By-laws.**—Where no rule or by-law of stock company required stock to be transferred on books, legal title to share passed by transfer and delivery of certificate. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

When persons form voluntary associations, and adopt rules, under which members may be admitted and expelled, such rules are articles of agreement to which all who have become members are parties. *Brown v. Harris County Medical Soc.* (Civ. App.) 194 S. W. 1179.

**Property and funds of association.**—A lease to an unincorporated association which could not own a leasehold estate would not, for that reason, fail for want of a grantee, as the title would vest in its members. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

While the incorporation of a voluntary association does not of itself constitute the corporation the owner of the association's property, yet, when such property is paid for with money derived from the sale of stock in, and is held in trust for, the contemplated corporation, delivery of possession to it when formed vests it with at least the equitable title to the property. *Id.*

**Liability of members for acts and debts of association.**—Members of an unincorporated insurance association, the losses of which are paid from deposits made by the members, but the policies of which provide that the members agree to pay any loss in the proportion that the amount of their deposits bear to the total deposits, are liable upon such policies in that proportion; such plan being different from *Lloyd's* insurance. *Sergeant v. Goldsmith Dry Goods Co.* (Civ. App.) 159 S. W. 1036.

The members of an unincorporated insurance association operating under a plan whereby members make a deposit from which to pay losses, and the business is run by a manager, the object being cheaper insurance, are liable for any debts incurred during

their period of membership, and any agreement between the members limiting their liability would not affect third persons. *Id.*

The rights and liabilities of the members of an unincorporated mutual benefit insurance association as between themselves are governed by the provisions of the application for insurance and the policy contract issued thereon. *Id.*

The liability of the members of an unincorporated insurance association for losses under a plan whereby a manager was appointed to carry on the business, the losses being payable by the members, is based on the principle of agency, and a corporation cannot escape liability because it could not become a member of a partnership, as the arrangement did not constitute partnership. *Id.*

In an action against members of a voluntary association on a note, with cross-action by part of the defendants against their codefendants, held, that a judgment might be rendered for plaintiff against the defendants jointly and severally, and a judgment for each defendant over against each other defendant. *Hardy v. Carter (Civ. App.) 163 S. W. 1003.*

A bank loaning to a voluntary association, on security of notes executed by part of the members and upon which all the members were primarily liable, which note had been renewed from time to time, was justified in presuming that the president and the secretary treasurer had power to execute it and could hold the members liable on the transaction, as being within the apparent authority of such officers. *Id.*

On evidence, in an action against the members of an association upon a note on which they were primarily liable as co-obligors, held, that a peremptory instruction to find for plaintiff against the defendants jointly and severally was proper. *Id.*

Judgment, within the pleadings, in action against the members of a voluntary association upon a note on which they were primarily liable as co-obligors, held not objectionable, because the several amounts which plaintiff was to recover against each of the defendants was calculated and entered therein. *Id.*

Members of a voluntary association, which had executed notes to secure a loan, held to have the right, upon maturity of such notes, to pay them, and, at the proper time, to demand contribution of their co-obligors. *Id.*

Each member of a voluntary association is liable for its debts necessarily contracted to carry out its objects, and, where its directors might have agreed to extend original notes and pay interest on such extension from time to time, they had the right to postpone the note by making new notes to different payees. *Id.*

In an action on a note for a loan to a voluntary association organized to assist the promotion of a railroad, on which the members were primarily liable as co-obligors, held that, after such purpose had been accomplished, it was too late for the members to claim that they were not liable because not present when a new party was substituted for the original promoter. *Id.*

Upon directors' renewal of note to secure a loan, upon which the members of a voluntary association were primarily liable as co-obligors, held that such members were personally liable. *Id.*

Members of a voluntary association primarily liable on notes executed to secure a loan to it who acquiesced in and accepted the benefits of a renewal by co-obligors, held to thereby impliedly ratify such renewal. *Id.*

Members of a voluntary association who had consented to a loan obtained by it, which debt was primarily theirs, could not object to a renewal by their co-obligors, when made necessary by their own failure to pay it at maturity, especially where such action was beneficial to them. *Id.*

Defendants, operating an unincorporated insurance association which they knew was insolvent, and representing to plaintiff, who relied thereon, that his insurance would be placed in a solvent company, held personally liable for a loss under the policy. *Hancock v. Wilson (Civ. App.) 173 S. W. 1171.*

**Officers and committees.**—The directors of a voluntary association, not required by anything in the contract or constitution to apply funds derived from any assessment to the payment of any particular debt, had the right to apply the funds to any debtor without becoming liable to the members. *Hardy v. Carter (Civ. App.) 163 S. W. 1003.*

Where a committee of voluntary association without constitution or by-laws gave a note for a loan, the execution of the note therefor could not be challenged by defendants, who had signed the association contract and executed their notes to a committee, and the notes could not be impaired by the subsequent adoption of a constitution defining the powers of directors. *Id.*

**Equitable relief.**—Plaintiff physician, expelled from county medical association on charges of which he had no notice until at the trial he had presented defense to other charges, trial being in violation of by-laws of association, while provisions for appeal by association were inadequate, held to have right to resort to equity for relief. *Brown v. Harris County Medical Soc. (Civ. App.) 194 S. W. 1179.*

Where voluntary association under its rules expels a member, such member must exhaust the remedies provided by the association itself through its constitution and by-laws before applying to a court of equity for relief. *Id.*

## TITLE 103

## PAWNBROKERS AND LOAN BROKERS

Art.	Art.
6155. Definition of "pawnbroker."	6171g. Loan broker to file power of attorney to receive service of process.
6171a. "Loan broker" defined.	6171h. Payment of judgments.
6171b. Bond required.	6171i. Judgments collectable from bond.
6171c. Registration of bond.	6171j. Consent of wife to security for loan.
6171d. Separate offices.	6171k. Annual tax.
6171e. Broker to keep record of loans.	6171l. Compromise for usury void.
6171f. Public inspection of register.	

**Article 6155. [3636] Definition of "pawnbroker."**

**License taxes.**—Article 6155 et seq., and Pen. Code 1911, art. 641, held not to fix the liability of a pawnbroker for pursuing the occupation without obtaining a license, which is determined by Rev. St. arts. 7355, 7357, and Penal Code, art. 130. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

**Art. 6171a. "Loan broker" defined.**—A "loan broker" is a person, firm or corporation who pursues the business of lending money upon interest and taking as security for the payment of such loan and interest an assignment of wages, or an assignment of wages with power of attorney to collect the same or other order for unpaid chattel mortgage or bill of sale upon household or kitchen furniture. [Act March 1, 1915, ch. 28, § 1.]

The act took effect 90 days after adjournment of the Legislature which occurred on March 20, 1915.

**Constitutionality.**—The Court of Criminal Appeals, in determining whether this act is constitutional, has nothing to do with the wisdom of the law. The act is constitutional, as promoting the public welfare. It is not invalid as making a capricious or unreasonable classification, because of its exclusion of bankers or other money lenders not taking the same security of wages, household goods, etc. Such act held not void for not levying a penalty for its violation, when construed with section 10 thereof, assessing a specific penalty, and with the usury laws, and is not unconstitutional as impairing the right to contract. *Ex parte Hutsell* (Cr. App.) 182 S. W. 468.

**Art. 6171b. Bond required.**—No person, firm or corporation shall pursue the business of a loan broker without first having given bond with at least two good and sufficient sureties or the guaranty of some solvent bonding company authorized to do business in this State, in the sum of five thousand (\$5000) dollars, payable to the State of Texas, approved by and filed with the clerk of the County Court of the county in which such person, firm or corporation proposes to pursue said business, conditioned that such person, firm or corporation shall faithfully comply with each and every requirement of the law governing such business, and will pay to any person dealing with such loan broker any judgment that may be obtained against him. [Id., § 2.]

**Validity.**—This article held not to impose unreasonable requirements. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458; note under art. 999jj.

**Art. 6171c. Registration of bond.**—The bond required by the preceding article shall be recorded and safely kept in the office of the clerk of the County Court of the county in which such loan broker pursues such business, the recording fees thereof to be paid by such loan broker, and a new bond shall be given, filed and recorded in the same manner as the first one, every twelve months during the continuance of such business. [Id., § 3.]

**Art. 6171d. Separate offices.**—A bond shall be required and given by each loan broker for each and every separate office or place of business which he may conduct. [Id., § 4.]

**Art. 6171e. Broker to keep register of loans.**—Each loan broker shall keep a well-bound book in which he shall register all his transactions as a broker at the time same occurs; such registry shall show (1) the articles of property securing the loan, if the same be secured by chattel mortgage or bill of sale on household or kitchen furniture; (2) the assignment of wages, or the assignment of wages with power of attorney to collect the same, or other order for unpaid wages given as security, giving the name of the person receiving the money, and the person by whom such person is employed, or by whom it is expected that he will be employed, and in whose service it is expected that he shall earn the salary or wages; (3) the amount of money received by the borrower; (4) the amount to be received back by the loan broker, and the time in which he is to receive back such payment; (5) the rate of interest or discount agreed upon. [Id., § 5.]

**Validity.**—This article does not impose unreasonable requirements. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

**Art. 6171f. Public inspection of register.**—Such books shall be kept open for inspection, and that the broker shall give to the party borrowing, a ticket showing the amount of cash actually received, and showing the amount paid back by the borrower to the loan broker on each payment, such tickets to correspond with the entry on the book of the register. [Id., § 6.]

**Art. 6171g. Loan broker to file power of attorney to receive service of process.**—Each loan broker as defined in Section 1 of this Act [Art. 6171a] engaged in doing or desiring to do business in this State shall file with the County Clerk of the county in which he or it is engaged in doing such business or desires to do such business an irrevocable power of attorney duly executed, constituting and appointing the County Judge of the county in which he or it is engaged in doing business or in which he or it desires to do business, and to his successors in office, his or its duly authorized agent and attorney in fact, for the purpose of accepting service for him or it, or being served with citation in any suit brought against him or it in any court of this State by any person, firm, company or corporation, and consenting that the service of any civil process upon such County Judge as his or its attorney for such purpose, in any suit or proceeding, shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service and such appointment, agency and power of attorney, shall by its terms and recitals provide that it shall continue and remain in force and effect so long as such loan broker continues to do business in this State and so long as it shall have outstanding any claim of any character held by any citizen, firm, company or corporation of this State or by the State of Texas against him or it, and until all claims of every character, so held by any citizen, firm, company or corporation or by the State of Texas, shall have been settled. Said power of attorney shall be signed in person by any individual loan broker and by each member of any firm, partnership or association engaged in business as a loan broker, and if such loan broker is a corporation it shall be signed by the president or vice-president and by the secretary of such corporation, and shall be attested by the seal of such corporation. Each such power of attorney shall be acknowledged before some officer authorized by the laws of this State to take acknowledgements. [Id., § 7.]

**Constitutionality.**—This article held not unconstitutional. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

**Art. 6171h. Payment of judgments.**—If any judgment upon any bond given by any loan broker shall remain unpaid for sixty days after final judgment and execution thereon, it shall be unlawful for such loan broker to continue to run such business, and the same shall be punished by fine of not less than \$50.00 nor more than \$250.00, and each and every day in which such loan broker conducts such business shall be a new and separate offense. Each and every person employed by and engaged in the conduct of such business shall be guilty of unlawfully conducting the same, if the same be conducted without a bond, or after the forfeiture of such bond as above described. [Id., § 8.]

**Validity.**—This article held within the legislative authority. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

**Art. 6171i. Judgments collectable from bond.**—Any judgment obtained by any person against a loan broker under these articles or under the laws of the State of Texas shall be collectable out of the bond herein provided for. [Id., § 9.]

**Note.**—Section 10 makes it an offense to make loans without a compliance with the act, and is set forth in Vernon's Pen. Code 1916 as art. 9997ll.

**Constitutionality.**—The invalidity of this article, making the broker's bond liable to any judgment obtained against him, would not make the whole act invalid, where the bond prescribed by section 2 would meet such liability. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

This act held not void for not levying a penalty for its violation, when construed with this article, and with the usury laws. *Id.*

**Art. 6171j. Consent of wife to security for loan.**—Each assignment, mortgage, power of attorney to collect or other transfer of the salary or wages of a married man, and each bill of sale or chattel mortgage upon the household and kitchen furniture of a married man shall be void unless the same be made and given with the consent of the wife, and such consent shall be evidenced by the wife joining in the assignment, mortgage, power of attorney to collect or other transfer of salary or wages, and the signing of her name thereto and by her separate acknowledgement thereof, taken and certified to by a proper officer, substantially in the mode provided by law for the acknowledgement by the wife of a conveyance of the homestead. [Id., § 11.]

**Art. 6171k. Annual tax.**—Every loan broker shall pay an annual tax of one hundred and fifty dollars to the State of Texas for each and every place of business. [Id., § 12.]

**Constitutionality.**—This act is not invalid, as imposing a prohibitive tax. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

**Construction.**—Under this act, it is the occupation that one pursues that is licensed and taxed, and not the mere loaning of money on security, and, though one making an occasional loan is not within its provisions, the act is not thereby rendered discriminatory. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

**Art. 6171l. Compromises for usury void.**—All compromises for usury or unlawful interest collected and received are contrary to public policy, and shall be void. [Id., § 13.]

**Constitutionality.**—This article making compromises for usury void, held not unconstitutional. *Ex parte Hutsell* (Cr. App.) 182 S. W. 458.

## TITLE 104

## PENITENTIARIES AND CONVICTS

## Chap.

1. System of prison government.
2. Prison regulations and discipline.

## Chap.

3. Workhouses and county convicts.
4. Hiring of county convicts.

## CHAPTER ONE

## SYSTEM OF PRISON GOVERNMENT

## Art.

6174. Prison labor not to be leased to private parties.
6175. Board of prison commissioners; appointment; term.
6181. Chairman; quorum; records.

## Art.

6186. Modern buildings to be erected and equipped.
6188. Prison funds.
6196. Salaries and qualifications of under-officers and employés.

**Article 6174. Prison labor not to be leased to private parties.**—It is hereby declared the policy of this State to work all prisoners within the walls and upon the farms owned or leased by the State, and in no event shall the labor of a prisoner be sold to any contractor or lessee nor shall any prisoner be worked on any farm not owned or leased by the State or otherwise upon shares. [Acts 1910, 4 S. S., p. 143, § 3; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

**Explanatory.**—The act amends arts. 6174, 6181, 6186, 6188, 6196, 6201, 6212, 6214, 6215, 6220, 6223, 6224, 6227, and adds art. 6231a, tit. 104, chapters 1 and 2, Rev. Civ. St. 1911. Sec. 2 repeals all laws in conflict. Took effect 90 days after May 17, 1917, date of adjournment.

**Art. 6175. Board of prison commissioners; appointment; term.**

**Effect of constitutional amendment.**—Plaintiff was appointed, during recess, by the Governor as a prison commissioner under this article, creating the board of prison commissioners, and thereafter, before the Legislature convened, Const. art. 16, § 58, was amended, so as to make the office a constitutional office, and the same day such amendment took effect the Senate confirmed the appointment. Held, that plaintiff had no title to the constitutional office, and hence a court of equity would not restrain interference with his possession. *Stamps v. Title* (Civ. App.) 167 S. W. 776.

**Art. 6181. Chairman; quorum; records.**—The prison commission shall select one of its members as chairman and a majority of said commission shall constitute a quorum for the transaction of business. The commission shall keep, or cause to be kept, in a well bound book a minute of all proceedings. [Acts 1910, 4 S. S., p. 143, § 10; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6186. Modern buildings to be erected and equipped.**—The prison commission is authorized, and it shall be its duty to cause to be constructed upon the land now belonging to the prison system, and upon such land as may be bought hereafter all necessary modern well ventilated prison buildings with proper bathing facilities and all necessary sanitary water closets and other sanitary arrangements within such buildings; also sanitary kitchens, dining rooms, hospitals, school rooms, and chapels, and other necessary conveniences for the benefit of the prisoners. [Acts 1910, 4 S. S., p. 143, § 15; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6188. Prison funds.**—On the first Monday of each month, the prison commission shall remit to the State Treasurer all moneys received by them as such, from whatever source during the preceding month and belonging to the system. The treasurer shall hold such fund as bailee for the prison commission, which fund shall be known as the prison commission account, and he shall give to the prison commission a deposit receipt for same, and shall pay out same on draft by the officer designated by Article 6192. The prison commission is authorized to draw upon the prison commission account with the State Treasurer such sum or sums of money and at such time or times as in their judgment may be necessary for the transaction of the business of the system; provided, they shall not draw for a sum that will give them in hand and in bank, subject to disbursement, a sum in excess of one hundred and seventy-five thousand (\$175,000) dollars; and provided further, the account of the prison system with the state treasurer shall in no event be overdrawn, and in no event shall the state treasurer ever permit an overdraft against the prison commission account to be paid. On December 1st of each year the State Treasurer shall ascertain the interest earned by the fund belonging to the prison system from the state depositories and place said sum to the credit of the prison commission account and send deposit receipt to the prison commission. [Acts 1910, 4 S. S., p. 143, § 17; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6196. Salaries and qualifications of under-officers and employés.**—The prison commission shall, except as provided in this Title, fix the salaries of all officers and employés of the prison system upon such basis as the labor and ability of the officer or employé entitles him to, such salary to be paid monthly at the end of each month. They shall pay to those employed as guards of the convicts a salary of not less than forty (\$40.00) dollars per month; and furnish them board and lodging free. No person shall be employed as a guard to guard convicts who is not at least twenty-one years of age, of good moral character, and who is not able to read and write and has not a fair knowledge of the English language; and the prison commission may provide such other qualifications as they may deem expedient; provided, that no person shall be employed as a guard who is in any way addicted to the use of alcoholic or intoxicating liquors; and the prison commission shall require all officers and employés connected with the prison system to familiarize themselves with and conform to the rules and regulations and laws governing the prison system of this State; provided, the prison commission shall require all officers and employés with the prison system of this State to take and subscribe to the oath of office prescribed by the Constitution. [Acts 1910, 4 S. S., p. 143, § 29; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.



## CHAPTER TWO

## PRISON REGULATIONS AND DISCIPLINE

<p>Art. 6201. Transportation of prisoners; examination and classification; furnishing with copy of rules.</p> <p>6212. Only married men employed as guards for female prisoners.</p> <p>6214. Credits to prisoners who work; forfeiture.</p> <p>6215. Sunday labor.</p>	<p>Art. 6220. Restrictions of the amount of labor required.</p> <p>6223. Death of prisoner; disposition of remains; record.</p> <p>6224. Report of accidental death; penalty for failure; fees.</p> <p>6227. Discharge of prisoner.</p> <p>6231a. Prison commission may maintain suits; offsets and counterclaims.</p>
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**Article 6201. Transportation of prisoners; examination and classification; furnishing with copy of rules.**—It shall be the duty of the prison commission to make suitable and proper provisions for the safe and speedy transportation of prisoners from counties where sentenced to the prison at Huntsville, or to some other point in the prison system, as provided hereinafter, or by the sheriffs of the respective counties if such sheriffs are willing to perform such services as cheaply as said commission can have it done otherwise by reliable and competent parties under their direction. Transportation of State prisoners shall be on State account. Each prisoner who may, by direction of the prison commission, be taken direct to Huntsville from the place of conviction shall, upon arrival, be required to make a statement giving brief history of his life, showing where he has resided, the names and post office address of his near relatives, and such other facts as will tend to show his past habits and character. Inquiry shall be made by the prison physician, as may be directed by the commission, into the physical and mental condition of each such State prisoner so that the character of labor of which the prisoner is capable may be determined, and that in the event of infectious or contagious diseases, proper restriction may be imposed. The prison commission may in its discretion direct that such class of State prisoners as it is the policy of the prison system to employ in farm labor upon the State farms be sent direct from the place of conviction to such farm as they shall direct. In the event the prison commission shall direct a State prisoner sent direct to a State farm, such prisoner shall, upon arrival at the farm, be required to make the statement hereinbefore required of those sent to Huntsville, and the prison physician of such farm shall make the necessary examination of the physical and mental condition of such State prisoner and shall file such report with the prison commission. Each State prisoner shall be furnished with a copy of the prison rules and regulations providing for regulating conduct and labor of prisoners and officers connected with the system and such other information and encouragement as will enable him to conform to the rules. The prison commission shall verify by correspondence or otherwise, as far as practicable, the statements made by him and shall preserve the record and information so obtained, for future reference. [Acts 1910, 4 S. S., p. 143, § 20; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6212. Only married men employed as guards for female prisoners.**—At the place where female prisoners are kept, none but married men shall be employed as guards; and the house for such guards and their families shall be provided by the State, in which the families of the

guards shall live. [Acts 1910, 4 S. S., p. 143, § 37; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6214. Credits to prisoners who work; forfeiture.**—Every prisoner who shall do extra work or work over time shall be entitled to a credit for same and diminution of time, as hereinafter provided, as commutation time to be allowed to him in addition to the commutation time for good conduct now provided by law in Article 6217 of the Revised Civil Statutes of 1911; provided, such commutation time may be forfeited in whole or in part by the prison commission for mis-conduct or violation of the rules of the prison system. [Acts 1910, 4 S. S., p. 143, § 39; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6215. Sunday labor.**—No prisoner shall be worked on Sundays except in cases of emergency or extreme necessity; provided, the prison commission shall be authorized to work prisoners on Sunday at labor that is necessary to be performed, such as cooks, waiters, lot men, and men attending to stock, and men engaged in the necessary operation of machinery; provided, for each Sunday or each hour on Sunday a prisoner is so worked, he shall have deducted from his time two days for one day or two hours for one hour so worked by him as commutation time in addition to the commutation time now provided by law for good behavior. [Acts 1910, 4 S. S., p. 143, § 40; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6220. Restrictions on amount of labor required.**—Prisoners shall be kept at work under such rules and regulations as may be prescribed by the prison commission. No greater amount of labor shall be required of any prisoner than his physical health and strength will reasonably permit, nor shall any prisoner be placed at such labor as the prison physician may pronounce him unable to perform. No prisoner upon his admission to prison, shall be assigned to any labor until having first been examined by the prison physician. Provided, that no prisoner shall be required to work more than nine hours per day, except that the commission shall be authorized to work the prisoners on the farms of the prison system in accordance with the following plan.

During the months of December, January, and February, nine hours; During the months of March, April, July, August and November, ten hours; during the months of May, June, September and October, eleven hours.

The commission is further authorized to work prisoners on the farms such time in addition to that stipulated above, as may be agreed on by convicts who are desirous of shortening their terms as hereinafter provided.

Provided, that for each hour a prisoner may work in excess of nine hours a day, an equal amount of time shall be deducted for the term of his sentence in addition to the commutation for good behavior now allowed by law; for each nine hours of over time he shall be entitled to one day off his sentence.

The hours of labor shall be computed from the time of arriving at the place of work, where the distance is not greater than one mile and a half from the prison building, till the time of stopping work exclusive of the intermission allowed for dinner which shall not be less than one hour. Provided, life term prisoners who are worked over or extra time,

who, by reason of the nature of the sentence, can not earn commutation, shall have entered and shown on his record as a credit, the amount of over time worked, which shall be counted as time served on their sentences in addition to the actual time served, on the same rate as prisoners having a term of years, which shall be reckoned in the consideration of their cases when applying for pardon or parole. Any officer or employé violating any provision of this Article shall be dismissed from the service. [Acts 1910, 4 S. S., p. 143, § 45; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6223. Death of prisoners; disposition of remains; record.**—The prison commission shall make such rules and regulations as it may deem necessary and proper regarding reports of death of prisoners to relatives and friends, and with respect to the delivery of the bodies of prisoners to relatives and friends; provided the prison commission shall cause to be kept a record of the deaths of the prisoners and the disposition of the bodies. [Acts 1910, 4 S. S., p. 143, § 48; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6224. Report of accidental death; penalty for failure; fees.**—The prison commission or other persons in charge of prisoners, upon the death of any prisoner under their care and control, if he die suddenly or from accident or injury, shall at once notify the nearest justice of the peace of the county in which said prisoner dies of the death of said prisoner, and it shall be the duty of such justice of the peace, when notified of the death of such prisoner, to go in person and make a personal examination of the body of such prisoner, and said justice of the peace shall reduce to writing the evidence taken during such inquest, and shall furnish a copy of same to the district judge of the county in which said prisoner died; and the copy so furnished to said district judge shall be turned over by the district judge to the succeeding grand jury; and the said judge shall charge the grand jury if there should be any suspicion of wrong doing shown by the inquest papers to thoroughly investigate the cause of such death, provided that no inquest shall be required when the prisoner died from natural causes, and has been under the care of the prison physician. Any officer or employé of the prison system having charge of any prisoner at the time of the death by accident, injury or sudden death of such prisoner, who shall fail to immediately notify a justice of the peace of the death of such prisoner, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, and by confinement in the county jail not less than sixty days, nor more than one year; provided, that the justice of the peace making such examination shall be paid a fee as is now provided by law for holding inquests, said fee to be on sworn account thereof approved and paid by the prison commission out of the penitentiary funds. [Acts 1910, 4 S. S., p. 143, § 49; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6227. Discharge of prisoner.**—When a prisoner is discharged he shall be furnished with a written or printed discharge from the prison commission signed by the chairman of the board of prison commissioners with the seal of the commission affixed, giving prisoner's name, date of sentence, from what county sentenced, the amount of commutation received, if any; the trade he has learned, if any; his proficiency in

same, and such other description as may be practicable. He shall be furnished with a suit of clothing of good quality and fit, two suits of underwear, one pair of shoes and a hat, one shirt, \$5.00 in money in addition to any money which he may have to his credit with the prison commission, and redeemable and non-transferable railroad transportation to the place from which he was sentenced or to such place as he may desire, provided, that the same be not a greater distance from the place where he is released than the place from which he was sentenced. [Acts 1910, 4 S. S., p. 143, § 52; Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

**Art. 6231a. Prison commission may maintain suits; offsets and counterclaims.**—The prison commission is hereby authorized, subject to the approval of the Governor of this State, to bring and maintain in any court of competent jurisdiction in this State, suits for the collection and enforcement of all demands and debts now owing or which may hereafter become owing to said prison commission, which suits may be maintained in the courts of competent jurisdiction of the county in which the residence of the prison commission is fixed by law. In such suits the defendant or defendants are hereby authorized to plead and urge by way of offset and counter-claim any valid and lawful claims and demands which such defendant or defendants may have against the prison commission. [Act May 19, 1917, 1st C. S., ch. 32, § 1.]

See note under art. 6174.

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## CHAPTER THREE

### WORKHOUSES AND COUNTY CONVICTS

**Article 6232. [3727] Commissioners' courts to establish workhouses, etc.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

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## CHAPTER FOUR

### HIRING COUNTY CONVICTS

<p>Art. 6249. Convicts may be hired out. 6251. Hirer shall give bond, and its requisites.</p>	<p>Art. 6253. Suit on bond.</p>
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**Article 6249. [3744] Convicts may be hired out.**

**Residence of partles in county of conviction.**—Ex parte Medaris, 38 Cr. R. 493, 43 S. W. 517.

**Art. 6251. [3746] Hirer shall give bond and its requisites.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

**Requisites of bond.**—Under this article, requiring two sureties on a convict bond, a bond executed by one as principal and another as surety was invalid. A convict bond invalid as a statutory bond because not signed by two sureties as required by this article, held obligatory as a common-law bond; the custody and control of the convict given on execution and delivery of the bond being a sufficient consideration for such bond as a common-law obligation, though it was invalid as a convict bond. *Harris v. Taylor County* (Civ. App.) 173 S. W. 921.

**Art. 6253. [3748] Suit on bond.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

## TITLE 105

## PENSIONS

Chap.

2. Confederate soldiers and sailors.
3. Mothers' pensions.

Chap.

4. Mortuary pension warrants.

## CHAPTER TWO

## CONFEDERATE SOLDIERS AND SAILORS

Art.

6267. Tax; fund for payment of pensions.
- 6267a. Pension, to whom granted.
6268. Application, how made.
6272. What constitutes indigency.
6273. Payments, to be made when; affidavit; warrant.
- 6273a. Proof in case of disability of pensioner.

Art.

6279. Appropriation, how allotted to pensioners.
- 6279a. Repeal.

## COMMISSIONER OF PENSIONS

6283. Salary and general duties of.

**Article 6267. Tax; fund for payment of pensions.**—There shall be levied and collected in the same manner and at the same time that other taxes are levied and collected for the year 1913, and annually thereafter, an Ad Valorem tax of five cents on the one hundred dollars valuation thereof on all property owned in the State, on the first day of January of the year 1913, and of every year thereafter and on all property sent out of the State prior to the first day of January of any of said years, for the purpose of evading the payment of taxes thereon, and afterwards returned to the State, except so much thereof as may be exempted by the Constitution and laws of this State or of the United States which valuation shall be made in the manner prescribed by law for the assessment, levy and collection of other State and County taxes which said tax so levied and collected, shall be paid into the treasury of the State of Texas, in the same manner as other State taxes, and shall constitute a special fund for the payment of pensions for service in the Confederate army and navy, frontier organization, militia of the State of Texas and for the widows of said Confederate soldiers or sailors serving in said armies, navies or organizations or militia, in the manner and under the rules and regulations prescribe herein and prescribed in existing law not repealed hereby and as may be hereafter prescribed by law. Which said fund is hereby expressly appropriated by the Legislature of the State of Texas for the purpose herein stated. [Acts 1909, p. 231, § 1; Acts 1913, p. 282, § 1; Act April 3, 1917, ch. 188, § 2.]

**Explanatory.**—The act amends ch. 141, general laws 33rd Legislature, so as to read as set forth in the above article and arts. 6267a, 6268, 6272, 6279, 6279a, post, and art. 317a, Penal Code, post. The act also repeals said chapter 141 and arts. 6267, 6268, 6272, and 6279, Rev. St. 1911. See art. 6279a, post. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 6267a. Pension, to whom granted.**—Out of the fund to be created under the provisions of Section 2 hereof [Art. 6267], there shall be paid an annual pension of Eight and one-third ( $\$8\frac{1}{3}$ ) Dollars per month, the same to be paid quarterly on the first day of September, December, March and June of each year to every disabled and indigent soldier, who, under special laws of the State of Texas, during the war between the States, served for a period of at least six months in organizations for the protection of the frontier against Indian raids and Mexican maraud-

ers, and to every indigent and disabled soldier of the militia of the State of Texas who was in active service for a period of at least six months during the war between the States, and to every widow of such soldier who is in indigent circumstances and who was married to such soldier prior to January 1, 1900, and has never remarried, and to every indigent and disabled Confederate soldier or sailor who served for a period of at least three months of active service in the armies or navies of the Confederate States of America during the war between the States, and who became a resident of the State of Texas prior to January 1st, 1900, and who has been a bona fide resident of the State of Texas continually since January 1st, 1900, and to every widow of such Confederate soldier or sailor who is in indigent circumstances and who became a resident of the State of Texas prior to January 1st, 1900, and who has been a bona fide resident of said State continually since January 1st, 1900, and who was married to such soldier or sailor prior to January 1, 1900, and who has never remarried, and provided that the word "widow" as used in this Act and in the existing law shall not apply to nor include women born since 1861; and provided that in the event the appropriation made by the State Legislature out of such special fund for any one year shall prove insufficient to pay in full said pensions, there shall not thereby be created a deficiency outstanding as a valid claim against the State of Texas, and each pensioner shall only receive, except as herein or in existing law otherwise provided for, his or her pro rata according to the amount appropriated for that year. [Acts 1913, p. 282, § 2; Act April 3, 1917, ch. 188, § 3.]

See note under art. 6267.

**Art. 6268. Application, how made.**—Every person entitled to a pension under the foregoing sections of this Act [Arts. 6267, 6267a, 6272], shall make application in writing and under oath for the same, to the County Judge of his or her residence. Such application shall state the name, age and residence of the applicant and his or her occupation, if able to engage in one, his or her physical condition, and each and every fact necessary to qualify and entitle the applicant to a pension under the foregoing section of this Act [Art. 6272]; provided that persons now on the pension rolls of the State shall not be required to file a new application under this Act.

In the event the applicant is such a soldier or sailor as is prescribed in the foregoing section of this Act [Art. 6272], in said application he shall state the company and regiment in which he was enlisted in the Confederate army or the militia of Texas, or in the event he served in an organization for the protection of the frontier against Indian raids or Mexican marauders, and shall name and identify such organizations, or if he were an officer commissioned by the President of the Confederate States or by the Governor, or other competent authorities of the State of Texas, in said army, navy, militia or frontier organization, he shall state the date of his commission and his rank therein; and if he were detailed directly under the provisions of the conscript law for duty in any of the armories or shops of the Confederate Government or for any other labor necessary for the maintenance of the army in the field, and if he served in the Confederate Navy, he shall state the time of service in each case. Each applicant shall also state in his application what property, effects and income he possesses and shall furnish the testimony of at least two credible witnesses who personally know that he enlisted in the service and performed the duties of a soldier or a sailor claimed by him; provided however, that if an applicant for a pension

cannot secure the testimony of two witnesses, then he may furnish documents or evidence in connection with his service in the army or navy or militia, of such organization as may establish his claim for a pension. These proofs shall be made under oath and in writing before the County Judge of the county of the residence of the applicant, unless such applicant or the witnesses are not physically able to appear before the County Judge, or from other circumstances beyond the control of the applicant, cannot appear before the County Judge, then such evidence may be made before any officer authorized to administer oaths; provided that when the proof is made before any other officer than the County Judge the County Judge shall certify that the applicant and witnesses are of trustworthy character and entitled to credit and that the officer before whom the proof is made is duly qualified and authorized by law to administer oaths and take affidavits. The County Judge shall also certify to the citizenship of the applicant, who must have been a bona fide resident of the County in which he or she makes his or her application for a period of six months next before the date of said application and which fact shall be stated in the certificate of the County Judge. In every case the officer taking the proof shall administer the oath to each applicant and witness before they sign the affidavit. Provided further that if it be necessary for the applicant to go outside of the county and state for proof to establish such application, such proof may be submitted in the form of affidavits made in due form before some officer authorized to administer oaths and take the depositions of witnesses and accompanied by certificates from the County Judge of the County where made, that the witnesses are of trustworthy character and entitled to credit. In case the applicant be a widow of a soldier or sailor, who, if living would be entitled to a pension under the provisions of Section 3 of this Act [Art. 6267a], she shall make written application for such pension and therein state, under oath, that she is in fact the widow of such soldier or sailor as near as possible therein state the facts showing her to be entitled to receive a pension under the provisions of Section 3 of this Act [Art. 6267a], in the same manner as the applicant who is such a soldier or sailor must make such proof as herein stated, and thereupon such widow shall be entitled to receive such pension on the same terms as other pensioners. In the event such widow cannot make such proof, she may, by complying with the provisions of Article 6270, Revised Statutes, become entitled to receive a pension on the terms and conditions stated in said Article. [Acts 1909, p. 231, § 2; Acts 1913, p. 282, § 4; Act April 3, 1917, ch. 188, § 5.]

See note under art. 6267.

**Art. 6272. What constitutes indigency.**—To constitute indigency within the meaning of this Act, neither the applicant nor his wife if the applicant be a married man, nor both together, nor the widow, if the applicant be a widow, shall own property, real or personal, exceeding in value One Thousand (\$1,000.00) Dollars, exclusive of the homestead, and if its value be not in excess of One Thousand (\$1,000.00) Dollars, and exclusive of household goods and wearing apparel; and such applicant shall not be in the enjoyment of an income, annuity, the emoluments of an office or wages for his or her services in excess of Three Hundred (\$300.00) Dollars per year, now in the receipt of aid or of a pension from any State of the United States, or from any other public source, not an inmate of the Confederate Home or other public institution at the expense of the State. Persons who are not indigent under the

foregoing definition shall not be entitled to a pension under this Chapter. [Acts 1909, p. 231, § 6; Acts 1913, p. 282, § 3; Act April 3, 1917, ch. 188, § 4.]

See note under art. 6267.

**Art. 6273. Payments to be made when; affidavit; warrant.**—The payment of such pension shall begin on the 1st day of March and September of each year, payable at the end of each quarter and on and after the first of each quarter. The pensioner shall make his or her affidavit, or shall, in case of old age, infirmities, or physical disabilities, preventing him or her from appearing before some officer authorized to administer oaths, make statement in writing as to his or her claim or rights, in the presence of two creditable witnesses who are in no wise related to the applicant, stating the County of his or her residence, post office address, and that he or she is the identical person to whom a pension has been granted under this law, and that the conditions which existed at the time of making his or her application and on which the pension was originally granted, still exist, which affidavit shall be supported by the affidavit of some other creditable person or persons to the same fact, and which affidavit may be made before any one authorized to administer oaths, which affidavit shall be filed with the Commissioner of Pensions for examination, and if approved by him the Comptroller of Public Accounts shall draw his warrant to the amount of such pension on the Treasurer, and upon presentation the Treasurer shall pay the same out of any money in the Treasury which may be appropriated to this purpose. [Acts 1909, p. 231, § 7; Act March 22, 1915, ch. 103, § 1.]

Sec. 3 repeals all laws in conflict. The act became a law March 22, 1917.

**Countersigning warrants.**—Under Act August 19, 1910 (Acts 31st Leg. [3d Called Sess.] c. 17) § 26, subd. 3, and Act March 26, 1909 (Acts 31st Leg. c. 118) §§ 7, 15, regulating the issuance of confederate pension warrants, it is not necessary to the validity thereof that they be countersigned by the state treasurer before being sent out by the comptroller. *Dreeben v. State*, 71 Cr. R. 341, 162 S. W. 501.

**Art. 6273a. Proof in case of disability of pensioner.**—If the pensioner, on account of old age, infirmities or physical disability, shall make his or her statement in writing in the presence of two creditable witnesses, as provided in Section 1, of this Act [Art. 6273], it shall be sufficient for one of such witnesses, in whose presence the statement was made, to make affidavit stating that said statement was made and signed in his or her presence and that the statements contained therein are within the knowledge of affiant, true and correct, and when such affidavit has been made by such person and approved by the Comptroller of Public Accounts, he shall draw his warrant for the amount of such pension in the same manner as if the oath had been made by the pensioner and payment of same shall be made by the Treasurer, as provided in Section 1 of this Act. [Act March 22, 1915, ch. 103, § 2.]

**Art. 6279. Appropriation, how allotted to pensioners.**—On the first day of September and on the first day of March of each year, the Commissioner of Pensions shall first allot to each blind, maimed, and totally disabled soldier or sailor or the blind and totally disabled widow of such soldier or sailor, the sum of Eight and one-third (\$8 1-3) Dollars per month for each year, and the remainder of said appropriation shall be equally pro-rated among the pensioners who are in indigent circumstances only, and whose claim to pensions have been established and filed with the Commissioner of Pensions, as provided by law; and the Comptroller shall issue his warrants for the amounts due said pensions in the manner provided by law, and all pensioners to be paid at the end



of each quarter and all such pensions shall begin on the first day of the quarter next succeeding the filing and establishment of such application; provided, however, that the Commissioner of Pensions is authorized to fill, after the apportionment is made, any vacancies created by death or other causes, at any time between the first day of March and the first day of September each year. [Acts 1909, p. 231, § 15; Acts 1913, p. 282, § 5; Act April 2, 1917, ch. 175, § 1; Act April 3, 1917, ch. 188, § 6.]

**Explanatory.**—This article supersedes Act April 2, 1917, ch. 175, p. 387, general laws 35th Legislature, regular session, amending sec. 5 of House Bill No. 25, passed by 33rd Legislature, regular session 1913, approved April 7, 1913. See note under art. 6267.

Act April 2, 1917, ch. 175, amends "section 5 of House Bill No. 25, passed by the Thirty-third Legislature at the regular session 1913, and approved April 7, 1913, relating to prorating the appropriation for Confederate pensions among the pensioners," etc. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 6279a. Repeal.**—That Article 6267 and 6268 and 6272 and 6279, Revised Statutes of 1911, and Chapter 141 of the Acts of the Thirty-third Legislature and all other laws and parts of laws in conflict herewith be and the same are hereby repealed, but this Act be cumulative of all existing laws not in conflict herewith. [Act April 3, 1917, ch. 188, § 7.]

**Note.**—Sec. 8 is a criminal provision, and is set forth post as art. 317a, Penal Code.

### COMMISSIONER OF PENSIONS

#### Art. 6283. Salary and general duties of.

See arts. 7076 and 7085b, fixing salary of commissioner.

## CHAPTER THREE

### MOTHERS' PENSIONS

<b>Art.</b> 6285 $\frac{1}{4}$ . Petition to county commissioners.	<b>Art.</b> 6285 $\frac{1}{4}$ d. Award of pension; amount; duration of payment.
6285 $\frac{1}{4}$ a. Requisites of petition.	6285 $\frac{1}{4}$ e. Supervision of expenditure; cancellation; protection of children.
6285 $\frac{1}{4}$ b. Service of petition and notice on county judge.	6285 $\frac{1}{4}$ f. May refuse allowance; action final.
6285 $\frac{1}{4}$ c. Hearing; subpoena of witnesses; reference to commissioner.	6285 $\frac{1}{4}$ g. Residence in state and county.

**Article 6285 $\frac{1}{4}$ . Petition to County Commissioners.**—Any widow who is the mother of a child or children under the age of sixteen years and who is unable to support them and to maintain her home, may present a petition for assistance to the Board of County Commissioners of the county wherein she resides. [Act March 29, 1917, ch. 120, § 1.]

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

**Art. 6285 $\frac{1}{4}$ a. Requisites of petition.**—Such petition shall be verified and shall set forth the following:

(a) Her name, the date of the death of her husband, the names of her children, and the dates and places of their birth and the time and place of her marriage.

(b) Her residence and the length of time that she has been a resident of the State, the length of time she has lived at said residence and the address or addresses of her place or places of abode for the previous five years, and the date, as near as possible when she moved in and when she left said place or places of residence.

(c) A statement of all the property belonging to her and to each of her children, which statement shall include any future or contingent interest which she or any of them may have.

(d) A statement of the efforts made by her to support her children.

(e) The name, relationships and addresses of all her and her husband's relatives, that may be known.

(f) The names, sex, and age of each of her children, giving date and place of birth of same. [Id., § 2.]

**Art. 6285 $\frac{1}{4}$ b. Service of petition and notice on county judge.**—A copy of the petition provided for in section two hereof and a notice of the time and place when it will be presented to the Board of County Commissioners must be served on or mailed to the County Judge as chairman of the Board at least five days before the time the Board shall be requested in said petition to meet to consider the same. [Id., § 3.]

**Art. 6285 $\frac{1}{4}$ c. Hearing; subpoena of witnesses; reference to commissioner.**—Upon the return of the petition and notice the Board of County Commissioners shall examine under oath all who desire to be heard; provided, however, that the Board may, in its discretion, issue subpoenas for the attendance of witnesses and adjourn the hearing from day to day; and provided, however, that the Board may refer said matter to a commissioner to be appointed by the Board to hear such witnesses. Said commissioner shall make a report to the Board setting forth the facts as proven before him. [Id., § 4.]

**Art. 6285 $\frac{1}{4}$ d. Award of pension; amount; duration of payment.**—If, upon the completion of the examination provided for under section four hereof, the Board concludes that, unless relief is granted, the mother will be unable to properly support and educate her children, and that they may become a public charge, it may make an order directing that there shall be paid to the mother, monthly, out of the county funds, the following amounts, for the maintenance and support of the children under sixteen years old; not more than Twelve Dollars for one such child; eighteen dollars for two children; and four dollars per month additional for each additional child; and it is provided further that said allowance or relief shall be discontinued after said child or any of said children as mentioned in section one of this Act has reached the age of sixteen years. [Id., § 5.]

**Art. 6285 $\frac{1}{4}$ e. Supervision of expenditure; cancellation; protection of children.**—It shall be the duty of the Board of County Commissioners to see that any widow receiving an allowance as provided under this Act is properly caring for her children, that they are sufficiently clothed and fed, and when it is found that she is not properly caring for her child or children, or that she is an improper guardian for such child or children, or when the Board shall find that she no longer needs such support as is afforded by said allowance, the Board shall thereupon revoke or cancel any order made pursuant to this Act, at any time with or without notice, and in lieu thereof make any order that in the judgment of the Board may protect the welfare of the child or children. [Id., § 6.]

**Art. 6285 $\frac{1}{4}$ f. May refuse allowance; action final.**—Provided that the Commissioners' Court shall have the right to refuse any and all applications for allowance under this Act, and their action in so doing shall be final and not subject to review by any court. [Id., § 7.]

**Art. 6285 $\frac{1}{4}$ g. Residence in state and county.**—Provided that no person shall be entitled to receive allowances under the terms of this Act until after they have been a bona fide resident of the State of Texas for five years and the County in which they make their application for at least two years. [Id., § 8.]

## CHAPTER FOUR

## MORTUARY PENSION WARRANTS

**Article 6285½. Mortuary warrant in lieu of warrant for quarter during which pensioner dies.**—Whenever any pensioner who has been regularly placed upon the pension rolls under the provisions of law relating thereto, shall die and proof thereof shall be made to the Commissioner of Pensions within forty days from the date of such death, by the affidavit of the doctor who attended the pensioner during the last illness, or the undertaker who conducted the funeral, or made arrangements therefor, the Commissioner of Pensions shall have authority to approve and have issued by the Comptroller of Public Accounts a mortuary warrant for an amount not exceeding thirty (\$30.00) dollars, payable out of the pension fund, in favor of the heirs or legal representatives of the deceased pensioner, or in favor of the person or persons owning the accounts (proof of the existence and justice of such accounts to be made to said Commissioner under oath and in such form as he may require) for the purpose of paying the funeral expenses of the deceased pensioner. In such cases where a warrant for the pension for the quarter during which the pensioner died has been issued, the same shall be returned to the Commissioner of Pensions, who shall mark the same "Cancelled," and file it with the Comptroller of Public Accounts before the mortuary warrant herein provided for shall issue. Where such warrant for the pension has not been issued, the same shall not be issued, but the mortuary warrant herein provided for shall take the place thereof. [Act March 2, 1917, ch. 56, § 1.]

**Note.**—Sec. 2 declares an emergency and provides that the act shall take effect April 1, 1917. Became a law March 2, 1917.

## TITLE 106

## PHARMACY

Art.  
6292. Fees of board.

Art.  
6293. Pharmacists to be licensed.

**Article 6292. Fees of board.**—The State Board of Pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license to practice Pharmacy, Ten Dollars (\$10.00); for the examination of an applicant as an assistant pharmacist, Five Dollars (\$5.00); for the renewal of a license, One Dollar (\$1.00); said fee for the renewal shall be paid on or before the first day of January of each year. For issuing duplicate certificates of renewal cards, One Dollar (\$1.00); for issuing license to any proprietor or employé to conduct a drug store in towns of not more than one thousand inhabitants, One Dollar (\$1.00); for reciprocal exchanges of certificates with other states, Twenty-Five Dollars (\$25.00); for life member certificates Twenty-Five Dollars (\$25.00).

All fees shall be paid before any applicant shall be admitted to an examination or his or her name to be placed upon the register as a pharmacist, or before the license, duplicate, or renewal, or life membership can be issued. [Acts 1907, p. 394, § 13; Act March 29, 1917, ch. 128, § 1.]

**Explanatory.**—The act amends art. 6292, title 106, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 6293. Pharmacists to be licensed.**

**Failure to furnish proper drug.**—In an action for injuries caused by defendant's having furnished plaintiff, in place of acetanilid headache tablets, poisonous antiseptic tablets, evidence held sufficient to support verdict for plaintiff. *French v. De Moss* (Civ. App.) 180 S. W. 1105.

## TITLE 107 A

## POOL HALLS

<p>Art. 6319a. Local option elections. 6319b. Order for election; where held, etc. 6319e. Laws applicable; report of election; duty of commissioners' court; order prohibiting; evidence.</p>	<p>Art. 6319k. Election may be contested, when and how, etc. 6319mm. Refundment of proportionment amount of license tax paid.</p>
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**Article 6319a. Local option elections.**

**Constitutionality.**—The Court of Civil Appeals has held that, since the Legislature may exercise all power not expressly or impliedly withdrawn, it could enact the pool room local option law, and that it is no objection to such law that the constitution does not expressly authorize the Legislature to give the electors such power, and that such act does not violate the bill of rights prohibiting interference with property, etc., except by the due course of the law of the land, and is not unconstitutional as delegating legislative power contrary to Const. art. 3, § 1. *Roper & Gilley v. Lumpkins* (Civ. App.) 163 S. W. 110. And such court has further declared that a decision of the Court of Criminal Appeals adjudging the act constitutional, will be followed by a Court of Civil Appeals. *Watson v. Cochran* (Civ. App.) 171 S. W. 1067.

The Court of Criminal Appeals has held that courts have no right to strike down laws enacted by the Legislature, no matter how unwise they may deem them, unless they can find an inhibition in the Constitution (Ex parte Mode [Cr. App.] 180 S. W. 708); that the pool hall statute is not void as being vague, ambiguous, and indefinite, or as conflicting with Const. U. S. amend. 14, guaranteeing equal protection of the laws, or Const. U. S. amend. 14, or Texas Bill of Rights, § 19, providing that property shall not be taken without due process of law (Ex parte Francis, 72 Cr. R. 304, 165 S. W. 147). It has also held that the act is not unconstitutional as a delegation of legislative power to make a law, or as violative of Const. art. 1, § 28, restricting the power to suspend laws to the Legislature. Ex parte Mode (Cr. App.) 180 S. W. 708; Ex parte Francis, 72 Cr. R. 304, 165 S. W. 147. But such court, in a later decision, held that, in view of Const. art. 1, § 28, and Rev. St. 1911, art. 7355, § 8, expressly permitting the keeping of pool rooms, the provision authorizing local option with regard to the keeping of pool rooms for hire, is unconstitutional. *Lyle v. State* (Cr. App.) 193 S. W. 680.

The Supreme Court, however, has declared that the act is violative of Const. art. 1, § 28, as authorizing the suspension of the general law for the licensing of poolrooms by the voters of a county or subdivision, and that it is unconstitutional as a delegation by the Legislature of its own proper power. Ex parte Mitchell (Sup.) 177 S. W. 953.

**Relation to art. 7355.**—Rev. St. 1911, art. 7355, § 8, levying an occupation tax of \$20 on every billiard or pool table used for profit, held not in conflict with or suspended by this act. Ex parte Francis, 72 Cr. R. 304, 165 S. W. 147.

**Enjoining election.**—If this act is unconstitutional, the taxpayers could enjoin the commissioners from ordering an election, since the expenditure of public funds for the election would be unlawful, and the election would be a nullity. And persons having an established pool room business, which would be destroyed by the enforcement of the law, were entitled to enjoin the holding of an election to put it into operation. *Roper & Gilley v. Lumpkins* (Civ. App.) 163 S. W. 110.

**Art. 6319b. Order for election; where held, etc.**

**Enjoining publishing of election returns.**—The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute. *Watson v. Cochran* (Civ. App.) 171 S. W. 1067.

**Art. 6319e. Laws applicable; report of election; duty of commissioners' court; order prohibiting; evidence.**

**Enjoining canvass of election.**—Courts cannot enjoin the canvass of an election by the commissioners' court of a county on the question of the prohibition of pool halls; such canvass being a political power beyond judicial authority, and it is immaterial that the canvass might affect plaintiff's pecuniary rights. *Lyle & Eiker v. Longan* (Civ. App.) 162 S. W. 1156.

**Art. 6319k. Election may be contested, when and how, etc.**

**Constitutionality.**—The provision that, if the result of the election be in favor of prohibiting the running of pool halls in the county, a contest shall not suspend the enforcement of the law pending such contest is constitutional. *Winn v. Dyess* (Civ. App.) 167 S. W. 294.

**Enjoining publishing results.**—Irregularities which may be invoked under Vernon's Sayles' Ann. Civ. St. 1914, art. 6319k, to contest a local option election, are not grounds

for an injunction to restrain the county judge from publishing the result. *Watson v. Cochran* (Civ. App.) 171 S. W. 1067.

**Art. 6319mm. Refundment of proportionment amount of license tax paid.**—In all cases where any person, firm or association of persons, pursuing the occupation of operating pool halls or pool rooms under license issued under the laws of this state, has been or shall hereafter be prevented from pursuing such occupation for the full time for which he would otherwise be entitled, by reason of the adoption of local option prohibiting the running of pool halls or pool rooms in any county, precinct or subdivision of such county, town or city, proportionate amount of the pool hall license tax paid by him for the unexpired term shall be refunded to him. [Act March 22, 1915, ch. 77, § 1.]

**Explanatory.**—This act amends section 14, chapter 74, Acts of Thirty-Third Legislature, by adding thereto section 14a to read as above. The amendatory act took effect 90 days after March 20, 1915, the date of the adjournment of the Legislature.

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## TITLE 108

### PRAIRIE DOGS—PROVIDING FOR THE EXTERMINATION OF

Art. 6328a. Prairie dogs declared a public nuisance; duty of landowners to exterminate.	Art. 6328c. Duty of sheriff to exterminate prairie dogs; audit of expense; lien on land; compensation of sheriff.
6328b. Investigations by commissioners' court; notice to owners.	6328d. Enforcement of assessment.

**Article 6328a. Prairie dogs declared a public nuisance; duty of landowners to exterminate.**—That prairie dogs are hereby declared to be a public nuisance, and the owners of lands in any county in this State upon which prairie dogs exist shall, within two years from the date this Act takes effect, kill, or cause to be killed, all dogs on land so owned by them. [Act June 3, 1915, 1st C. S., ch. 11, § 1.]

**Explanatory.**—Sec. 5 repeals all laws in conflict. The act took effect 90 days after May 28, 1915, date of adjournment.

**Art. 6328b. Investigations by Commissioners' Court; notice to owners.**—It is hereby made the duty of the county commissioners of any county in which prairie dogs exist, to investigate and determine whether owners of lands in their respective commissioners' precincts have complied with the provisions of Section 1 of this Act [Art. 6328a], and if any such land owners have failed or refused to destroy the prairie dogs on their land, it shall be the duty of said commissioner to immediately notify the sheriff of his county of such failure, and the name and postoffice address of such owner, or his agent, and said sheriff shall immediately mail, by registered mail, a notice to the said owner, or his agent, that if he shall fail, within thirty days from and after the date of mailing of notice by sheriff, to comply with the terms of Section 1 of this Act, that the sheriff shall proceed to destroy all prairie dogs on said land. [Id., § 2.]

**Art. 6328c. Duty of sheriff to exterminate prairie dogs; audit of expense; lien on land; compensation of sheriff.**—After the failure of any owner to comply with the provisions of Section 1 of this Act [Art. 6328a], and the terms of Section 2 hereof have been performed, and said owner has not, within the time provided for in Section 2 [Art. 6328b], destroyed said prairie dogs, it shall be the duty of said sheriff to immediately pro-

ceed to destroy the dogs on land of said owner, and to use the practical and economical methods in general use. And he shall report his action, together with an itemized bill of expenses, under oath, to the first term of the commissioners court of said county, which court shall examine said account, and if found correct and reasonable, shall allow and cause the same to be paid, and, by its order duly entered, assess said amount against said owner and enter same as a lien against his land. It being provided, however, that the commissioners court may compensate the sheriff in the sum of not exceeding five dollars (\$5.00) per day for each and every day the sheriff shall have performed actual services in the matter of supervising the destruction of said prairie dogs. [Id., § 3.]

**Art. 6328d. Enforcement of assessment.**—If the owner of any land against which said costs and expenses have been assessed by the commissioners court shall fail to pay the same within thirty days after notice of such assessment, it shall be the duty of the county attorney of such county to bring suit in any court of competent jurisdiction to enforce the payment of such costs and expenses; and the county attorney shall, in each suit brought by him for said purpose, be allowed a reasonable fee, to be fixed by the court trying the cause, which fee shall be taxed as costs in the case, and upon the rendition of any judgment for such costs and expenses, execution and order of sale shall issue and be executed as in cases of other judgments. [Id., § 4.]

## TITLE 109

## PRINCIPAL AND SURETY

Art.		Art.	
6329.	Surety may require suit to be brought.	6333.	Rights of surety who makes payment on judgment.
6330.	Discharged by failure to sue, when.	6336.	Surety not to be sued alone, unless, etc.
6331.	May have question of suretyship tried, when.	6337.	Who is surety within this title.
6332.	Execution levied first on property of principal.		

**Article 6329. [3811] Surety may require suit to be brought.**

**Who is surety within meaning of act.**—One who indorsed his name on the back of a note, intending to become a surety thereon, as the payee knew, was a surety within articles 6329, 6330, entitling a surety to require the creditor to sue, etc. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

**Notice by surety to creditor to proceed against principal.**—Even though the maker of a note was insolvent, held, that a surety who gave notice to the payee and others as to whom he was surety upon nonpayment, requesting that suit be brought, pursuant to this article was discharged from liability upon failure to bring suit within the time provided by article 6330 against all parties; the bringing of such suit not being excused by articles 6336 or 1843. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

If the principal obligor is actually or notoriously insolvent, suit need not be brought to the first or second term of court after notice requiring suit to be brought, given pursuant to articles 6329, 6330, in order to fix the liability of an indorser, nor is it necessary to fix liability by protest. *Id.*

Under this article a verbal notice by a surety requiring the creditor to sue, not acted on by the creditor, does not release the surety. *Brooks v. Stevens* (Civ. App.) 178 S. W. 30.

— **Form and sufficiency of notice.**—Under arts. 6329, 6330, held that a surety on a note was not discharged by the payee's failure to sue the principal; his demand not being sufficient under the statute. *Naylor v. Anderson* (Civ. App.) 178 S. W. 620.

**Waiver of notice, etc.**—A provision in a note that each surety or indorser waived notice, protest, and presentation for payment would not deprive a surety of his right to compel the payee to sue on the note when due by giving notice pursuant to this article requiring him to institute suit within the time specified by article 6330 in order not to discharge the surety. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

**Art. 6330. [3812] Discharged by failure to sue, when.**

**Who is surety within meaning of act.**—See *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099; note under art. 6329.

**Failure of creditor to proceed against principal.**—See *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099; *Naylor v. Anderson* (Civ. App.) 178 S. W. 620; notes under art. 6329.

A mere forbearance to sue, without an agreement not to do so, will not release a surety from liability for a debt. *Speer v. Rushing* (Civ. App.) 183 S. W. 67.

In action on notes of corporation alleging defendant to be surety thereon, it was not necessary to allege that corporation principal was insolvent at institution of suit, nor any reason or excuse for failure to sue it at first or second term of court after notes matured. *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760.

**Waiver of notice, etc.**—See *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099; note under art. 6329.

**Art. 6331. [3813] May have question of suretyship tried, when.**

**Action by creditors—Parties.**—Cross-petitioner, who was defendant in suit on note and sought judgment against codefendants, held not entitled to judgment under arts. 6331, 6333, in the absence of notice to his codefendants of the cross-petition. *McNeese v. First Nat. Bank of Waco* (Civ. App.) 183 S. W. 1184.

**Art. 6332. [3814] Execution, levied first on property of principal.**

**In general.**—Where in an action on a bond, judgment was rendered against both the surety and contractor with execution first against the contractor and judgment for the surety over against him, it was immaterial whether the contractor was solvent as to the surety's liability to reimburse plaintiff. *Fidelity & Deposit Co. v. Bankers' Trust Co.* (Civ. App.) 161 S. W. 45.

Where a judgment provided for execution against sureties only if sufficient property of the principal could not be found, the return of several executions against the



principal nulla bona held prima facie sufficient to authorize a levy on the property of the sureties. *Magill v. Rugeley* (Civ. App.) 171 S. W. 528.

In action against corporation on its notes and against its president as surety thereon, where the surety's pleadings sought no such relief, it was not necessary that a judgment against him be framed to subject the corporation's property to satisfaction before proceeding against him. *Bonner Oil Co. v. Gaines* (Civ. App.) 179 S. W. 686.

The court rendering judgment against all persons signing as maker and indorser and for some of the makers against comakers or indorser must, as required by this article direct order of execution. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

### Art. 6333. [3815] Rights of surety who makes payment on a judgment.

**In general.**—Where a surety pays the obligation at maturity, on default of the principal debtor, there is an implied obligation of the principal debtor to reimburse the surety. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

A clause in an application by a contractor for a surety bond held to give the surety only the same rights on default by the contractor that it would have under the law of subrogation. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

**Rights of surety against creditor.**—Where the collected tax money belonging to the state and to a county was commingled by the collector, and in part embezzled, and the balance paid to the county, the sureties on the collector's bond to the state, after payment to the state under the terms of the bond, were subrogated to the state's rights as against the county and the sureties on the collector's county bond. *Boaz v. Ferrell* (Civ. App.) 152 S. W. 200.

Stockholders of a national bank are sureties for the debts of the bank to the amount of their capital stock, and, having advanced funds to pay such debts, are subrogated to the rights of the creditor against the bank and its securities. *First Nat. Bank of Merkel v. Armstrong* (Civ. App.) 168 S. W. 873.

A surety for a part of a secured debt, having been compelled to pay such part, was not entitled to subrogation to the rights of the creditor in the security until the creditor's demand was fully paid. *Slaughter v. Boyce* (Civ. App.) 170 S. W. 259.

A surety claiming by subrogation a fund as the property of a defaulting principal has a superior equity over a creditor claiming by equitable assignment. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

**Right to contribution in general.**—Cross-petitioner, who was defendant in suit on note and sought judgment against codefendants, held not entitled to judgment under arts. 6331, 6333, in the absence of notice to his codefendants of the cross-petition. *McNeese v. First Nat. Bank of Waco* (Civ. App.) 183 S. W. 1184.

### Art. 6336. [3818] Surety not to be sued alone, unless, etc.

Cited, *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436; *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

**Parties.**—Arts. 587, 1842, 1843, 6336, and 6337, providing the manner of suing obligors other than the principals on notes, bills, etc., apply only to suits against obligors not primarily liable, so that it is not necessary before suing the absolute guarantor of a note to sue the principal, nor to make him a party. *Slaughter v. Morton* (Civ. App.) 185 S. W. 905.

**Failure to bring suit.**—Even though the maker of a note was insolvent, held, that a surety who gave notice to the payee and others as to whom he was surety upon non-payment, requesting that suit be brought, pursuant to article 6329, was discharged from liability upon failure to bring suit within the time provided by article 6330 against all parties; the bringing of such suit not being excused by articles 6336 or 1843. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

### Art. 6337. [3819] Who is surety within this title.

Cited, *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099; *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

**Parties.**—See *Slaughter v. Morton* (Civ. App.) 185 S. W. 905; note under art. 6336.

## DECISIONS RELATING TO SUBJECT IN GENERAL

### I. CREATION AND EXISTENCE OF RELATION

**2. Validity of obligation of principal.**—A bond given by a corporation to construct a building is binding on the surety, though the contract is ultra vires as to the corporation. *Kaufman v. Christian-Wathen Lumber Co.* (Civ. App.) 184 S. W. 1045.

**5. Change from principal debtor to surety.**—That a defendant, in an action on a note, agreed with defendant maker to assume payment would not of itself show that thereafter the holder could hold the original maker as surety only. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

**9. Execution of written instruments—Conditional signature.**—Where a principal debtor promised his comaker of a note that he would procure the signature of K. and

give him security, but failed to give any security, and K. not knowing of the agreement refused to sign except as indorser, held, that K. was a surety for the comaker and entitled to judgment over against him. *Shepherd v. Mott* (Civ. App.) 166 S. W. 128.

12. **Consideration.**—An extension of time for the payment of a debt is sufficient consideration for a contract of suretyship. *Bonner Oil Co. v. Gaines* (Sup.) 191 S. W. 552.

To support a contract of suretyship, it is not necessary that any consideration pass directly to the surety, but a consideration moving to the principal alone is sufficient. *Id.*

14. **Fraud.**—A bank held entitled to recover from sureties on a note covering a past indebtedness of the principal, notwithstanding the principal's representations to the sureties that it was indemnity only for possible future losses. *First Nat. Bank v. Hix* (Civ. App.) 164 S. W. 1035.

A surety who signed a bond after a material alteration had released the liability of previous signers represented to him to be bound is not liable. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

15. **Evidence of existence of relation.**—In action on notes signed by a corporation and indorsed as a surety by defendant, evidence held to support finding that plaintiff did not accept the notes when first tendered to it, and that defendant's signature, made thereafter to induce acceptance, was not a subsequent, separate, and entirely distinct transaction from original execution and delivery, so as to require a new consideration. *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760.

## II. NATURE AND EXTENT OF LIABILITY OF SURETY

18. **General rules of construction.**—Sureties can be held only upon the very terms of their contracts. *Bomar v. Wynn* (Civ. App.) 164 S. W. 1038.

Surety bonds on building contracts are not to be construed as contracts of insurance, but as the obligation of a surety, and are to be strictly construed. *General Bonding & Casualty Ins. Co. v. Waples Lumber Co.* (Civ. App.) 176 S. W. 651.

The rule that the contract of a surety is to be strictly construed in his favor is applied only after the legal scope of its terms is determined by the same rule of construction applied to other writings. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

22. **Duties of office or employment, and performance thereof by principal.**—Bond of sureties of life insurance company's agent held to bind a surety to extent of \$1,000 and for reasonable attorney's fees if suit was necessary to enforce collection. *Shaw v. Southland Life Ins. Co.* (Civ. App.) 185 S. W. 915.

23. **Performance of contract by principal.**—Where a building contract provided that advances made by the owner should not be deemed an acceptance and did not require the owner to inspect the quality of the work, or that the architect should do so before the owner had made the advancements, the owner making the advancements could recover from the contractor's surety the amount paid an architect for services in supervising the rebuilding of defective work done by the contractor. *Welsh v. Warren* (Civ. App.) 159 S. W. 106.

Where an engineering company's contract for the construction of a waterworks system required the company to manage the construction of the system, its bond, conditioned on faithful performance of its contract, covered negligence in failing to provide a proper superintendent and labor, resulting in loss to the city. *O'Neil Engineering Co. v. City of San Augustine* (Civ. App.) 171 S. W. 524.

The surety of a dealer in sewing machines held not relieved from liability for machines obtained by the dealer and sold by him and third persons as partners. *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 950.

A principal contractor can recover from the subcontractor's surety only the reasonable cost of finishing the work, not the full amount expended by him, if he did not act in good faith in procuring the completion of the work. *American Const. Co. v. Kleinie* (Civ. App.) 177 S. W. 1176.

The owner of a building, on default of the contractor, cannot, except as authorized by the contract or the contractor's bond, make contracts, and so render the bondsman liable. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

## III. DISCHARGE OF SURETY

25. **Subsequent release or agreement.**—Where sureties on a note signed a renewal note, but the principal failed to sign, his failure to do so is no defense to an action on the original note. *Bibb v. Bluffdale State Bank* (Civ. App.) 164 S. W. 417.

29. **Change in obligation or duty of principal.**—Failure to give a surety notice of alterations in the contract costing less than 10 per cent. of the bond held not to release the surety. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Trifling alterations in a contract should not release a surety for hire; the contract being construed strictly against him, and not in his favor, as in case of a voluntary suretyship. *Id.*

Alteration of building contract and liability of contractor's surety held to release one who had contracted to indemnify the surety. *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

It is a material alteration of a building contract, releasing the contractor's surety, that, contrary thereto, the owner pays the contractor, as the work progresses, more than 75 per cent. of the price; the surety not consenting. *Id.*

Bonding company executing school building contractor's bond with provision for notification of changes held not liable for contractor's default under subsequent new contract between contractor and school trustees involving changes of which bonding company was not advised. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County (Civ. App.) 182 S. W. 386.*

Sureties on contractor's bond held released through the alteration of the contract by the contractor and builder, from liability to subcontractor, who was a beneficiary under the bond. *Bullard v. Norton (Sup.) 182 S. W. 668.*

A material alteration of the contract by building contractor and building owner will release the contractor's bondsman. *General Bonding & Casualty Ins. Co. v. McCurdy (Civ. App.) 183 S. W. 796.*

As regards liability of a building contractor's surety, it is immaterial that there were changes from the original plans, where the contract was for construction according to the changed plans. *Da Moth & Rose v. Hillsboro Independent School Dist. (Civ. App.) 186 S. W. 437.*

A change in ornamentation not affecting cost or strength is immaterial, and will not discharge a building contractor's surety. *Id.*

30. **Alteration of instrument.**—Where a constable, after receiving a claim bond, erased the name of one of the sureties thereon, and substituted another, such act was a mere spoliation by a stranger to the bond, and did not relieve the surety whose name was erased. *Sumner v. Swink (Civ. App.) 163 S. W. 355.*

Striking out from a contractor's bond a clause requiring money due under a school building contract to be paid to the building superintendent for disbursement is a material alteration. *Kerbow v. Wooldridge (Civ. App.) 184 S. W. 746.*

Changing a note to bear interest from maturity instead of from date, where made after signature of surety without his knowledge or consent, renders the note unenforceable as to him, notwithstanding it was favorable to him. *Williams v. Midland Nat. Bank (Civ. App.) 191 S. W. 1181.*

A surety, released from liability as indorser by reason of a material alteration as to interest, who received none of the consideration for the note, cannot be held liable on any theory under the common counts, although the principal is still liable on the debt, notwithstanding the alteration. *Id.*

32. **Extension of time for payment or other performance.**—Provision in a note, signed by a surety, as well as the principal debtor, that time of payment might be extended without notice thereof permitted of but one extension; so that a subsequent extension, without the knowledge and consent of the surety, binding the payee, discharged the surety. *Heaton v. State Nat. Bank (Civ. App.) 159 S. W. 844.*

An extension of time granted by the payee to one whose name did not appear on the note, but who was alleged to be a comaker, did not release a surety. *Central Bank & Trust Co. of Houston v. Hill (Civ. App.) 160 S. W. 1099.*

An agreement by the payee of a note with the principal maker, for a valuable consideration, to extend the time for payment for a definite time, made without the consent of the principal's surety, will release the surety. *Speer v. Rushing (Civ. App.) 183 S. W. 67.*

In suit on a note, evidence as to plaintiff's alleged agreement with the principal maker to extend the time for payment held insufficient to sustain verdict for defendants, sureties for the principal maker. *Id.*

Extension of time on a vendor's lien note, to one who has purchased the land and assumed its payment, though without consent of prior purchasers who had assumed it, will not release them, the holder of the note not knowing of their connection. *Newby v. Harbison (Civ. App.) 185 S. W. 642.*

An agreement not to sue on a note for 90 days constituted an extension thereof discharging the surety. *Cruse v. Gau (Civ. App.) 193 S. W. 405.*

A surety on a note is discharged from liability by an extension thereof without his consent. *Id.*

33. — **Requisites and validity of agreement in general.**—If the agreement between debtor and creditor for an extension of time for payment is conditional, it must be shown that such condition has been complied with to effect the release of the debtor's surety. *Speer v. Rushing (Civ. App.) 183 S. W. 67.*

Mere giving of time to principal maker of a note without binding agreement to that effect postponing right of action or injuring his surety will not discharge latter. *Jackson v. Home Nat. Bank of Baird (Civ. App.) 185 S. W. 893.*

34. — **Consideration.**—An agreement by the payee of a note that the maker might pay it at any time within a month was not supported by a consideration and did not discharge a surety thereon. *Robertds v. Laney (Civ. App.) 165 S. W. 114.*

The agreement whereby the payee of a note extends additional time to the principal maker for its payment, to release the principal's surety, must be supported by a valid consideration. *Speer v. Rushing (Civ. App.) 183 S. W. 67.*

Where the payee of an interest-bearing obligation promises to forbear collection for a definite time, and the principal debtor agrees to pay interest for such time, the mutual promises constitute valuable consideration, supporting the agreement, and incidentally discharging the principal's surety if made without his consent. *Id.*

36. **Payment or other satisfaction by principal.**—Where the principal on a note payable to a bank has money on deposit in the bank after maturity more than sufficient to pay it, the bank's failure to apply it to the note will not discharge the surety. *Solomon v. Merchants' & Planters' Nat. Bank (Civ. App.) 168 S. W. 1029.*

37. **Misapplication of funds or securities by creditor.**—If any of the proceeds of mortgaged property came into the hands of the indorsee of the secured note, it was its duty to apply them to the payment of the note if it knew that the money was the proceeds of such property or was chargeable with such knowledge. *First Nat. Bank v. Powell* (Civ. App.) 165 S. W. 131.

Where a note signed by a surety for supplies furnished to a cropper was subordinated to a note for additional supplies signed by the cropper alone, but the creditor received sufficient from the crop to pay both notes, he could not recover against the surety on failure to apply the proceeds of the crop to the note signed by the surety. *Ward & Co. v. Womack* (Civ. App.) 168 S. W. 433.

Where a bank holding mortgages on property of contractors and another promised if possible to protect defendants, who, with contractors, were primarily liable on a note, held that, where mortgaged property was found commingled, defendants cannot on ground of commingling goods defeat liability, no proceeds from mortgage foreclosure being applied on the note. *Hill & Meredith v. First State Bank of Hillsboro* (Civ. App.) 181 S. W. 219.

38. **Release or loss of other securities.**—The surety on a contractor's bond is not discharged because 20 per cent. is not at all times retained, as provided by the contract, where the owner not only pays in good faith on the architect's certificates, but in the end 20 per cent. is retained. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

Where creditor takes mortgage to secure payment of debt he owes surety duty of having it recorded, and if he does not do so and security is lost, surety will be released pro tanto. *Nunn v. Smith* (Civ. App.) 194 S. W. 406.

Since surety has interest in security taken by creditor, latter is regarded as trustee and must exercise good faith toward surety and do nothing to impair or release security. *Id.*

Duty of creditor who holds security is not ordinarily positive duty, and he is not liable for loss resulting from mere passivity. *Id.*

39. **Release of cosurety.**—The discharge of one of several sureties on a joint and several obligation does not release the others from liability for the released surety's portion of the debt. *Montgomery v. Boyd* (Civ. App.) 171 S. W. 273.

One surety on a joint and several obligation is not discharged because the creditor permits the cause of action against his cosurety to become barred by limitations. *Id.*

The release of one of two accommodation makers on a note after he had become a cosurety would not release other accommodation maker, as it would in no manner impair his right of contribution. *First State Bank of Teague v. Hare* (Civ. App.) 190 S. W. 1113.

40. **Unauthorized payment to principal.**—A building contract which stipulates for weekly payments of 85 per cent. on estimates of the actual labor done and material furnished is complied with, as far as a surety for performance is concerned, where there has been no payment in excess of 85 per cent. of the whole estimate made up of labor done and material furnished and does not require the payments to be in proportion only as the work done bears to the completed building. *Welsh v. Warren* (Civ. App.) 159 S. W. 106.

Evidence held to support a finding that an owner employing a contractor to construct a building under a contract calling for weekly payments of 85 per cent. on estimates of the actual labor done and material furnished did not make advances to the contractor in excess of the contract, and the contractor's surety was not released. *Id.*

The surety of a contractor can claim credit on the owner's claim for loss caused by the contractor's default for the amount of payments made by the owner in excess of those required by the contract. *Grant v. Alfalfa Lumber Co.* (Civ. App.) 177 S. W. 536.

As between the owner and the building contractor, the contractor's surety is released by failure of the owner to retain 10 per cent. for payment of artisans and mechanics, as required by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5638. *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

41. **Discharge of principal without payment or satisfaction.**—Where a surety was a party to an arrangement for the settlement of the principal's debts, and participated in negotiations with the payee to accept the settlement proposed, held, that the release of the principal by payee's acceptance was with surety's consent, and did not discharge him from liability for the balance of the note. *Peugh v. Moody* (Sup.) 182 S. W. 892.

Where a principal establishes a defense in bar, or is released from his obligation, his sureties are also released. *Wills v. Tyler* (Civ. App.) 186 S. W. 862.

44. **Neglect to give notice to surety of default.**—A provision of a note that each surety and indorser waived notice, protest, and presentation for payment fixed the liability of a surety upon nonpayment, without protest, as effectually as a protest would have done. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

A surety held released by the failure of the creditor to give notice of the principal's default in performance. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

The term "default," in a contract entitling a surety to notice of "default," held to mean the termination of the time for performance without performance, and not a later date on which the principal notified the owner that he could not perform. *Id.*

Provision of a building contractor's bond for notice to the surety of default of the contractor within 30 days after knowledge thereof held not to require it within such time after the default. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

47. **Consent by surety to transactions between creditor and principal.**—If the payee and indorser of a note, received for cattle sold and secured by a mortgage on the cat-

tle, consented to their sale by the one purchasing them from him, he could not escape liability on the note as an indorser because such sale was also consented to by the indorsee. *First Nat. Bank v. Powell* (Civ. App.) 165 S. W. 131.

If a chattel mortgagee consented to a sale of the mortgaged property, he was entitled to credit, when sued on the secured note by his indorsee, only for the proceeds of the property to the sale of which he consented. *Id.*

It would be immaterial upon the rights of the indorser of a note received for cattle and secured by a mortgage on the cattle that the proceeds of a sale of the cattle, which were sold with the consent of the indorser and indorsee, were reinvested before they finally came into the possession of the indorsee. *Id.*

A surety on a note, who agrees in the note to extensions of time for payment is not discharged by extensions without his consent. *Jackson v. Home Nat. Bank of Baird* (Civ. App.) 185 S. W. 893.

48. **Waiver or estoppel of surety.**—Sureties on contractor's bond discharged by change of contract by the parties, held not liable because failing to use diligence to see that original contract was carried out. *Bullard v. Norton* (Sup.) 182 S. W. 668.

Where a note was altered without knowledge or consent of surety, a letter from the surety in response to a request for payment written without knowledge of the alteration cannot render the surety liable as for a ratification. *Williams v. Midland Nat. Bank* (Civ. App.) 191 S. W. 1181.

Where a surety on a note had been discharged by an extension of time to the maker, an alleged letter written by the surety to the payee could not operate to reinstate the obligation, where the payee never received the letter. *Cruise v. Gau* (Civ. App.) 193 S. W. 405.

#### IV. REMEDIES OF CREDITORS

53. **Recourse to indemnity to surety.**—Where the maker of a note gave the surety a chattel mortgage, the payee is entitled to benefit of the mortgage. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

55. **Evidence.**—In an action against defendant as indorser of a note secured by a chattel mortgage, executed to him for cattle sold, evidence held to show that defendant consented to a sale of the cattle by the one purchasing them from him. *First Nat. Bank v. Powell* (Civ. App.) 165 S. W. 131.

Evidence held to sustain a verdict that time for paying a note was extended without a surety's consent. *Cruise v. Gau* (Civ. App.) 193 S. W. 405.

#### V. RIGHTS AND REMEDIES OF SURETY

##### (A) *As to Creditor*

59. **Recourse to and exhaustion of other securities.**—Surety and those secondarily liable for payment of indebtedness are entitled, upon payment thereof, to recover against principal debtor and be subrogated to rights of creditor, with respect to any security given for payment of indebtedness. *Nunn v. Smith* (Civ. App.) 194 S. W. 406.

##### (B) *As to Principal*

62. **Contracts and conveyances for indemnity.**—A building contractor's surety, having been released from all liability, held not entitled to attorney's fees out of money deposited to indemnify it against liability as surety. *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

Where indorsers of a note paid it, they were entitled to judgment upon an indemnity note given them by the maker and to a foreclosure of the trust deed securing it. *Grubbs v. Eddleman* (Civ. App.) 179 S. W. 91.

63. **Rights of surety after payment or satisfaction by him of debt or liability.**—The general rule that a surety cannot recover against his principal until the former has paid the debt does not apply where the surety has satisfied the debt of the principal by the execution of his negotiable note. *Ball v. Miller* (Civ. App.) 187 S. W. 688.

Where defendant's note to plaintiff was given in consideration of plaintiff executing his note to a bank in order to reduce the defendant's debt thereto and the bank accepted the note, plaintiff could sue defendant on his note. *Id.*

##### (C) *As to Cosureties*

68. **Right to contribution in general.**—One of two sureties cannot, when there has been no payment, sue the other to compel payment of his share to the principal debtor, for payment to the creditor. *Zachry & Gearhart v. Peterson & Avant* (Civ. App.) 171 S. W. 494.

## TITLE 110

## PRINTING—PUBLIC

Art.		Art.
6341. Expert may be employed.		6345. [Repealed.]
6342. Printing classified; prices to be paid.		

**Article 6341. [4222] An expert may be employed, etc.**

**Note.**—By Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, the salary of the state expert printer and secretary of the State Printing Board is fixed at \$2,000.

**Art. 6342. [4223] Printing classified; prices to be paid.**

**Note.**—By House Concurrent Resolution No. 1, approved January 29, 1915 (Acts 1915, Reg. Sess. p. 274), the House of Representatives of the 34th Legislature is authorized to change the form of printed bills so as to provide a page of 40 lines of ten point type, exclusive of folio line, each line to contain 33.6 of ten-point ems, for which the contractor shall be paid \$1.33½ per printed page.

**Art. 6345. [4225]**

Repealed by Act March 23, 1915, ch. 126, § 2, p. 198. See note under art. 7325.

## TITLE 112 A

## PUBLIC ACCOUNTANTS

Art.	Art.
6379a. State board created.	6379f. Qualifications of applicants for certificates.
6379b. Appointment of members of board; tenure and qualifications; certification of members; vacancies.	6379g. Certificate without examination.
6379c. Organization of board; rules and regulations; powers.	6379h. Same.
6379d. Meetings of board; examinations.	6379i. Examination fee; annual fee.
6379e. Records of board; transmission to secretary of state.	6379j. Expenses of board; accounts; funds.
	6379k. Revocation of certificate.
	6379l. Purpose and scope of law.

**Article 6379a. State board created.**—There is hereby created a board to be known as the State Board of Public Accountancy, to be composed of five members, who shall be public accountants of good moral character and qualified citizens of the State of Texas, each of whom shall have had at least three years practical experience as a public accountant on his own account immediately preceding his appointment, during the last three years of which he shall have been so engaged in the State of Texas; the members of said board to be selected and appointed as hereinafter provided. [Act March 22, 1915, ch. 122, § 1.]

Became a law March 22, 1915.

**Art. 6379b. Appointment of members of board; tenure and qualifications; certification of members; vacancies.**—Within thirty days after this Act shall go into effect the Governor of the State of Texas shall appoint five persons qualified as provided in Section 1 of this Act [Art. 6379a], who shall constitute the State Board of Public Accountancy.

The members of the first State Board of Public Accountancy provided for herein shall be appointed for and shall serve for the term ending on the third Tuesday of January, 1917, or until their successors are appointed and qualified. On and after the third Tuesday in January, 1917, and regularly every two years thereafter, the Governor of the State of Texas shall appoint five members as successors on said board, and each and every member who may be appointed to succeed any member of the first State Board of Public Accountancy shall be a certified Public Accountant, holding a certificate as such under the provisions of this Act, and resident of Texas for at least three years preceding said appointment.

Five members of the First State Board of Public Accountancy provided for herein shall confer upon themselves the title "Certified Public Accountant," provided that each member of said board shall have filed an application for such certificate with four remaining members of said board, and, provided further, that said applicant shall meet the requirements as provided in Section 8 [Art. 6379k]. All vacancies in said board caused by death, resignation, removal from the State, or otherwise, shall be filled by appointment of the Governor, and each special appointment shall be from the roster of certified public accountants created under this Act, and said appointee shall continue only until the expiration of the regular term for which the predecessor of such appointee would have held office. The revocation of the certificate of any member of this board shall terminate his membership thereon, and the Governor shall fill the vacancy so caused as herein above provided. [Id., § 2.]

**Art. 6379c. Organization of board; rules and regulations; powers.**—The members of said board shall, within thirty days after their appointment, qualify by taking the oath of office before a notary public or other officer empowered to administer oaths in the county in which each shall reside, and shall file same with the Secretary of State and receive their certificate of appointment as members of the “State Board of Public Accountancy.” At the first meeting after each biennial appointment, the board shall elect from among its members a chairman and secretary-treasurer. The board may prescribe rules, regulations and by-laws in harmony with the provisions of this law and not inconsistent with the laws of the State of Texas for its own proceedings and government and for the examination of applicants for certificates as certified public accountants; which rule shall provide that when a division on any motion occurs, at least three affirmative votes shall be necessary to the final adoption thereof. It is further provided that three members of said board shall constitute a quorum for the transaction of the business of the board.

All rules, regulations and by-laws adopted by the said board shall be filed with the office of the Secretary of State. Said board, or any member thereof, shall have the power to administer oaths for all purposes required in the discharge of its duties, and said board shall adopt a seal to be affixed to all of its official documents. [Id., § 3.]

**Art. 6379d. Meetings of board; examinations.**—The board shall meet within sixty days after its appointment and at least once in each year for the purpose of examining applicants for certificates as provided herein, and may meet as many times during the year as may be in its discretion advisable. Notice of all meetings shall be given at least thirty days prior to the dates selected for same by publication three consecutive times in three daily newspapers published in the three most populous cities in the State, such notice giving the time and place of meeting and stating the purpose to be for the examination of applicants for certificates as certified public accountants; provided, that the board may hold any number of meetings, and at any time, without giving notice by publication of such meetings, if a meeting be called for any other purpose than the examination of applicants for certificates. It is further provided that any applicant who has successfully passed an examination before said board upon three of the subjects required may have a re-examination upon the unsuccessful subject under the supervision of said board. Examinations by the board shall be on the following subjects: “Theory of Accounts,” “Practical Accounting,” “Auditing,” and “Commercial Law as Affecting Accountancy,” and each applicant shall be required to make a general average of at least seventy-five per cent on all subjects, and to each person passing such examination, if he has otherwise qualified, shall be issued by the State Board of Public Accountancy a certificate as a “Certified public accountant of the State of Texas,” and the State Board of Public Accountancy shall have the power to revoke or recall any certificate issued under this Act as hereinafter provided. [Id., § 4.]

**Art. 6379e. Records of board; transmission to Secretary of State.**—The State Board of Public Accountancy shall preserve a record of its proceedings in a book kept for that purpose, showing the name, age and duration of residence of each applicant, the time spent by the applicant in practice as a public accountant, or in employment in the office of the public accountant, and the year and school, if any, from which degrees were granted or in which the course of study was successfully completed by the applicant as required by law. Said register will show,



also whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The secretary of the board shall, on December 31 of each year, transmit an official copy of said register to the Secretary of State for permanent record, certified copy of which, under the hand and seal of the secretary of said board or Secretary of State, shall be admitted in evidence in any court or proceeding. [Id., § 5.]

**Art. 6379f. Qualifications of applicants for certificates.**—No person shall be permitted to take an examination unless he be twenty-one years of age, of good moral character, a qualified citizen of the United States, and unless he shall have had one year's study and practice in accountancy or accounting work. [Id., § 6.]

**Art. 6379g. Certificate without examination.**—The board may, in its discretion, waive the examination and issue a certificate to any person who has received and holds a valid and unrevoked certificate as a certified public accountant issued by or under the authority of any state or territory of the United States, the District of Columbia, or who holds the equivalent of such certificate by and under the expressed legal authority of any foreign nation, providing, however, that such certificate or degree shall, in the opinion of the board, have been issued under a standard fully equivalent to that of the requirements of said board, and issued by such state or territory as may extend the same privilege to certified public accountants holding certificates from this State; provided, further, that such applicant shall have qualified as provided in Section 6. [Id., § 7.]

**Art. 6379h. Same.**—The State Board of Public Accountancy shall, upon written application therefor, waive examination of any applicant, provided said applicant shall be qualified as provided by Section 6 hereof [Art. 6379f], and shall have been practicing on his own account as a public accountant, or on the behalf of another public accountant, as a senior public accountant for not less than three years, two years of which practice shall have been within the State of Texas immediately preceding said application; provided, further, that such application is filed prior to January 1, 1916. [Id., § 8.]

**Art. 6379i. Examination fee; annual fee.**—Each applicant for a certificate as certified public accountant shall, at the time of making application, pay to the treasurer of said board a fee of twenty-five dollars, and no application shall be considered by said board until said fee of twenty-five dollars shall have been paid. In case of failure on the part of any applicant to pass a satisfactory examination, said applicant may have the privilege of appearing at any subsequent examination conducted by said board for re-examination, upon the payment of an additional fee of ten dollars.

The holder of each certificate issued hereunder shall pay an annual fee of \$1.00 into the treasury of the State Board of Public Accountancy. The failure on the part of the holder of any certificate issued under this Act to pay this fee shall automatically cancel the privilege of using the title "Certified Public Accountant," but reinstatement may be had at any time within two years, or before the expiration of sixty days after the two years shall have elapsed, by the payment of the fee and application in such form as may be provided by the board and the payment further of a penalty of \$2.50 for each year lapsed. [Id., § 9.]

**Art. 6379j. Expenses of board; accounts; funds.**—Each member of said board shall receive from the secretary-treasurer of the board, out of the funds in the hands of the board, if there be sufficient thereof, all of his necessary railroad and hotel expenses for attending the meeting of said board; but otherwise shall serve without compensation. The secretary-treasurer shall be required to keep an account of all money received and disbursed, and shall render an annual statement to the Governor of the State, showing receipts and disbursements and the balance on hand. The balance shall remain in the treasury of the board, and all expenses in connection with the maintenance of the board shall be paid from same, and no provisions of this Act shall be a charge upon the common funds of the State of Texas. [Id., § 10.]

**Art. 6379k. Revocation of certificate.**—The State Board of Public Accountancy shall revoke and recall any certificate issued under this Act if the holder thereof: (1) shall be convicted of a felony; (2) shall be declared by any court to have committed any fraud; or (3) shall be declared by any court or commission to be insane or otherwise incompetent; or (4) shall be held by this board to be guilty of any act or default discreditable to the profession; provided, that written notice of the cause of such contemplated action and the date of the hearing thereof by this board shall have been served upon the holder of such certificate at least fifteen days prior to such hearing, or provided that such notice of such contemplated action and the date of the hearing thereof by this board shall have been mailed to the last known address of such holder of such certificate at least twenty days prior to such hearing; and at such hearing the Attorney General of this State, or any one of his assistants, or any district attorney designated by him, may sit with the board as legal counsellor and advisor, and to prepare for any legal action that may be determined upon by the State Board of Public Accountancy. [Id., § 11.]

**Art. 6379l. Purpose and scope of law.**—Nothing herein contained shall be construed to prevent any person from being employed as an accountant in this State in either public or private practice. The purpose of this law is to provide for the examination and the issuance of a certificate, or degree, granting the privilege of the use of the title "Certified Public Accountant," and the use of the initials "C. P. A.," as indicative of the holder's fitness to serve the public as a competent and properly qualified accountant in public practice, and to prevent those who have no such certificate or degree from using such title or initials; provided, however, the use of the initials "C. P. A." or "C. A." to designate any business other than the practice of accountants or auditors is not prohibited by this Act. [Id., § 14.]

## TITLE 113

## PUBLIC BUILDINGS, GROUNDS AND PARKS

Chap.

1. Public buildings and grounds.
2. State inspector of masonry, public buildings and works.

Chap.

3. Contractors' bonds to secure laborers and materialmen.
6. First capitol site.

## CHAPTER ONE

## PUBLIC BUILDINGS AND GROUNDS

Art.

6383. Superintendent to have charge of public buildings.
6389. Not to be used for private purposes.
- 6392a. Certain departments to occupy new departmental building.

Art.

- 6393a. Daughters of the Republic and Texas division of the Daughters of the Confederacy may use General land office building.

**Article 6383. [3823] Superintendent to have charge of public buildings.**

**Authority of superintendent.**—Notwithstanding this article gives the superintendent of public buildings and grounds authority to take charge of all public buildings not used by state officers, the question of whether the state has a present need for a room which the Daughters of the Confederacy were permitted to use until the state needed such room, by House Concurrent Resolution No. 4, approved Feb. 25, 1889 (Acts 21st Leg. p. 173), is for the Legislature to determine, and not such superintendent. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

**Art. 6389. [3829] Not to be used for private purposes.**

**What is a private purpose.**—In view of Const. art. 16, § 39, permitting the Legislature to make appropriations to perpetuate Texas history, and section 45, requiring it to preserve documents, etc., relating to Texas history, House Concurrent Resolution No. 18, passed by the Twenty-Eighth Legislature (Acts 28th Leg. p. 250), permitting the Daughters of the Confederacy to use a room in the state capitol for depositing the relics of the Confederacy, etc., was for a quasi public purpose, and not for a private purpose, within this article. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

**Art. 6392a. Certain departments to occupy new departmental building.**—The General Land Office, the Agricultural Department and such other departments and offices of the State Government as may be determined by the Governor shall occupy the new departmental building now being erected in the City of Austin at the corner of Brazos and East Eleventh Streets. [Act Oct. 2, 1917, ch. 9, § 1.]

Sec. 2 repeals all laws in conflict.

**Art. 6393a. Daughters of the Republic and Texas Division of the Daughters of the Confederacy may use General Land Office building.**—That as soon as the building located near the Capitol and known as the General Land Office Building, in Austin, Travis county, Texas, is vacated the same is hereby set aside for the uses and purposes of the Daughters of the Republic and the Texas Division of the Daughters of the Confederacy; and the said Daughters of the Republic and the Texas Division of the Daughters of the Confederacy be and the same are hereby authorized to take full charge of said building and use the same conjointly as they see proper; provided, however, that the Daughters of the Republic shall occupy the upper floor of said building and the Texas Division of the Daughters of the Confederacy shall occupy the lower floor of said building. [Act April 9, 1917, ch. 208, § 1.]

**Explanatory.**—Sec. 2 makes an appropriation to repair and remodel such building. Took effect 90 days after March 21, 1917, date of adjournment.

**Constitutionality.**—In view of Const. art. 4, § 15, art. 3, §§ 34, 38, the Legislature could by resolution set apart a particular room in the state capitol for use of the Daughters of the Confederacy. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

**Incorporation of association.**—The fact that, after the Twenty-Eighth Legislature passed House Concurrent Resolution No. 18 (Acts 28th Leg. p. 250), permitting the Daughters of the Confederacy to occupy a certain room in the state capitol, that association incorporated for the purpose of being better able to provide a home for destitute and dependent old ladies of the Confederacy would not deprive them of the benefits and privilege of the resolution. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

## CHAPTER TWO

### STATE INSPECTOR OF MASONRY, PUBLIC BUILDINGS AND WORKS

<p>Art. 6394a. Office created; salary, expenses, etc.</p> <p>6394dd. Inspection of plans and specifications of proposed municipal buildings; superintendence of such buildings, proviso.</p>	<p>Art. 6394ddd. Appointment of assistants for inspection of municipal buildings; salary and expenses; limitation of number.</p> <p>6394dddd. Inspection charge for municipal buildings.</p>
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#### Article 6394a. Office created; salary, expenses, etc.

Superseded as to amount of salary of inspector by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing salary at \$2,000.

**Art. 6394dd. Inspection of plans and specifications of proposed municipal buildings; superintendence of such buildings; proviso.**—The State Inspector of Masonry, Public Buildings and Works is hereby authorized and it is made his duty to inspect all plans and specifications for public buildings and structures and additions thereto that are to be constructed by contract or otherwise for and by the counties, cities, municipalities and other political subdivisions of the State of Texas, prior to the time such plans and specifications are adopted, and he shall aid such commissioners court, city commission, board of aldermen, city manager, school board, committee, board, person or persons, having in charge the preparation for the construction of any and all public buildings, structures and additions thereto that are to be constructed by contract or otherwise for such counties, cities, municipalities and other political subdivisions of the State of Texas, and he shall have full and final superintendence over all such buildings, structures or additions that may be constructed by contract or otherwise for such counties, cities, municipalities and other political subdivisions of the State of Texas, according to the terms of contract. Provided, that this Act shall not apply to any public buildings, structure or additions thereto, the contract price of which is less than twenty-five thousand dollars. [Act April 5, 1915, ch. 148, § 1 (sec. 2c).]

**Explanatory.**—The act amends ch. 104, Acts 32nd Leg., Reg. Sess., as amended by Act of 33rd Leg., Reg. Sess. by adding after section 2b three other sections, to be known as 2c, 2d, 2e, and 2f. The last-named section is the emergency clause, and is omitted from this compilation. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 6394ddd. Appointment of assistants for inspection of municipal buildings; salary and expenses; limitation of number.**—The State Inspector of Masonry, Public Buildings and Works shall, when the work in his department requires it, appoint not more than three assistants, such assistants to be skilled and practical mechanics in the respective trades, which enter into the construction of such public buildings, structures and additions, and such assistants to have at least ten years' practical

experience in their respective trade next prior to his appointment as assistant to the State Inspector of Masonry, Public Buildings and Works, and the salary of each of such assistants shall not exceed eighteen hundred (\$1,800) dollars per year, payable in equal monthly installments, and their actual and necessary traveling expenses while in the performance of their duties under this Act; provided, that said Inspector of Masonry shall not employ more assistants than the fees collected under the provisions of this Act shall be sufficient to pay; provided, that in no event shall the number of assistants exceed three; such expenses to be paid on itemized accounts, signed and sworn to by such assistants, and approved by the State Inspector of Masonry, Public Buildings and Works; provided, however, that the State Inspector of Masonry, Public Buildings and Works shall discontinue the service of such assistant or assistants at any time his service is no longer needed. [Id. (sec. 2d).]

**Art. 6394dddd. Inspection charge for municipal buildings.**—There shall be set aside a sum equal to one (1) per cent of the contract price or estimated cost of each building, structure or addition thereto to be constructed for such county, city, municipal or other political subdivision of the State of Texas by the respective commissioners court, city commissioners, board of aldermen, city manager, committee, board, person or persons having such public building, structure or addition thereto, in charge, and said one (1) per cent of the contract price shall be forwarded immediately prior to the beginning of such work to the State Treasurer, to be held intact for the purpose of defraying the salaries, traveling and other necessary expenses as may be incurred by the State Inspector of Masonry, Public Buildings and Works, and his assistants, in the performance of their duties as required by this Act, and the State Treasurer shall pay out said moneys upon warrants issued through the Comptroller of Public Accounts for the State of Texas as now in vogue for other departments of the State. [Id. (sec. 2e).]

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### CHAPTER THREE

#### CONTRACTORS' BONDS TO SECURE LABORERS AND MATERIALMEN

<p><b>Art.</b> 6394f. Contractors with state, municipalities, etc., to give bond; actions on bond, etc.</p>	<p><b>Art.</b> 6394g. Laborers and materialmen to have right of action, when. 6394h. Action to be commenced, when; parties.</p>
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**Article 6394f. Contractors with state, municipalities, etc., to give bond; actions on bond, etc.**

**Effect as to prior law.**—That this act requires any person contracting with a school district for a building to give a bond to pay for labor and material did not prove want of previous authority to require such a bond. *N. O. Nelson Co. v. Stephenson* (Civ. App.) 168 S. W. 61.

**Bonds—Construction.**—A condition in a school building contractor's bond for the payment of debts incurred by the trustees instead of the contractor held a clerical error. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

A school building contractor's bond requiring completion free of mechanics' liens protects a materialman, though there could be no lien on a school building. *Id.*

— **Acceptance.**—Permission to a school contractor to take down his forfeit and proceed with the work is a sufficient acceptance of his bond. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

— **Form and sufficiency.**—A school building contractor's bond not conforming to the requirements of *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 6394f-6394j, held valid as a common-law obligation. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

**Sureties—Liability in general.**—Invalidity of a contract for the construction of a school building under Vernon's Sayles' Ann. Civ. St. 1914, arts. 2904n, 2904o, does not defeat recovery by a materialman on the contractor's bond given as required by articles 6394f-6394j. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

The refusal of school trustees to accept a contractor's bond when first tendered because the sureties were not sufficient does not terminate the liability of those sureties. *Id.*

Bank lending money to contractor held to have no claim against surety on the contractor's bond, though contractor represented that money was to be used for labor and material. *Lion Bonding & Surety Co. v. First State Bank of Paris* (Civ. App.) 194 S. W. 1012.

**Art. 6394g. Laborers and materialmen to have right of action, when.**

**Action by materialmen—Sufficiency of evidence.**—In an action by the materialmen against the surety on a county building contractor's bond, evidence that the material purchased from plaintiff was used in the building held sufficient to support the judgment. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

**Art. 6394h. Action to be commenced, when; parties.**

**Action by materialmen—Parties.**—Neither the county, nor the commissioners thereof for which a building was built are necessary parties to a suit by a materialman under the contractor's bond given to secure the county and all laborers and materialmen. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

Where one of two principals on a county building contractor's bond was dead and the other had been adjudged a bankrupt, they are unnecessary parties to an action by materialmen against the surety. *Id.*

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## CHAPTER SIX

### FIRST CAPITOL SITE

**Article 6397g. Purchase of site; improvement; appropriation.**—That not to exceed fifty acres of land upon and immediately surrounding the spot upon which was erected the monument by the school children of Washington County in 1900, commemorating the point where the first capitol of Texas stood, be purchased, to be held in perpetuity by the State of Texas. Said lands shall be purchased, beautified and improved under the supervision of the Governor of the State of Texas, the Superintendent of Public Buildings and Grounds and the Attorney General, and that the sum of ten thousand (\$10,000) dollars, or so much thereof as may be necessary, be and the same is hereby appropriated for that purpose out of any funds in the State Treasury not otherwise appropriated, and the Comptroller of Public Accounts is hereby authorized and directed to issue warrants on accounts approved by the Governor; provided, no portion of this appropriation shall be available, and no voucher issue therefor, until the title to said land and deeds and conveyances therefor shall be examined by and be satisfactory to the Attorney General of this State. [Act May 20, 1915, 1st C. S., ch. 3, § 1.]

## TITLE 114

## QUO WARRANTO

Art.	Art.
6398. Petition for, when presented.	6402. Judgment of court.
6401. Proceedings as in civil cases.	

**Article 6398. [4343] Quo warranto, when.**

**In general.**—Any power of the court to correct abuse of discretion of county school trustees, in changing territory of one school district to another, can be exercised only in quo warranto instituted by a proper party. *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

A suit by school districts and taxpayers against county school trustees to enjoin redistricting of the county could be maintained as an ordinary suit between the parties, and need not be by a proceeding by quo warranto under the statute. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

Whether acts of county school trustees in abolishing a school district and annexing it to two other districts was an abuse of their discretion may not be tested by proceeding in quo warranto under statute, which is a remedy employed only to test the actual right to an office or franchise. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

A suit by district school trustees and taxpayers against county school trustees to enjoin abolition of a school district and its annexation to two other districts could be maintained as an ordinary suit, and need not be by a proceeding in quo warranto under statute to review acts of county school trustees. *Id.*

**Exercise of corporate franchises and powers.**—Quo warranto is a proper remedy where a charter election is void because preliminary questions were not submitted by the council to the voters. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

**Parties plaintiff or petitioners.**—The relator in quo warranto under articles 6398-6404, is the real plaintiff, and the state is merely a nominal party. *Cole v. State* (Civ. App.) 163 S. W. 353.

A county attorney may not bring suit to forfeit charter of a private corporation, exclusive authority in that respect being conferred by Const. art. 4, § 22, on the Attorney General. *Union Men's Fraternal & Beneficiary Ass'n v. State* (Civ. App.) 190 S. W. 242.

**Art. 6401. [4346] Proceedings as in civil cases.**

**Time for appeal.**—Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 2079, providing for appeals from interlocutory orders appointing receivers, and article 1608, providing for the filing of a transcript within 90 days in appeal cases, held, that the defendant had 90 days from the time the appeal was perfected from an order appointing a receiver to file a transcript of the record, in view of the history of legislation as shown by articles 2084, 2099, 2105, 2108, 4644, 6401 and chapter 20 of title 37. *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

**Parties.**—Where quo warranto was instituted on relation of a private individual to test the validity of the incorporation of a municipality, an appeal from an adverse judgment by such private relator, in which the state did not join, was unsustainable. *State v. Nelson* (Civ. App.) 170 S. W. 814.

**Failure to file transcript.**—Failure of appellants, in quo warranto proceedings, to file the transcript within 20 days after perfecting the appeal, as required by Court of Civil Appeals rule 7 (142 S. W. x), held a jurisdictional defect, which could not be excused because of mistake, inadvertence, or oversight of the attorneys for both sides, and of the district judge. *State v. Nelson* (Civ. App.) 170 S. W. 814.

**Art. 6402. [4347] Judgment of court.**

**Judgment.**—In quo warranto by the state under articles 6398-6404, the only judgment permitted is of ouster from office and the installation of the relator, while the contest of the election under articles 3046-3078 may result in the contestant obtaining a certificate of his election or in a declaration of the illegality of the election and the ordering of another. *Cole v. State* (Civ. App.) 163 S. W. 353.

In quo warranto by the state on relation of an individual under articles 6398-6404, the district court had the power to oust defendant from the office of mayor without attempting to install the relator therein. *Id.*

## TITLE 115

## RAILROADS

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|-------|---|-------|---|
| Chap. | 1. Incorporation of railroad companies.                             | Chap. | 12. Forfeiture of charter.                  |
|       | 3. Public offices and books.  |       | 13. Ticket agents—Authority and duty.       |
|       | 4. Officers of railroad corporations.                               |       | 14. Liable for injuries to employés.        |
|       | 6. Stock and stockholders.  |       | 15. Railroad commission of Texas.           |
|       | 8. Right of way.  |       | 16. Issuance of stocks and bonds regulated. |
|       | 9. Other rights of railroad corporations.                           |       | 17. Interurban railroad companies.          |
| 10.   | Restrictions upon, duties and liabilities of railroad corporations. |       | 18. Street railways.                        |
| 11.   | Collection of debts from railroad corporations.                     |       | 18a. State railroad.                        |
|       |   |       | 19. General provisions.                     |

## CHAPTER ONE

## INCORPORATION OF RAILROAD COMPANIES

**Article 6408. [4352] Articles of incorporation shall contain what.**

Cited, *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047; *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 167 S. W. 322.

## CHAPTER THREE

## PUBLIC OFFICES AND BOOKS

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|------|---|------|---|
| Art. | 6423. Shall keep offices in this state. | Art. | 6435. Change of location of general offices, etc., prohibited; application to receivers and purchasers. |
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**Article 6423. [4367] Shall keep offices in this state.**

Cited, *Logue v. Southern Kansas Ry. Co. of Texas*, 106 Tex. 445, 167 S. W. 805.

**Constitutionality.**—This article is within the police power; does not deny the equal protection of the law because of its classification; does not interfere with interstate commerce; does not impair the obligation of charter contracts; and is not retroactive as applied to a corporation subsequently incorporated. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

The state having the power to create a corporation may fix by initial legislation the location of its governing offices. *Id.*

The power to regulate and reasonably govern the operation of railroads in the public interest and convenience is legislative, and the courts will not interfere. *Id.*

**Applicability—In general.**—A corporation organized under art. 6625, by a purchaser of the property and franchises of a railroad company sold to pay debts, held governed by this article as to location of offices. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

— **To suits.**—A railroad corporation required by this article to maintain its general offices in a designated county, may not rely on a plea of privilege to be sued in another county. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

**Location of general offices—Change.**—Under this article a railroad locating its offices on its line in consideration of county aid cannot change it. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

**Contracts for location of shops and offices—Essentials in general.**—A contract between a railroad company and a county voting aid need not be in writing, or appear in the minutes of the commissioner's court. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

A contract within this article must have been authorized by the company or ratified by it. *Id.*

— **Knowledge of directors.**—Evidence held to show that a contract for the location by a railroad of its general offices, in consideration of county aid, was made



with the knowledge of and approval by its board of directors. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

— **Validity.**—A purchaser of the property and franchises of a railroad company contracting for a valuable consideration as to location of its general offices may not complain of this article, as impairing the obligation of charter contract. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

— **Blind successors.**—This article prohibits a railroad company from changing the place of its general office, machine shops, and roundhouses when once located, and a corporation formed by a purchaser is subject to the restriction; a bona fide sale of the property and franchises of a railroad corporation not discharging the obligations. And a railroad corporation formed by the consolidation of two railroads held required to maintain its principal office at one place named in its charter, or at a convenient point on its line. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

**Art. 6435. [4376] Change of location of general offices, etc., prohibited; application to receivers and purchasers.**—No railroad corporation shall have the right in the future to change the location of its general offices, machine shops or round houses, save with the consent and approval of the Railroad Commission of Texas, and this shall apply also to receivers and to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers or their assigns, provided, however, that the Railroad Commission of Texas shall not consent to, or approve of, any removal or change of location, in conflict with the restrictions of Article 6423 of the Revised Civil Statutes of Texas of 1911; and, provided further, that no consent or approval of the Railroad Commission of Texas shall be required before the return of general offices, machine shops or round houses to previous locations when ordered or required under judgments in suits now pending in trial or appellate courts. [Act Feb. 7, 1854; P. D. 4888; Act Feb. 20, 1915, ch. 20, § 1.]

**Explanatory.**—The act amends art. 6435, Rev. Civ. St. 1911. Took effect 90 days after March 20, 1915, date of adjournment.

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## CHAPTER FOUR

### OFFICERS OF RAILROAD CORPORATIONS

Art. 6445.	Corporate powers vested, etc.	Art. 6446.	President and other officers.
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**Article 6445. [4386] Corporate powers vested in directors.**

**Power of president.**—See *Logue v. Southern Kansas Ry. Co. of Texas*, 167 S. W. 805, 106 Tex. 445, affirming judgment *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11; note under art. 6446.

**Art. 6446. [4387] President and other officers.**

**Authority of officers and agents—President.**—Under articles 6445, 6446, the president could not contract for the maintenance of the road, its offices and station on certain land, in the absence of express authority from, or ratification by, the directors. *Logue v. Southern Kansas Ry. Co. of Texas*, 167 S. W. 805, 106 Tex. 445, affirming judgment *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

— **Local agent.**—A local agent held not entitled to demand reimbursement from a railroad company for rent paid by him on a building rented and used as a depot without authority from the railroad company. *Missouri, K. & T. Ry. Co. of Texas v. Hood* (Civ. App.) 172 S. W. 1120.

## CHAPTER SIX

## STOCK AND STOCKHOLDERS

Art. 6458.	Extent of stockholder's liability for debts of corporation.	Art. 6464a.	Decrease of capital stock; prerequisites.
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**Article 6458. [4399] Extent of stockholder's liability for debts of corporation.**

**Liability of stockholders—Nature.**—This article making stockholders of railroads liable to its creditors to the amount unpaid on their stock, makes the stockholders sureties to that extent. *Texas, G. & N. Ry. Co. v. Berlin (Civ. App.) 165 S. W. 62.*

— **Insolvency.**—Under this article it is unnecessary to prove insolvency of the corporation. *Texas, G. & N. Ry. Co. v. Berlin (Civ. App.) 165 S. W. 62.*

— **Judgment and execution.**—Under this article the judgment should direct execution against the corporation, and, if not satisfied, then against the stockholder. *Texas, G. & N. Ry. Co. v. Berlin (Civ. App.) 165 S. W. 62.*

**Art. 6464a. Decrease of capital stock; prerequisites.**—A railroad corporation may, in the same manner prescribed in this chapter for an increase of capital stock, decrease its capital stock in any amount which shall not reduce the same to less than one thousand (\$1,000) dollars for every mile of its road as planned and described in its charter. But no such decrease shall prejudice the rights of any creditor of such corporation in any claim or cause of action such creditor may have against the company or any stockholder or director thereof. If such decrease relates to or affects any part of the stock that has actually been subscribed or issued, then such decrease shall not become effective until full proof is made by affidavit of the directors to the Secretary of State of the financial condition of such corporation, giving therein all its assets and liabilities, with names and postoffice addresses of all creditors and amount due each; and where the proposed decrease affects any part of the subscribed or issued stock as aforesaid the Secretary of State may require as a condition precedent to the filing of such certificate of decrease that the debts of the corporation be paid or reduced. [Act April 7, 1915, ch. 153, § 1.]

**Explanatory.**—The act amends ch. 6, title 115, Rev. St. 1911, by adding thereto art. 6464a, to be inserted immediately after art. 6464. The act took effect 90 days after March 20, 1915, date of adjournment.

## CHAPTER EIGHT

## RIGHT OF WAY

Art. 6481.	Right to construct anywhere in the state, etc.	Art. 6506.	Statement to be filed, etc.
6482.	Right of way over public lands.	6507.	Regular judge disqualified; special judge appointed.
6485.	Across streams of water, etc.	6508.	County judge shall appoint.
6486.	Opening through fences, etc.	6518.	Rules of damages, etc.
6488.	Where may be made, etc.	6519.	Same subject.
6492.	Failure, etc.	6520.	Same subject.
6494.	Crossings of public roads, etc.	6521.	Injuries and benefits not to be estimated as to.
6495.	Culverts, etc.	6522.	Assessments to be in writing.
6497.	Streets not to be taken without.	6527.	May remove cause, when.
6502.	May enter upon adjacent land and take material, etc.	6530.	Damages to be paid, when.
6504.	When owner and corporation can not agree.	6531.	Practice in case specified.
6505.	Shall not enter on land, except.	6532.	Right of way, how construed.
		6534.	Right of way vested how.

**Article 6481. [4422] Right to construct, etc., road anywhere in the state.**

**Duty to provide crossing.**—See *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 158 S. W. 1179; note under art. 6485.

**Art. 6482. [4423] Right of way over public lands.**

Cited, *Washington County v. Pendleton* (Civ. App.) 178 S. W. 979.

**Art. 6485. [4426] Right to construct across streams of water, etc.**

Cited, *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493; *Cleburne St. Ry. Co. v. Dickey* (Civ. App.) 168 S. W. 475; *Marshall & E. T. Ry. Co. v. Petty* (Sup.) 180 S. W. 105 (in dissenting opinion).

**Applicability.**—Articles 6485, 6494, are limited to public roads maintained and established by the county authorities, so that, as to crossings over other highways, the railroads are only required to exercise ordinary care. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 164 S. W. 1125.

Under articles 6485, 6495, it is proper to compel a railroad company by injunction to construct openings in its roadbed, which will permit surface waters and natural streams to escape, so as not to overflow adjoining land. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

Under articles 6485, 6486, 6494, 6603, railroad held absolutely liable for killing stock entering the right of way by an unfenced crossing leading from a road parallel to the tracks to a private closed lane having no outlet. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

**Duty to restore and repair—Questions for jury.**—Where plaintiff was injured as the result of a defective railroad crossing over a highway which was not a public county road, or one where the railroad was absolutely bound to keep the crossing in repair, the court did not err in submitting the question of the railroad's want of knowledge of the alleged defect as bearing on the question of its negligence. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 164 S. W. 1125.

Under this article it is a question for the jury whether a crossing was properly restored or kept in repair. *Horton v. Texas Midland R. R.* (Civ. App.) 171 S. W. 1023.

**Damages for failure to restore and repair—In general.**—Defendant railroad company, in raising its tracks over a highway crossing, having failed to provide a crossing on either side of the traveled part of the road for the use of the public, as it could have done, and as it was its duty to do under Const. art. 10, § 1. and Rev. Civ. St. 1911, arts. 6481, 6485, held guilty of actionable negligence authorizing a recovery for injuries to plaintiff by the frightening of his horse as he attempted to lead it over the unprotected rails and ties. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 158 S. W. 1179.

A railway required by statute to keep its crossings in repair, whose negligence concurred with that of its contractor in obstructing its crossing, held liable for resulting personal injuries. *Quanah, A. & P. Ry. Co. v. Goodwin* (Civ. App.) 177 S. W. 545.

**Art. 6486. [4427] Opening through fences, etc.**

Cited, *Missouri, K. & T. Ry. Co. of Texas v. Attaway* (Civ. App.) 180 S. W. 1151.

**Inclosed land divided by right of way.**—A railroad company cannot be compelled to place a crossing leading from a road parallel to the right of way to a private lane closed by a gate and having no outlet. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

Where a railroad right of way divides an inclosure, the owner may demand and compel the railroad company to place gates in the fences along the right of way to permit passage from one part of the inclosure to the other as required by this article. *Penshorn v. International & G. N. Ry. Co.* (Civ. App.) 186 S. W. 868.

**Duty to keep gates closed.**—Where a railroad places gates at openings in right of way fences, dividing an inclosure as required by this article, the duty devolves on the owner of the premises to keep such gates in repair. *Penshorn v. International & G. N. Ry. Co.* (Civ. App.) 186 S. W. 868.

**Damages for failure to construct crossing—In general.**—Under articles 6485, 6486, 6494, 6603, railroad held absolutely liable for killing stock entering the right of way by an unfenced crossing leading from a road parallel to the tracks to a private closed lane having no outlet. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

The placing of gates in a right of way fence dividing an inclosure as required by this article, although unnecessary by reason of another passageway under railroad trestle, is not negligence rendering the railroad liable for live stock escaping through such gates and being killed on right of way. *Penshorn v. International & G. N. Ry. Co.* (Civ. App.) 186 S. W. 868.

**Art. 6488. [4429] Where may be made.**

Cited, *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

**Art. 6492. [4433] Failure, etc.**

**Actions for negligence in maintenance of crossings—Liability in general.**—In action for damages for blocking farm crossing with cars for 8½ days, plaintiffs could recover

damages for melons pulled and partly loaded, and for exposure of oats to rain, and increased expense in carrying water to stock and in working his crop. *Chicago, R. I. & G. Ry. Co. v. Nicholson* (Civ. App.) 191 S. W. 167.

— **Measure of damages.**—In action for damages from blockading a farm crossing by loaded gravel train, the measure of damages was any difference between the value of the use of the farm while the crossing was blocked and what such value would have been if there had been no such blockade. *Chicago, R. I. & G. Ry. Co. v. Nicholson* (Civ. App.) 191 S. W. 167.

— **Contributory negligence.**—Where plaintiff's farm crossing was blockaded by a train for 8½ days, he was not negligent in not preparing a crossing to go around the obstruction. *Chicago, R. I. & G. Ry. Co. v. Nicholson* (Civ. App.) 191 S. W. 167.

### Art. 6494. [4435] Crossings of public roads.

Cited, *Marshall & E. T. Ry. Co. v. Petty* (Sup.) 180 S. W. 105 (in dissenting opinion).

**To what crossings applicable.**—Articles 6485, 6494, imposing on railroads the absolute duty to keep highway crossings in repair, are limited to public roads maintained and established by the county authorities, so that, as to crossings over other highways, the railroads are only required to exercise ordinary care. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 164 S. W. 1125.

The contention that where a railroad crosses a public highway it is not required to keep the approaches in repair if properly constructed, unless the approach constitutes a part of the track or crossing proper, is untenable. *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493.

Under articles 6485, 6486, 6494, 6603, railroad held absolutely liable for killing stock entering the right of way by an unfenced crossing leading from a road parallel to the tracks to a private closed lane having no outlet. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

### Art. 6495. [4436] Shall first construct necessary culverts, or sluices.

Cited, *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

1. **Duty to construct culverts or sluices—in general.**—Under articles 6485, 6495, relating to the right of way of railroad companies, it is proper to compel a railroad company by injunction to construct openings in its roadbed, which will permit surface waters and natural streams to escape, so as not to overflow adjoining land. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

Where a railroad wing dam together with a fill by its codefendant caused a stream to overflow, the railroad company was liable. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

This article, being a proviso of Act Aug. 15, 1876 (Acts 15th Leg. c. 97) § 23, held not retroactive, nor to impose a liability upon railroad which constructed its roadbed before passage of the act. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 189 S. W. 1006.

Under Const. art. 1, § 16, prohibiting the making of any retroactive law, defendant railroad, who had constructed its roadbed at time of passage of this article, held entitled to demand proof of its negligence in construction of its roadbed before it could be held for damages. *Id.*

4. — **Floods or overflows.**—Under this article, held that defendant railroad would be liable to plaintiff for damage caused by flooding of basement if caused by railroad's failure to construct culverts or sluices necessary to pass off surface water. *Pence v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 190 S. W. 538.

10. **Actions for damages for breach of duty—Liability in general.**—As defendant railroad's liability for damages caused by surface water must be by failure to comply with this article, it owed no duty to plaintiff to give notice that an opening had been washed through roadbed, that opening had been cribbed up, or that it intended to put a culvert under its roadbed. *Pence v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 190 S. W. 538.

12. — **Cause of injury.**—Where plaintiff's crops would have been inundated in any event, but fills under a railroad trestle caused the waters to stand longer on plaintiff's land, an award for destruction of crops cannot stand, being based on pure conjecture, there being nothing to show what part of the damage resulted from standing of the water. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

A flood not shown to have been higher than previous floods, but which plaintiff claimed injured his premises because the defendant railroad company had partially filled in trestles of a dirt embankment causing the water to back up, is not an act of God excusing the railroad company from liability. *Id.*

The unprecedented character of the rainfall will not relieve defendant from liability, where it diverted waters from their natural channel and impounded them, and then permitted them to escape on plaintiff's land. *Texas & P. Ry. Co. of Texas v. Frazer* (Civ. App.) 182 S. W. 1161.

A railroad failing to construct necessary culverts in an embankment, as required by this article, held liable for all damages of which the failure was the proximate cause. *Missouri, K. & T. Ry. Co. of Texas v. Evans* (Civ. App.) 183 S. W. 93.

Railroad is liable for flooding lands, though extraordinary and unprecedented floods concur with road's negligence in construction and maintenance of embankment in causing damage. *Missouri, K. & T. Ry. Co. of Texas v. Stearnes* (Civ. App.) 185 S. W. 646.

A railroad company is not liable for alleged damages to land from overflow, though caused by its negligent construction or maintenance of embankments and culverts, diverting the natural flow of surface or creek waters, if such overflow occurred when natural conditions would have caused the same damages. *Scott v. Northern Texas Traction Co.* (Civ. App.) 190 S. W. 209.

A railroad which constructed an embankment and backed water upon plaintiff's land from one direction held not liable for damages due to fact that the land on the other sides of plaintiff's land was higher than his. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 194 S. W. 662.

13. — **Negligence.**—In an action against railroads and the receiver of one for damages to plaintiff's lands from the roads' failure to construct necessary culverts, the sole issues, concerning defendants' compliance with their statutory duty, and whether damages resulted from any failure, should have been submitted to the jury without reference to negligence. *San Antonio & A. P. Ry. Co. v. McCammon* (Civ. App.) 181 S. W. 541.

In an action against a railroad company for destruction of plaintiff's crops which he claimed resulted from an embankment partially filling railroad trestles which caused flood waters to back up and inundate his land, evidence held insufficient to show that the fill caused the damage. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

Defendant to be liable for damages from the breaking of a dam, by which it impounded waters which it diverted, need not have been negligent. *Texas & P. Ry. Co. v. Frazer* (Civ. App.) 182 S. W. 1161.

This article imposes an absolute duty, and exercise of ordinary care would be no defense to a suit to enforce compliance with act. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 189 S. W. 1006.

17. — **Measure of damages in general.**—In an action against a railroad company for overflowing plaintiff's land by failing to construct necessary culverts, the measure of damages is the market value of the land immediately before and immediately after the particular overflow. *Stephenville N. & S. T. Ry. Co. v. Walton* (Civ. App.) 160 S. W. 651.

19. — **Johnson grass.**—In action against a railroad company negligently failing to construct culverts in an embankment which, with Johnson grass thereon, was by flood carried on plaintiff's land, refusal of an instruction directing a finding for the company held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Evans* (Civ. App.) 183 S. W. 93.

Evidence held to justify a finding that a railroad company negligently failed to construct culverts in an embankment on which there was Johnson grass, and that in consequence thereof the embankment and the grass were washed by flood onto plaintiff's land. *Id.*

25. — **Pleading.**—Where plaintiff alleged that defendant railroad was governed by this article, passed in 1876, the duty devolved upon him to show that fact, so that defendant under general denial could prove that it had built its roadbed prior to 1876. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 189 S. W. 1006.

#### Art. 6497. [4438] Streets, etc., of incorporated cities or towns shall not be taken without, etc.

**Grant of right to use streets—Construction and effect.**—Under railroad charter and ordinances of city of Galveston, railroad and successor held not authorized to relocate line of connection between two streets whenever necessary to avoid sea wall and preserve continuity of line, especially in view of this article. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 186 S. W. 368.

#### Art. 6502. [4443] May enter upon adjacent land and take material, etc.

**Entry upon adjacent land—In general.**—Where a railroad company, which had contracted for a right of way, took dirt from land outside its right of way, this act was an independent trespass entitling the then owner to recover damages, and such right did not pass to a subsequent grantee of the land, unless it was specially conveyed. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

#### Art. 6504. [4445] In case corporation and owner can not agree, etc.

**Compliance with statute.**—The testimony of an agent of a corporation, seeking to condemn land for a right of way, that he had asked the owner what he would settle for, and that the owner asked such a price that it was impossible to agree to it, and that no agreement was made, showed an effort by the company to reach an agreement, entitling it to condemn. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Mode of acquiring land.**—Const. art. 1, § 17, does not prevent a railroad corporation from acquiring by adverse possession title to land occupied by it as a right of way. *Gulf, C. & S. F. Ry. Co. v. Brandenburg* (Civ. App.) 167 S. W. 170.

Since a corporation may recover land on record title acquired by ultra vires act, no reason can be advanced why it cannot do so on a title by limitation so acquired. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Const. art. 1, § 17, providing that no personal property shall be taken for public use without adequate compensation first made, does not prevent a railroad from acquiring title to land by adverse possession. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 193 S. W. 179.

**Land that may be taken.**—Such interest in the land of one railroad company as is necessary for the depot purposes of two other companies, under the order of the Railroad Commission that the three construct a union depot on the depot site of the first company, may be condemned by them, under this article. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

Land of a railroad, though subject, with the rest of its property, to the lien of all its mortgage bonds, may be condemned for a union depot; the bondholders being made a party to the proceedings. *Id.*

A railroad's depot site, though condemned by it for such purpose, may be condemned for a union depot, which it and another company are ordered by the Railroad Commission to construct thereon. *Id.*

**Use of land condemned.**—Erection of a fence along a building abutting land taken by a railroad for a track and foot passage to its depot is not an additional use, but a means adopted for its protection in the uses enumerated in the decree of condemnation. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

Evidence that certain business places were not fenced off from a railroad right of way does not show that maintenance of a fence in front of plaintiff's business was unnecessary and an additional servitude upon the land acquired by eminent domain. *Id.*

**Art. 6505. [4446] Shall not enter upon land, etc., except for a lineal survey.**

**Remedies of owner for trespass—Damages in general.**—Under this article, owner of land unlawfully appropriated by railroad company without condemnation held entitled to recover damages for special injuries, including damages to adjacent land by the operation of trains; article 6518 not applying. *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373.

Where two railroad companies both trespassed on land and operated trains thereon, they were liable as joint tort-feasors for the value of the land and damages to adjoining land from the operation of the trains. *Id.*

Where land is appropriated for a railroad without condemnation, it is not essential to a recovery of damages to adjoining land from the operation of trains that the tracks were negligently constructed, or the trains negligently operated. *Id.*

A railroad company held liable for mental suffering and physical injuries suffered from fright caused by its agents under its instruction trespassing on premises at night. *St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 172 S. W. 709, 106 Tex. 518, affirming judgment (Civ. App.) 141 S. W. 135.

**Reparation for trespasses.**—Where a railroad company constructed its line under a written contract for the purchase of a right of way, specific performance will not be denied because it had not made reparation for independent trespasses upon other land of the owner of the right of way. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

**Art. 6506. [4447] Statement to be filed with county judge.**

Cited, *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Art. 6507. Regular judge disqualified; special judge appointed.**

Cited, *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Art. 6508. [4448] County judge shall appoint commissioners.**

Cited, *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Jurisdiction.**—A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24. *Balch v. San Antonio, F. & N. R. Co.* (Civ. App.) 161 S. W. 1091.

**Art. 6518. [4459] Rule of damages.**

Cited, *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

**Measure of compensation—In general.**—Where a railroad sought to condemn land for a right of way, it was not necessary for the landowner to allege special damage; the damage being fixed by law at the value of the land actually taken, and the injury to the remaining portion by the construction of the railroad. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 158 S. W. 570.

Evidence, in an action to condemn 5.72 acres of land for a railroad right of way, held to sustain a verdict awarding defendant \$150 for the land actually taken. *San Antonio, U. & G. R. Co. v. Bobo* (Civ. App.) 163 S. W. 377.

Measure of damages for permanent injury to land by the construction of a railroad near it is the difference between its market value immediately before construction and operation and immediately thereafter. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

— **Matters to be considered.**—Where land is appropriated for a railroad without condemnation, it is not essential to a recovery of damages to adjoining land from the operation of trains that the tracks were negligently constructed, or the trains negligently operated. *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373; *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

Where farming land condemned for right of way purposes was worth more if sold in connection with rough land comprising part of the same tracts, defendant was entitled

to an award for the land actually taken, on the basis of the higher valuation. *San Antonio, U. & G. R. Co. v. Bobo* (Civ. App.) 163 S. W. 377.

Instructions, in an action for damage to realty by constructing railroad terminal adjacent thereto, held erroneous, as permitting the jury to allow plaintiff, in addition to the amount allowed for depreciation in the value of the land from present operations, a further amount for damages which she might suffer in the future. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

In forming their opinion as to the difference between the value of land before and after the construction of a railroad adjacent thereto for the purpose of testifying as to the damage sustained, witnesses may take into consideration the past and present effect of the construction and operation, as well as probable future constructions and operations, upon the depreciation of the value of the property. *Id.*

In action for damage to land by the construction of a railroad terminal near it, the jury could not allow, in addition to the depreciation in value immediately after the roads were constructed, damages which might result from further operations which plaintiff might, in reasonable probability, sustain in the future, if such probable operations were not a part of the causes which produced the diminution just after the commission of the original acts. *Id.*

In determining the amount of damages from injury to realty by constructing a railroad adjacent thereto, all elements causing depreciation in the value of the land may be considered, including a probable or contemplated increase of operations. *Id.*

In an action for damage to realty by constructing a railroad terminal, a requested charge that, if the market value of the land for any use to which it might be put, or to which it was adapted, immediately after the construction of the tracks and beginning of operations was equal to its market value for any use to which it might be put immediately before such construction, plaintiff could not recover should have been given. *Id.*

In condemnation proceedings, where, upon the issue of damages, the owner had testified as to the quality and character of the land condemned and given his opinion of its value, the jury could properly consider the fact of plaintiff's long residence upon the land as bearing upon the weight of the testimony. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

— **Homestead.**—In condemnation proceedings, upon the issue of the value and character of the property condemned, the jury could properly consider the fact that the owner had raised his family upon the land as showing its adaptability to homestead uses. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

— **Overflow or interference with drainage.**—That a railroad company condemned lands will not under this article, prevent the landowner from enjoining unlawful diversion of a water course though land taken was to be used for new channel. *McAmis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 331.

— **Injuries and benefits to land not taken.**—Under article 6505, owner of land unlawfully appropriated by railroad company without condemnation held entitled to recover damages for special injuries, including damages to adjacent land by the operation of trains; article 6518 not applying. *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373.

#### Art. 6519. [4406] Same subject.

Cited, *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387; *McAmis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 331.

**Measure of compensation.**—Under the charter of a city empowering it to condemn land for reservoir purposes according to the general law, and this article, the market value in the market in which it is located was the proper measure of compensation. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

#### Art. 6520. [4461] Same subject.

Cited, *McAmis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 331.

#### Art. 6521. [4462] Injuries and benefits which shall not be estimated.

Cited, *McAmis v. Gulf, C. & S. F. R. Co.* (Civ. App.) 184 S. W. 331.

**Measure of compensation in general.**—Where land is condemned in the statutory manner for a railroad, the company cannot be held liable for any inconveniences or discomforts arising from the proper operation of such trains. *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373.

Evidence of increased value of land held under this article not to deprive plaintiff of his right to recover for lands not condemned, but, at most, make it a question for the jury. *Quannah, A. & P. Ry. Co. v. Collett* (Civ. App.) 190 S. W. 1128.

#### Art. 6522. [4463] Assessment shall be in writing, dated, signed, etc.

Cited, *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

#### Art. 6527. [4468] Either party, if dissatisfied with decision, may remove cause, etc.

Cited, *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

**Proceedings after filing opposition—Scope of inquiry.**—In a trial of condemnation proceedings, where the railroad had been constructed pending appeal from the com-

missioners' award, the conditions arising from construction of the road without negligence may be given in evidence. *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

#### Art. 6530. [4471] Damages must be paid before property is taken.

**Appeal—Matters considered.**—At the trial on appeal from award of commissioners, where the railroad had taken possession under this article and constructed its road, damages occasioned by negligent construction cannot be allowed and no inquiry showing such construction is permissible. *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

#### Art. 6531. [4472] Practice in case specified.

**Trespass to try title.**—Railroad, seeking to condemn land for a right of way, held not precluded by judgment in trespass to try title, under this article brought against it by the defendant. *Vance v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 173 S. W. 264.

— **Jurisdiction.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6531, and chapter 21A, arts. 1283c, 1283d, district court has jurisdiction, in action by railroad in trespass to try title, to adjudge condemnation in favor of defendant electric light and ice company. *Pecos & N. T. Ry. Co. v. Malone* (Civ. App.) 190 S. W. 809.

**Waiver or estoppel.**—Railroad seeking to condemn land for right of way held not estopped by former void judgment in similar proceedings. *Vance v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 173 S. W. 264.

A railroad appealing from an award of damages on its plea for condemnation filed under this article, but not questioning the judgment of condemnation, is estopped to raise questions affecting its original claim of title. *Quanah, A. & P. Ry. Co. v. Collett* (Civ. App.) 190 S. W. 1128.

**New trial—Newly discovered evidence.**—A defendant railroad company, permitted to condemn land under a plea filed under this article cannot secure a new trial for newly discovered evidence as to its claim of title. *Quanah, A. & P. Ry. Co. v. Collett* (Civ. App.) 190 S. W. 1128.

#### Art. 6532. [4473] The right of way, how construed.

**Fee in land.**—Where a right of way is taken by condemnation under Texas Statutes, the fee remains in the owner of the land. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

A railroad company held by a second grant to have acquired the fee to its right of way and to be entitled to use it for any purpose, regardless of any limitations contained in the first grant of an easement. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

**Use by owners of fee.**—If the use by the public as a passageway over a railroad right of way for three years would constitute a dedication, an abutting owner could not thereby gain rights different from those of the public, and could not maintain doorways giving ingress and egress to the right of way; that not being a public use. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

The owner of the fee has no right of passage over ground condemned by a railway, since he may use the public crossings, and a fortiori he cannot claim such right of passage to his place of business on adjoining land in behalf of the public. *Id.*

The owner of fee of land condemned for railroad right of way is entitled to use and possession not interfering or inconsistent with right of way purposes, so that the railroad is entitled to judgment dispossessing him only to the extent it pleads and shows such interference. *Davidson v. Houston E. & W. T. Ry. Co.* (Civ. App.) 194 S. W. 211.

— **Adverse use.**—If a railroad has the right to fence its track, and permissive use does not ripen into a right on the part of the public to use such way as a passage, the railroad is not estopped by mere knowledge of another's intended use of the property and of expenses incurred looking to such use, and by its failure to object to erect the fence, in the absence of willful desire to mislead such party. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

**Use by railroad and nature and extent of rights acquired.**—A railroad company which has an easement in a right of way over plaintiff's land cannot authorize the establishment of a private telephone line over such way. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

A right of way awarded in condemnation proceedings held only an "easement" in the sense of "a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor." *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

Use of land by a railroad which leased it to others for storage purposes, though convenient for the railroad in unloading goods, is not a use for the benefit of the public generally. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Despite articles 6532, 6542, a railroad company which owns the fee of its right of way may lease portions thereof for purposes unconnected with the railroad. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

Where a railroad company was granted the fee of a right of way by one who platted a townsite at that point, held that, though the plat showed the right of way, the railroad company was not bound to refrain from using its land for other purposes. *Id.*

Railroad, condemning lot abutting on platted street described by lot and block number only, held to acquire title to middle of street. *Amerman v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 182 S. W. 54.



Subjection of a railway right of way to uses as a highway or passway for a restaurant or place of business is inconsistent with its use for railway purposes, since it would largely increase hazard of accidents, so that erection of a fence by the railroad would conserve its rights and protect the public, and is lawful. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

The right to fence a railroad right of way in towns where necessary for the protection of persons who might otherwise go upon the track without legal right is incident to the right of way acquired. *Id.*

In acquiring easements for construction and operation of railways, the company is entitled to space above territory appropriated necessary for use of its franchise. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

A railroad may as against the owner of the fee of a part of its right of way use dirt therefrom for purposes of the road outside such part of the right of way. *Davidson v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 194 S. W. 211.

**Abandonment.**—In condemnation proceedings, where a right of way or easement was awarded, the right of forfeiture for nonuser held a "condition subsequent." *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

### Art. 6534. [4475] Right of way vested by judgment of the court.

Cited, *San Antonio, U. & G. R. Co. v. Bobo* (Civ. App.) 163 S. W. 377.

**Reformation of judgment.**—The county court's judgment in a condemnation proceeding awarding a right of way to plaintiff therein, to revert to the owner of the fee upon nonuser within two years became a final judgment upon the adjournment of that term of court, and hence could not be reopened two years afterwards by a motion to declare a forfeiture alleging neither accident, fraud, or mistake as a basis therefor. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

## INJURIES FROM CONSTRUCTION OR MAINTENANCE OF RAILROAD

2. **Injuries to abutting property—Necessity of compensation.**—An interurban railroad operated on existing street car tracks held not to impose an additional servitude entitling abutting landowners to restrain the operation until compensation was paid. *Galveston-Houston Electric Ry. Co. v. Jewish Literary Society* (Civ. App.) 192 S. W. 324.

Whether goods carried by an interurban electric railroad are express or freight, on which depends whether the railroad is an additional servitude entitling landowners to injunction, does not depend on the weight of the separate articles but on the manner in which they are carried. *Id.*

4. — **Party entitled to recover.**—In trespass to try title by the owner of the fee in the street to recover possession of the street, subject to use for ordinary street purposes, as against an interurban company operating cars along the street, plaintiff cannot recover damages for the negligent operation of the interurban cars in violation of the city ordinances. *Galveston-Houston Electric Ry. Co. v. Jewish Literary Society* (Civ. App.) 192 S. W. 324.

17. — **Benefits.**—In an action for special damages from the construction of a railroad viaduct in front of plaintiff's property, it is no defense that the viaduct is beneficial to the public. *Texas & P. Ry. Co. v. Hardin* (Civ. App.) 168 S. W. 1017.

21. — **Defenses.**—Action to recover for damages to overflow of land held not barred by former action and a release therein. *Smith v. Texas & P. Ry. Co.* (Civ. App.) 180 S. W. 920.

23. — **Evidence.**—In an action to recover damages from a railroad company for destruction and depreciation of real estate caused by its siding and engines, evidence held sufficient to sustain the verdict. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

In a suit by owner of property injured by a railroad, a jury may not fix the value of the property, immediately after the wrong complained of, at a less sum than given by any witness. *Houston Belt & Terminal Ry. Co. v. Lynch* (Civ. App.) 185 S. W. 362.

26. **Negligence in construction or maintenance.**—See arts. 1068 and 6618, and notes. Evidence, in an action for injuries from explosion of a locomotive, held not to show that the explosion was due to excessive steam pressure. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

34. **Nuisances—In general.**—Defendant railroad's keeping dynamite held a public nuisance, rendering it liable, irrespective of negligence, for injury from explosion. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

## CHAPTER NINE

## OTHER RIGHTS OF RAILROAD CORPORATIONS

Art.	Art.
6537. Shall have the right to hold lands and other property.	6539. Shall alienate lands, except, etc.; forfeiture.
6538. Shall have the right to receive and hold grants, etc.	6542. Right to erect and maintain buildings, etc.
	6545. Mortgage invalid, unless, etc.

**Article 6537. [4478]** Shall have the right to purchase and hold lands and other property.

**Purposes for which land may be taken.**—In spite of articles 6537-6539, designating the purposes for which railways may acquire land, a railway may take title to land for any purpose good against all the world except the state. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Under arts. 5439-5441, 6537, 6538, railroad company may validly contract to construct sidings, depot, etc., in return for conveyance of lands, though it did not intend to use lands for townsite. *Dermott Townsite Co. v. Wooten* (Civ. App.) 193 S. W. 214.

**Specific performance—Bond for conveyance.**—Any incapacity of a railroad company to take land for a certain purpose is not ground for demurrer to its petition for specific performance, not showing the land was not for a use authorized by articles 5439-5441, 6537-6539. *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598.

Where railroad company which was real party in interest was not entitled to demand specific performance of contract for conveyance of lands, it cannot recover on bond for conveyance. *Dermott Townsite Co. v. Wooten* (Civ. App.) 193 S. W. 214.

**Art. 6538. [4479]** Shall have the right to receive and hold grants, etc.

Cited, *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

**Grants for right of way or other purposes—Title, estate or interest acquired.**—A railway company may acquire by purchase or donation the fee-simple title to lands for its right of way, depot grounds, and other railway necessities. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 169 S. W. 644.

Deeds which convey property to a railroad company, its successors and assigns, on condition that the property be used exclusively for railroad purposes, or so long as it shall be used for such purposes, convey the fee and not merely an easement. *Id.*

Railway company held within its rights in building fence to prevent use of right of way as passway by patrons of a restaurant adjoining the right of way. *Ft. Worth & D. C. Ry. Co. v. Graig* (Civ. App.) 176 S. W. 827.

**— Purposes for which title may be taken.**—In spite of articles 6537-6539, designating the purposes for which railways may acquire land, a railway may take title to land for any purpose good against all the world except the state. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

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Under this article railroad company may receive in aid of construction voluntary grant of land intending to hold same for enhanced price, so that a special issue in action on bond for conveyance submitting question whether railroad company contracted for land as matter of speculation or in aid of construction was erroneous. *Id.*

**— Covenants and conditions.**—The grantee of a tract upon which a railroad located its right of way and a station was entitled to the benefit of any contract with his grantor for the permanent maintenance of the same thereon. *Logue v. Southern Kansas Ry. Co. of Texas*, 167 S. W. 805, 106 Tex. 445, affirming judgment *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

A deed conveying property for so long as it should be used as a railroad right of way conveys it upon limitation, not upon condition subsequent, and the right to recover the land for breach of the condition passes by a subsequent quitclaim deed, given by the grantor to a third person. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 169 S. W. 644.

A deed conveying property to a railroad company on condition that it be used exclusively for railroad depot grounds and railroad business purposes, and that if such premises shall cease wholly to be used for such purposes, they shall revert to the grantors or their successors, conveys the fee upon condition subsequent. *Id.*

A condition subsequent, requiring the land conveyed to be used for railroad purposes, is one which requires continuous performance, and the fact that it has been performed for more than 30 years does not free the land from the condition. *Id.*

Defendant railroad held bound under its contract for the use of a spur track with plaintiff's lessor to deliver to plaintiff all shipments consigned to him of the commodities

in which he dealt, whether he was owner or bailee of the goods. *Missouri, K. & T. Ry. Co. of Texas v. Seeger* (Civ. App.) 175 S. W. 713.

— **Transfer of right of way.**—A corporation purchasing a railroad was only charged with such conditions as attached by law, and no presumption could arise from the mere occupancy of land under deed that there was a private agreement with the president of the railroad that the road, its offices and station, should be permanently located thereon. *Logue v. Southern Kansas Ry. Co. of Texas*, 106 Tex. 445, 167 S. W. 805, affirming judgment *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

**Estoppel.**—A railroad company which accepted a deed upon limitation and entered into possession of the premises thereunder, is thereby estopped from asserting against its grantor a superior outstanding title to defeat the right to recover the premises upon breach of the condition, and its acquisition of such outstanding title by deed or by adverse possession inures to the benefit of the original grantor. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 169 S. W. 644.

#### Art. 6539. [4480] Shall alienate lands, except, etc.; forfeiture.

Cited, *Stephenson v. St. Louis Southwestern R. Co. of Texas* (Civ. App.) 181 S. W. 568.

**Forfeiture.**—Under articles 6539, 6630, where directors of a railroad corporation for 27 years after the sale of its franchise, etc., did not settle its affairs, or take charge of land owned by it, held that their interest therein had ceased. *Allison v. Richardson* (Civ. App.) 171 S. W. 1021.

**Purposes for which title may be taken.**—In spite of articles 6537-6539, designating the purposes for which railways may acquire land, a railway may take title to land for any purpose good against all the world except the state. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

#### Art. 6542. [4483] Right to erect and maintain buildings, etc.

**Does not apply to lands owned in fee.**—Despite articles 6532, 6542, a railroad company which owns the fee of its right of way may lease portions thereof for purposes unconnected with the railroad. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

#### Art. 6545. [4487] Mortgage invalid, unless, etc.

Cited, *Weathersby v. Texas & Ohio Lumber Co.* (Sup.) 180 S. W. 735.

## CHAPTER TEN

### RESTRICTIONS UPON, DUTIES AND LIABILITIES OF RAILROAD CORPORATIONS

Art.	Art.
6549. Roads to pass through county seat.	6592. Water closets to be erected.
6550. Shall survey twenty-five miles of road, etc.	6593. Separate closets, how constructed and maintained.
6552. Trains to be regular.	6594. Penalties and suits for.
6554. Refusal to transport, etc.	6596. Cattle guards and stops, at what places.
6558. Freight to be delivered on payment of charges.	6597. Same subject.
6559. Penalty for refusal to deliver freight.	6598. Character of.
6559a. Unlawful for railroad company to confiscate or convert freight.	6599. Owner may place, etc., cattle guards, etc.
6559b. Same; penalty.	6600. Liability for failure, etc.
6559c. Same; cumulative remedies.	6601. Johnson grass not to be permitted to go to seed on right of way.
6559d. Same; partial invalidity.	6602. Penalty and damages.
6560. Conductor shall wear badge.	6603. Liability for stock, etc.
6561. Without it, shall not collect, etc.	6603a. Report of animals killed; evidence.
6564. Bell and steam whistle, duty as to.	6608. To receive freight, etc., from connecting lines.
6581. Shall provide suitable places for employes to work.	6614. Declared to be trustees, when.
6582. Penalty.	6615. Penalty for refusal, etc.
6589. Stations shall be erected, etc.	6616. Equal facilities, etc.
6590. No storage charged, except.	6617. Damage for failure, etc.
6591. Depots opened, lighted, etc., penalty for failure.	

#### Article 6549. [4491] Road shall pass through county seat, when.

**Duty to pay for right of way—Time.**—Under Const. art. 10, § 9, requiring every railroad passing within three miles of a county seat to pass through it and maintain

a depot therein, provided that the town or its citizens should grant the right of way and ground for depot purposes, and this article enacted in similar terms, the duty to pay for the right of way and depot grounds did not arise until the railroad had surveyed its line and designated its depot site. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

**Remedy for breach of duty—Mandamus.**—Where a railroad company fails and refuses to perform its constitutional and statutory duty to construct a line through a county seat and maintain a depot therein, the district court may award a writ of mandamus. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

Where a receiver has been appointed for a railroad company, so that it is legally impossible for it to comply with mandamus from a district court, requiring it to construct a line through a county seat and maintain a depot therein, enforcement should be suspended until conditions so change as to put it in the power of the corporation to obey. *Id.*

**Waiver of statute.**—Const. art. 10, § 9, requiring any railroad passing within three miles of a county seat to pass through it and maintain a depot therein, held intended for the benefit of the public desiring to or required to visit the county seat, and to be mandatory, so that the duty imposed thereby cannot be excused or waived by the citizens. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

### Art. 6550. [4492] Shall survey 25 miles of road, locate depot, etc.

Cited, *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 498.

**Construction.**—The words "depot grounds," as used in this article are synonymous with "station." *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

**Applicability.**—Railroad Commission empowered by art. 6675, to enforce laws, may not enforce a contract binding a railway company to maintain a depot at a particular place, notwithstanding this article. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

This article relates to the construction of new railroads, and does not preclude the changing of a depot in a town when for the benefit of the public. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 180 S. W. 1138.

By placing a suggested location upon its preliminary map as a place suitable for a depot and so reporting it to chief officers of railroad, who after investigation decided not to designate that place as a depot or a station, a railroad did not designate such place as a depot within meaning of this article. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

**Change of location—In general.**—By direct provisions of this article no railroad company may change its depot grounds after they have been designated. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

— **Remedy.**—Even if the Railroad Commission had authority to direct a railroad company to replace track removed pursuant to another order of the Commission, a penalty will not be assessed in mandamus against the company for failure to comply with the order to replace the track, since it had reasonable grounds to believe it was justified in doing so. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

**Abandonment—Right of.**—Under articles 6550, 6625, in absence of express legislative grant, a railroad company cannot abandon or remove any part of its track after it has been located, and operations begun. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

**Contracts—In general.**—A contract by a railway company to maintain perpetually a depot on land acquired held not performed by maintenance of a depot for eight years or by maintaining a freight depot only. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

A railway company may, by contract, bind itself to perpetually maintain a depot at a particular place, unless the interests of the public demand its removal. *Id.*

### Art. 6552. [4494] Trains to be regular, and notice to be given.

Cited, *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 167 S. W. 822; *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Constitutionality.**—In the absence of exercise of the authority of Congress, it is within the police power of the state to protect passengers on interstate trains by requiring that all trains leave termini or junction points not more than 30 minutes behind their regular schedules, and on such schedules at all other stations. *Missouri, K. & T. Ry. Co. of Texas v. State* (Sup.) 181 S. W. 721.

**Railroad commission—Powers in general.**—Railroad commission may, under articles 6552, 6654, 6670, order division between connecting carriers of revenue earned in transporting coal not owned by either. *Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 175 S. W. 1116.

**Liability for freight charges.**—See notes under art. 6558.

**Art. 6554. [4496] Refusal to transport passenger or property.**

Cited, *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**8. Delay in transportation.**—Where a carrier of live stock, with knowledge of the congestion of its lines, accepted a shipment of live stock without notice to the shipper that such condition would likely cause extraordinary delay, it is no defense that the shipments were unusual and that the carrier was not prepared to handle them. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

A carrier of live stock is charged with notice of the congested condition of its lines in a given locality, and so cannot excuse delay in a shipment of cattle on the ground that there were unusually heavy shipments of cattle at that time which it was not prepared to handle. *Id.*

While a carrier of live stock is not an insurer of the time at which they will arrive, it is otherwise subject to the common-law burdens and is an insurer of the safe handling of such live stock. *Id.*

Where a carrier contracted to deliver cattle in time for a particular market, but did not make the delivery in time to permit the cattle to be fed and watered, as was customary, before being placed on the market, so that they were held over until the next day's market, the carrier was liable for a loss by a decline in the market. *St. Louis & S. F. R. Co. v. White* (Civ. App.) 160 S. W. 1128.

Where a carrier made a mistake in billing a car, so that it did not reach the consignee in time to enable the shipper to complete a contract of sale, but brought it back as soon as possible and tendered it to him, held, that his only cause of action was for damages for delay in delivery. *Gulf & I. S. Ry. Co. of Texas v. Blalock* (Civ. App.) 162 S. W. 1009.

Where a railroad company negligently delayed a shipment of cattle for more than 12 hours after they were delivered into its pens, near its tracks, it cannot escape liability, for injuries to the cattle by fright from passing trains, by showing that such trains were properly operated. *Gulf, C. & S. F. Ry. Co. v. Marshall* (Civ. App.) 164 S. W. 446.

Where a carrier failed to notify the consignee of the arrival of freight and the consignee did not receive the same, it was immaterial when the freight reached its destination in determining issue of negligent delay. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

In the absence of special agreement, there is an implied agreement only that the carrier will deliver in a reasonable time, not breached by necessary or reasonable delay. *Kansas City, M. & O. Ry. Co. of Texas v. Odom* (Civ. App.) 185 S. W. 626.

The Carmack Amendment to the Interstate Commerce Act applies to damages caused by delay in transportation as well as to injuries to the property. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056. See, also, notes under art. 707, ante.

**13. Evidence.**—In an action for damages caused by delay in shipping cattle, evidence held insufficient to warrant a recovery based upon an alleged misrouting of the shipment. *St. Louis, B. & M. Ry. Co. v. True Bros.* (Civ. App.) 159 S. W. 152.

Evidence held to justify jury in finding that death of one of a shipment of cattle was caused by negligent delay and improper handling. *St. Louis & S. F. R. Co. v. Rich* (Civ. App.) 162 S. W. 1194.

Evidence held not to support the finding of period of time of negligent delay in transportation of live stock. *Kansas City, M. & O. Ry. Co. of Texas v. Odom* (Civ. App.) 185 S. W. 626.

**14. Measure of damages.**—The measure of damages in an action for delay in the delivery of goods is the difference between their market value at the time they should have been delivered by the use of ordinary care and their market value at the time delivery was made. *Gulf & I. S. Ry. Co. of Texas v. Blalock* (Civ. App.) 162 S. W. 1009; *Foster v. International & G. N. Ry. Co.* (Civ. App.) 175 S. W. 762.

Notice to a carrier at the place of consignment that plaintiff had sold a car of melons at a certain price at a siding at a certain time held not sufficient to make the carrier liable for special damages, where, because of a mistake in billing, it was impossible to have the car on the siding at that time. *Gulf & I. S. Ry. Co. of Texas v. Blalock* (Civ. App.) 162 S. W. 1009.

Where the delay of a carrier in delivering a car occurred while in transit to the consignee, who was to load it with oil and return it to consignor, but the carrier was not informed that it was to be so loaded, the value of the ordinary use of the car during the delay was the measure of the consignor's damages. *San Antonio & A. P. Ry. Co. v. Houston Packing Co.*, 106 Tex. 383, 167 S. W. 228.

If the carrier's delay occurred after the car was loaded with oil by the consignee and returned to the carrier, the carrier was liable for such damages as would ordinarily result from a failure to deliver the oil for the use to which it was to be applied. *Id.*

The carrier not being apprised that any such special damages would ensue from delay in transporting a car of household goods, recovery cannot be had for board bills and room rent paid by the owner while awaiting their arrival. *Pecos & N. T. Ry. Co. v. Grundy* (Civ. App.) 171 S. W. 318.

The measure of damages for delay of a carrier in transporting household goods is the reasonable value of their use to the owner during the delay. *Id.*

Profits lost by a carrier's delay in delivering goods intended for sale are recoverable. *Foster v. International & G. N. Ry. Co.* (Civ. App.) 175 S. W. 762.

Where a carrier negligently delayed transportation of cotton, but during delay the market price at destination increased, delay did not result in any injury to the shipper. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

A shipper of cotton for resale held not to have suffered any loss by delay in transportation, where the cotton when delivered was worth as much or more than the cotton he purchased to deliver to the buyers. *Id.*

**16. — Live stock.**—Though contract for transportation of cattle issued by defendant stated the destination as St. Louis, facts held to show that defendant knew that the destination was the National Stockyards at East St. Louis, and the measure of damages for delay was the difference in value at the stockyards. *St. Louis & S. F. R. Co. v. Rich* (Civ. App.) 162 S. W. 1194.

**20. Conversion of freight by railroad.**—Where goods, missent because of a mistake in billing, did not arrive in time to enable the shipper to complete a contract of sale, but were brought back as soon as possible and tendered to the shipper, there was no "conversion" making the carrier liable for the value of the goods. *Gulf & I. S. Ry. Co. of Texas v. Blalock* (Civ. App.) 162 S. W. 1009.

Action by shipper where a carrier demanded excessive rate and sold goods for charges held one for conversion. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

Where plaintiff's shipment of maize was refused by consignee and railway company shipped to another place and stored it without plaintiff's knowledge or consent, the railway company's action held not conversion. *Texas & N. O. Ry. Co. v. Patterson & Roberts* (Civ. App.) 192 S. W. 585.

### Art. 6558. Freight to be delivered on payment of charges.

Cited, *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

**Liability for freight charges—In general.**—As a rule a consignor with whom a contract of shipment is made is impliedly liable for the freight charges, irrespective of whether he is owner. *Chicago, R. I. & G. Ry. Co. v. Floyd* (Civ. App.) 161 S. W. 954.

While a consignor is ordinarily liable for the freight charges, if the owner is the real consignor, and the person making the shipment, to the carrier's knowledge, only acts as the consignor's agent, the owner, and not his agent, is liable for the freight charges. *Id.*

One who is not the consignor or consignee of goods, and who does not receive the goods from the carrier at the point of destination, but who merely indorses the bill of lading, is not liable for the freight. *St. Louis Southwestern Ry. Co. v. Browne Grain Co.* (Civ. App.) 166 S. W. 40.

Under the Texas statute requiring a railroad company to deliver possession of goods to the owner or consignee upon payment of the freight charges, as shown by the bill of lading, etc., a railroad company has no right to impose, as a condition to the delivery, the surrender of the bill of lading, but can only require its production for inspection. *Missouri, K. & T. Ry. Co. of Texas v. Long* (Civ. App.) 167 S. W. 769.

— **Storage charges.**—A carrier not delivering unidentified baggage, though informed of the circumstances of its shipment, held not entitled to storage charges. *St. Louis Southwestern Ry. Co. of Texas v. Kelly* (Civ. App.) 173 S. W. 540.

**Liability of carrier after refusal to pay freight charges—In general.**—A carrier is liable as warehouseman for the keeping of goods after the shipper has refused to pay the legal rate. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

— **Conversion.**—That shipper refused to pay more than contract rate held not to affect recovery for conversion by carrier by refusal to accept the proper rate and sale of goods for charges. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

That carrier's agent demanded only small excess of legal rate honestly and without wrongful intent, does not affect shipper's right to recover for conversion on sale of goods. *Id.*

### Art. 6559. Penalty for refusal to deliver freight.

**Applicability—Interstate shipments.**—This article does not apply to interstate shipment. *Gulf, C. & S. F. Ry. Co. v. Mathis* (Civ. App.) 194 S. W. 1135.

Where a stock of merchandise was shipped from Oklahoma to Ft. Worth, Tex., and subsequently reshipped to Abilene, Tex., held that shipment from Ft. Worth to Abilene, made pursuant to purpose of shippers existing at time of original shipment, was interstate. *Id.*

**Art. 6559a. Unlawful for railroad company to confiscate or convert freight.**—It is hereby declared to be unlawful for any railway company, or receiver thereof, in this State to confiscate, or otherwise convert to its own use, any carload shipment or substantial portion of any such carload shipment of any article or commodity of freight traffic received by it, or them, for transportation and delivery, without the express consent of the owner or consignee thereof, and the acts of the agents, officers and employes of such carrier or receiver within the apparent scope of their duties or authority with respect to such conversion or confiscation shall be deemed to be the acts of such railway company, receiver or other carrier. The provisions of this Act shall not apply to conversion of freight

where the same has been damaged or intermingled with other freight in wrecks, nor to refused or unclaimed freight, the delivery of which the railroad is unable to effect. [Act April 2, 1917, ch. 174, § 1.]

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

**Art. 6559b. Same; penalty.**—In addition to all other remedies or penalties that may now be provided by law therefor, the violation of any of the provisions of Section 1 of this Act shall subject the railway company, receiver or other common carrier so offending to a penalty of not less than one hundred and twenty-five (\$125.00) dollars nor more than five hundred (\$500.00) dollars in favor of the State of Texas and a further penalty of twice the amount of the purchase price of the converted shipment in favor of the owner or consignee thereof. [Id., § 2.]

**Art. 6559c. Same; cumulative remedies.**—The terms, rights, and remedies provided by this Act are hereby declared to be cumulative of all other laws and the rights and remedies thereby provided upon the subject. [Id., § 3.]

**Art. 6559d. Same; partial invalidity.**—The terms of this Act are hereby declared to be separable and if for any reason any portion of the Act should be held to be invalid, the remainder thereof shall remain in full force and effect. It is further declared that this Act is intended to apply to all classes of freight traffic, but that if it should be held that the same may not constitutionally apply to certain portion or portions of such traffic, then it shall remain in full force and effect, nevertheless, and apply to all other such traffic. [Id., § 4.]

**Art. 6560. [4503] Conductor, etc., shall wear badge.**

**Delivery to employé without badge.**—Under this article held, that a passenger delivering his ticket to an employé on a passenger train without the prescribed badge on his hat or cap voluntarily took the risk that such employé was not authorized to receive it, and was not excused for its nonproduction when demanded by proper authority. Galveston, H. & S. A. Ry. Co. v. Short (Civ. App.) 163 S. W. 601.

**Authority of brakeman.**—Under arts. 6560, 6561, ejection of passenger, who had surrendered his ticket to the brakeman for failure to produce it on demand of the conductor, held wrongful. Galveston, H. & S. A. Ry. Co. v. Short (Civ. App.) 173 S. W. 615.

**Art. 6561. [4504] Without badge shall not receive fare, etc.**

**Delivery to employé without badge.**—See Galveston, H. & S. A. Ry. Co. v. Short (Civ. App.) 163 S. W. 601; note under art. 6560.

**Authority of brakeman.**—See Galveston, H. & S. A. Ry. Co. v. Short (Civ. App.) 173 S. W. 615; note under art. 6560.

**Art. 6564. [4507] Bell and steam whistle; duty as to.**

Cited St. Louis Southwestern Ry. Co. of Texas v. Wadsack (Civ. App.) 166 S. W. 42.

**When and where signals must be sounded—in general.**—It was a duty of trainmen to give the statutory signals by bell and whistle at a point on the right of way which was customarily used by pedestrians as a footpath or crossing to the company's knowledge. Galveston, H. & S. A. Ry. v. Huegle (Civ. App.) 158 S. W. 197.

— **Engine starting within 80 rods from crossing.**—Where the engine and cars which are kicked across a public crossing are not over 50 to 100 feet away, the statutory crossing signals need not be given. Ft. Worth & D. C. Ry. Co. v. Hart (Civ. App.) 178 S. W. 795.

Where a train approaching a crossing started within 80 rods of it, the statute does not require the blowing of the whistle, though it may require the ringing of the bell. Ft. Worth & D. C. Ry. Co. v. Alcorn (Civ. App.) 178 S. W. 833.

Under this article it is the duty of persons operating a railway engine to ring the bell thereof as it approaches a public street, though the engine starts within less than 80 rods from the street. Texarkana & Ft. S. Ry. Co. v. Rea (Civ. App.) 180 S. W. 945.

**For whose benefit duty is imposed—Injuries to animals.**—The killing of a horse by a train not being at a crossing, failure to give the statutory signal is not negligence per se. International & G. N. Ry. Co. v. Bandy (Civ. App.) 163 S. W. 341.

A charge on the duty of a railroad company to give the crossing signals prescribed by this article is not appropriate in an action for the killing of cattle, unless they were

killed on a crossing. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

Failure of a train approaching a crossing to give the statutory signals is negligence per se only as to those using, or about to use, the crossing, and not as to an animal feeding near by. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 180 S. W. 1146.

**Accidents at crossing—Proximate cause.**—The failure of engineer to sound warnings on approaching a crossing does not render the company liable for the death of a pedestrian killed at the crossing, unless it was the proximate cause of such death. *Texas & P. Ry. Co. v. Marrujo* (Civ. App.) 172 S. W. 588.

In an action for the killing of a pedestrian at a crossing, the failure to sound warning signals held not the proximate cause of the accident. *Id.*

Failure of trainmen approaching a crossing to give any warnings of the train's approach held the proximate cause of a collision. *Galveston, H. & H. R. Co. v. Copley* (Civ. App.) 176 S. W. 665.

Failure of trainmen to give signals of the approach of the train at a crossing held the direct cause of a collision with an automobile becoming stalled on the track. *Id.*

Evidence that a mule feeding near by, frightened by an approaching train, ran to cross the track and was killed held insufficient to show failure to give the crossing signals was the proximate cause. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 180 S. W. 1146.

— **Evidence.**—This article authorizes a finding of negligence on testimony of plaintiff that, as he approached the crossing, he listened for noises, but heard none. *Texarkana & Ft. S. Ry. Co. v. Rea* (Civ. App.) 180 S. W. 945.

### Art. 6581. Shall provide suitable places for employés to work.

**Validity.**—The court of civil appeals held that, in view of Const. art. 1, § 10, and Pen. Code 1911, art. 6, Rev. St. 1911, arts. 6581 to 6583, in excepting points where it is necessary to make light repairs only, is so indefinite as to be invalid. *State v. International & G. N. Ry. Co.* (Civ. App.) 165 S. W. 892. But the Supreme Court later decided that an act levying penalties upon any person failing to erect a shed wherein railroad repair work may be done must be plain enough for those operating the industry affected to know whether by engaging in an act of repair without erecting the shed they would breach its terms, but that the act in question was as definite in meaning as the nature of the subject allowed, and the rule that a penal act must be certain in its provisions was complied with, and hence the act was not void for uncertainty in exempting "light repairs." *State v. International & G. N. Ry. Co.* (Sup.) 179 S. W. 867.

### Art. 6582. Penalty.

See notes under art. 6581.

### Art. 6589. [4519] Station depots shall be erected, etc.

Cited, *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Bills of lading—Reasonableness.**—A provision of a bill of lading that property destined to a station at which there is no regular agent shall be at the owner's risk after cars are put on private sidings held not illegal, where the shipper knew that the shipment would have to be left on a siding, notwithstanding this article, protecting freight from damage by exposure; and the reasonableness of the provision held for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Smith Bros. Grain Co.* (Civ. App.) 164 S. W. 409.

**Suits—Defenses.**—In suit for penalty for violation of articles 6670, 6671, and rule of Railroad Commission and in view of defendant's violation of articles 6589, 6608, it was no defense that goods were carried beyond connecting point and held for connecting carrier's failure to settle advances on freight delivered to it, and for delivery on payment to junction point. *Quannah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

### Art. 6590. [4520] No storage to be charged, except, etc.

Cited, *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

### Art. 6591. [4521] Passenger depots opened, lighted, warmed, etc.; penalty for failure.

**Construction.**—This article fixes the reasonable time within which a passenger may remain in the station, without losing his right to protection as such, at not less than one hour. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

**Lighting and heating depots—Negligence per se.**—Failure to comply with this article, held negligence per se. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

— **Contributory negligence.**—In an action for injuries caused by the failure of a railroad company to keep its depot lighted and warmed for one hour after the departure of a passenger train, as required by this article, evidence held sufficient to warrant the jury in finding that the plaintiff was not negligent in remaining in the depot during the full hour. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

One who remains in a railroad station for the full hour, during which this article requires it to be warmed and lighted, after he has reasonable time and opportunity to leave, and thereby submits himself to danger or discomfort, cannot recover for the consequences because his own negligence contributed to the result. *Id.*



— **Proximate cause.**—In an action for injuries alleged from contracting a cold in defendant's station, evidence held to sustain a finding that, because of absence of heat in waiting room, plaintiff contracted a cold which resulted in injury complained of. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

**Actions—Instructions.**—In an action for injuries caused by the failure of a railroad company to keep its station warmed and lighted for one hour after the departure of a passenger train, as required by this article, a charge held not erroneous as assuming that the plaintiff was a passenger. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

In an action for the failure of a railroad company to keep its depot warmed after the departure of a passenger train, as required by this article, a special charge as to the duty of the company held misleading, as possibly denying the duty of the company to keep its depot warm. *Id.*

Refusal of instruction to find for defendant, if plaintiff remained in the waiting room of the station for her own purposes after all business with the railroad company connected with her journey had been entirely finished, held not error, in view of this article, where there was no evidence that more than 30 minutes elapsed between the time she alighted from the train and the accident. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

### Art. 6592. Water closets to be erected.

Cited, *State v. International & G. N. Ry. Co.* (Sup.) 179 S. W. 867.

**Constitutionality.**—Articles 6592–6594, entitling county attorney prosecuting for penalty, to one-fourth as commission, and county road and bridge fund to remainder, held not to violate Const. art. 3, § 51. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 173 S. W. 641.

**Construction.**—Mere fact that nearer location of water-closets to depot might be objectionable on other grounds does not relieve a railroad of its positive duty under this article, to have them within a reasonable and convenient distance. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

**Repeal of former statute.**—*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4526, 4537, 4543, under which railroads may be criminally prosecuted for not maintaining sanitary closets at stations, does not repeal Rev. St. 1911, arts. 6592–6594, providing a civil penalty for same offense. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959.

**Application.**—This article, held not to apply to stopping place for trains where no building for passengers or freight was maintained. *State v. Texas & P. Ry. Co.* (Civ. App.) 173 S. W. 900.

This article requires that reasonably clean and sanitary comfort stations for men and women be maintained only where the railroad maintains a building commonly known as a depot. *Ft. Worth & D. C. Ry. Co. v. State* (Civ. App.) 189 S. W. 131.

Neither a store building of a person authorized to sell tickets and handle freight, wherein seats are installed for waiting passengers nor a box car on trucks from which tickets are sold, and in which passengers wait and freight is stored, is a depot, so as to require installation of comfort stations in accordance with this article. *Id.*

**Evidence.**—In an action to recover statutory penalties for violation of articles 6592–6594, evidence held not to warrant a finding as to the length of time a railroad station closet had been in an unsanitary condition. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 173 S. W. 641.

Evidence held to support finding by jury that water-closets were not within reasonable and convenient distance of depot. *Galveston, H. & S. A. R. Co. v. State* (Civ. App.) 194 S. W. 462.

**Questions for jury.**—Whether water-closets are within a reasonable and convenient distance of a depot, as required by articles 6592, 6594, is a question of fact for the jury. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

### Art. 6593. Separate closets, how constructed and maintained.

Cited, *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 173 S. W. 641; *State v. Texas & P. Ry. Co.* (Civ. App.) 173 S. W. 900; *Ft. Worth & D. C. Ry. Co. v. State* (Civ. App.) 189 S. W. 131.

**Repeal of former statute.**—*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4526, 4537, 4543, under which railroads may be criminally prosecuted for not maintaining sanitary closets at stations, does not repeal Rev. St. 1911, arts. 6592–6594, providing a civil penalty for same offense. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959.

**Actions—Defenses.**—It was no defense that, during a part of the time charged the moon was shining. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 163 S. W. 338.

**Evidence.**—In an action by the state to recover from a railroad company the penalty for its failure to keep lighted a water-closet at its depot, as required by this article, held, under the evidence, not error to refuse to peremptorily instruct to find for defendant if it had honestly tried to light the premises and trespassers had destroyed the lights. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 163 S. W. 338.

Evidence held to show that a railroad company did not keep its depot toilet and grounds adjacent thereto lighted, as required by this article. *Id.*

**Art. 6594. Penalties, and suits for.**

**Constitutionality.**—See *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 173 S. W. 641; note under art. 6592.

**Repeal of former statute.**—See *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959; note under art. 6592.

**Questions for jury.**—See *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462; note under art. 6592.

**Art. 6596. [4523] Cattle-guards and stops at what places.**

Cited, *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

**Liability—In general.**—Defendant railway company held liable, under articles 6596, 6600, for failure to construct and maintain good and sufficient cattle guards at a lane between parts of plaintiff's property separated by the railway right of way. *Missouri, K. & T. Ry. Co. of Texas v. Attaway* (Civ. App.) 180 S. W. 1151.

**Actions—Instructions.**—In an action for injuries to plaintiff's mule received while crossing a cattle guard held not error to instruct as to the law of arts. 6596, 6598. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

**Art. 6597. [4524] Same subject.**

Cited, *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

**Art. 6598. [4525] Character of cattle-guards and stops.**

Cited, *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

**Application.**—In an action for injuries to plaintiff's mule received while crossing a cattle guard held not error to instruct as to the law of arts. 6596, 6598. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

**Art. 6599. [4526] Owner may place and keep in repair cattle-guards, etc.**

Cited, *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

**Contributory negligence of owner.**—Plaintiff held not guilty of contributory negligence in turning stock into a private lane with knowledge of defective condition of cattle guards at a railroad crossing therein. *Missouri, K. & T. Ry. Co. of Texas v. Attaway* (Civ. App.) 180 S. W. 1151.

**Art. 6600. [4527] Liability of company for neglect to place and keep in repair cattle-guards and stops.**

Cited, *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471; *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

**Liability for negligence respecting cattle guards—Evidence.**—Defendant railway company held liable under articles 6596, 6600, for failure to construct and maintain good and sufficient cattle guards at a lane between parts of plaintiff's property separated by the railway right of way. *Missouri, K. & T. Ry. Co. of Texas v. Attaway* (Civ. App.) 180 S. W. 1151.

**Art. 6601. Johnson grass not permitted to go to seed on right of way.**

Cited, *Ft. Worth & R. G. Ry. Co. v. Brown* (Civ. App.) 173 S. W. 943.

**Application.**—Articles 6601, 6602, giving right of recovery against a railroad for allowing Johnson grass to go to seed on its right of way, does not render liable its receivers for allowing it. *International & G. N. R. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

**Penal statute.**—Articles 6601, 6602, prohibiting railroad companies from permitting Johnson grass to mature on the right of way, and imposing a penalty in favor of contiguous landowners for its violation, is penal, and should be strictly construed. *International & G. N. R. Co. v. Boles* (Civ. App.) 161 S. W. 914.

**Questions for jury.**—In an action under articles 6601, 6602, against a railroad company for damages caused by its allowing Johnson grass to go to seed on its right of way, the question of permanent damages held properly submitted; there being testimony that land infested with Johnson grass could not be cleared. *Missouri, K. & T. Ry. Co. of Texas v. Forrest* (Civ. App.) 179 S. W. 273.

**Art. 6602. Penalty and damages.**

**Effect of receivership—Penalty.**—A railroad is not liable for penalty for allowing Johnson grass to go to seed on its right of way after its property had passed into the possession and control of a receiver. *International & G. N. Ry. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

**Penal statute.**—See *International & G. N. R. Co. v. Boles* (Civ. App.) 161 S. W. 914; note under art. 6601.

**Contiguous land.**—Land which was separated from a railroad right of way only by a parallel public road, which was condemned from the owner, was "contiguous" to the right of way within this article. *International & G. N. R. Co. v. Boles* (Civ. App.) 161 S. W. 914.

**Measure of damages.**—In an action under articles 6601, 6602, against a railroad company for damages caused by its allowing Johnson grass to go to seed on its right of way, the question of permanent damages held properly submitted; there being testimony that land infested with Johnson grass could not be cleared. *Missouri, K. & T. Ry. Co. of Texas v. Forrest* (Civ. App.) 179 S. W. 273.

**Actions—Instructions.**—In an action for damages for allowing Johnson grass to go to seed on a railroad right of way, where the jury were charged that plaintiff was bound to show the damages caused by defendant's act, defendant could not complain of submission of question of damages, though injury might have come from other sources. *Missouri, K. & T. Ry. Co. of Texas v. Forrest* (Civ. App.) 179 S. W. 273.

### Art. 6603. [4528] Liability of companies for stock killed or injured.

Cited, *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245.

**3. Purpose of statute.**—This article, relating to railroads fencing their tracks, is enacted, not only for the protection of animals, but especially for the protection of human life from derailments caused by striking animals on the tracks. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

**8. Applies only to injuries from collision.**—This article, making a railroad failing to fence its tracks liable for stock killed, does not authorize recovery for loss of stock by poison placed on right of way, in absence of negligence. *Ft. Worth & R. G. Ry. Co. v. Brown* (Civ. App.) 173 S. W. 943.

This article does not limit liability of railway companies, for injuries to stock on the right of way to injuries caused by being struck by its rolling stock, but the company is liable for injuries to stock due to any other form of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Attaway* (Civ. App.) 180 S. W. 1151.

Under this article, providing that, unless railway company fences its right of way, it shall be liable to owner for value of all stock killed or injured by locomotives and cars, recovery cannot be had unless injuries result from actual contact with running cars or locomotives of railway company. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

While recovery might be had for injury to animal on railroad track where there is no collision with running engine or car, if injury was proximate result of railroad's negligence, recovery in such case would not be based on this article, and same rules would apply as in any other case of nonstatutory negligence. *Id.*

**8½. Care required and liability in general.**—Where, in an action against a railroad for killing two horses, the evidence showed that they got upon the track, ran upon a trestle, and were killed by falling therefrom, plaintiff could not recover. *International & G. N. R. Co. v. Holley* (Civ. App.) 160 S. W. 990.

Railroad company, which made excavation on its right of way into which surface water flowed and washed a deep hole, held not bound to guard such hole to prevent persons or animals falling therein. *Missouri, K. & T. Ry. Co. of Texas v. Meyer* (Civ. App.) 161 S. W. 12.

Construction of embankment to confine cotton seed oil escaping from tank car in wrecked train, if negligence, held not actionable negligence rendering the company liable for the death of cattle which went upon the right of way and died as a result of drinking such oil. *St. Louis Southwestern Ry. Co. v. Bailey* (Civ. App.) 168 S. W. 406.

A railway company is not liable for injuries to a horse which was frightened by section hands shouting, laughing, and waving their hands at it. *Texas & P. Ry. Co. v. Howell* (Civ. App.) 184 S. W. 280.

The frightening of plaintiff's horse held to be due to acts of section hands outside of their employment, not to the manner of conducting their work. *Id.*

**9. — Signals and lookouts.**—In an action for killing stock, an instruction that the operatives of defendant's train were not required to keep a lookout for stock except at road crossings was properly refused. *Houston & T. C. R. Co. v. King* (Civ. App.) 160 S. W. 647.

Where stock were accustomed to graze where grass was growing in and about the defendant's tracks, as known to its employes, the engineer was bound to keep a lookout and exercise greater care to discover stock and avoid injury thereto. *Houston & T. C. Ry. Co. v. Holbert* (Civ. App.) 182 S. W. 1180.

**10. — Rate of speed.**—In an action for death of plaintiffs' horse within the switch limits of a town, that the train by which the horse was probably killed passed very rapidly through the town without signals held insufficient in itself to establish the railroad company's negligence. *International & G. N. Ry. Co. v. Matthews Bros.* (Civ. App.) 158 S. W. 1048.

**12. — Care as to animals seen on or near track.**—A railroad company must use the care that an ordinarily prudent person in like business would exercise under like circumstances, and a charge in an action for killing stock that greater care must be used in a city than other places does not conform to that rule. *Texas Cent. R. Co. v. Mallard* (Civ. App.) 158 S. W. 1183.

A railroad was not liable because, having seen plaintiff's stock on its right of way, it failed to recognize their peril, unless the trainmen realized that the stock would not

get off the track. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

Where railroad company's servants repairing a cattle guard near a road, though seeing that plaintiff's horses were frightened, continued to push a hand car towards them, it is liable for injuries to the animals. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

Where the engineer saw that a horse attached to a wagon and awaiting freight at a station was frightened by the approaching train, he should have stopped the train to avoid injury, and this duty would exist even if plaintiff's horse and wagon had been trespassers, instead of invitees, on the station grounds. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

**13. Liability where right of way is fenced.**—Where plaintiff's mule escaped from his lot through a break in defendant's right of way fence, and strayed onto defendant's bridge where it was caught between the ties, and was so injured thereby and by exposure that it died, held that, no injury by train being involved, the company could not be held liable on the ground of negligence in failing to fence against live stock. *Galveston, H. & S. A. Ry. Co. v. Grace* (Civ. App.) 164 S. W. 413.

This article did not render a railroad company liable, irrespective of negligence, for the death of cattle which went upon its fenced right of way and died from drinking cotton seed oil escaping from a car of a wrecked train. *St. Louis Southwestern Ry. Co. v. Bailey* (Civ. App.) 168 S. W. 406.

**14. Liability where right of way is not fenced.**—Railroad company held under no duty to keep a deep hole on its right of way inclosed to prevent live stock falling therein, and not liable for the death of a cow which fell therein after it had moved its right of way fence so as not to inclose such hole. *Missouri, K. & T. Ry. Co. of Texas v. Meyer* (Civ. App.) 161 S. W. 12.

A railroad owing no duty of fencing its track, it was not guilty of actionable negligence in failing to do so opposite plaintiff's pasture so as to render it liable where a horse ran onto the right of way and thence onto a bridge, where it was injured. *Missouri, K. & T. Ry. Co. of Texas v. Steiger* (Civ. App.) 162 S. W. 1192.

**15. Liability where stock are prohibited from running at large—In general.**—Where the stock law is in force, a railroad company placing poison on its right of way to kill Johnson grass, need not foresee that stock may be running at large. *Ft. Worth & R. G. Ry. Co. v. Brown* (Civ. App.) 173 S. W. 943.

**16. — Not required to keep lookout.**—Where a municipal ordinance prohibiting the running at large of domestic animals is enforced, a railroad is under no obligation to keep a lookout for trespassing animals in its switchyard. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

Defendant railroad's employes may assume that municipal ordinance prohibiting running at large of animals will be obeyed, and are not negligent in failing to keep a lookout for animals on track at places in municipality not required to be fenced. *Kansas City, M. & O. Ry. Co. v. Trammell* (Civ. App.) 194 S. W. 1130.

**19. Liability where right of way cannot be fenced—In general.**—As under *Vernon's Sayles' Ann. Civ. St. 1914, art. 6603*, a railroad company cannot escape liability merely by showing that accident occurred within its arbitrarily established switching yards, submission in an action for killing of cattle whether a fence at place of accident would have inclosed railroad employes held not error. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

**20. — Places where fences are not required.**—Railroad company held not bound to maintain a fence extending from its track to the right of way fence after moving the right of way fence closer to the track, and not liable to the owner of a cow which escaped from its pasture through such fence and fell into a hole. *Missouri, K. & T. Ry. Co. of Texas v. Meyer* (Civ. App.) 161 S. W. 12.

Where an animal is killed at a point where a railroad company is not required to fence its tracks, the owner must show negligence by the company in order to recover therefor. *International & G. N. Ry. Co. v. Leuschner* (Civ. App.) 166 S. W. 416.

A railroad company maintaining a station and a switch stand held not required to maintain fences between the station and the cattle guard about 100 yards distant. *Abbott v. Beaumont, S. L. & W. Ry. Co.* (Civ. App.) 177 S. W. 1052.

In an action against a railroad for the killing of cattle, a charge, authorizing verdict for plaintiff, held erroneous under *Vernon's Sayles' Ann. Civ. St. 1914, art. 6603*, as authorizing verdict against the company though the cattle were killed at places where it was not bound to fence. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

The fencing law, *Vernon's Sayles' Ann. Civ. St. 1914, art. 6603*, has no application to switchyards and station grounds of a railroad company, where a fence would endanger employes. *Id.*

**23. — Repair and maintenance.**—Though a railroad company had fenced its right of way sufficiently to prevent stock from getting upon the track, its duty to keep its right of way sufficiently inclosed was not thereafter discharged by the exercise of ordinary care to maintain the fence. *Chicago, R. I. & G. Ry. Co. v. Porter* (Civ. App.) 166 S. W. 37.

**25. Liability for stock injured at private crossings—In general.**—Where it did not appear that a railroad had any knowledge of herds crossing its right of way or had ever expressly or impliedly consented thereto, a license for herds to cross could not be implied from the fact of an occasional crossing. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

Under articles 6485, 6486, 6494, 6603, railroad held absolutely liable for killing stock entering the right of way by an unfenced crossing leading from a road parallel to the tracks to a private closed lane having no outlet. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

26. — **Duty to keep gates closed.**—One whose mule was killed on the right of way of a railroad company may recover, where it strayed through a gate placed by the company to afford access between two different farms owned by separate individuals, if the company did not exercise proper care to keep the gate closed. *International & G. N. Ry. Co. v. Humphrey* (Civ. App.) 167 S. W. 797.

27. — **Repair of gates.**—Where a railroad company assumed the duty of keeping in repair a gate which, for the benefit of plaintiff, it placed in the fence along its right of way, plaintiff is entitled to recover for the value of a mule which escaped because of defects in gate and was killed on the right of way. *Missouri, K. & T. Ry. Co. of Texas v. Withers* (Civ. App.) 167 S. W. 5.

Railroad killing stock on track held liable for having failed to repair a gate in its fence through which the stock entered. *Trinity & B. V. Ry. Co. v. Williamson* (Civ. App.) 180 S. W. 283.

28. **Excuses for failure to fence.**—Under this article the company can enter into contracts with adjacent landowners for crossings over the tracks, but such contract would not affect their absolute liability unless the crossing was one required by law for public convenience. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

29. **Contributory negligence of owner.**—Where no stock law was in force where plaintiff's horse was killed on defendant's railroad track, the horse was not a trespasser. *Houston & T. C. R. Co. v. Garrett* (Civ. App.) 160 S. W. 111.

An adjoining landowner could not assume that a right of way fence was in such condition as to prevent his mule from entering on the track, or that the company had repaired it, where he actually knew at the time that stock could go through the fence onto the right of way. *Galveston, H. & S. A. Ry. Co. v. Grace* (Civ. App.) 164 S. W. 413.

Plaintiff, who unlawfully took down a railroad's right of way fences to drive his stock across, held a trespasser upon the right of way and guilty of negligence contributing to injury to his stock from a freight train. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

A railroad company, whose train struck a cow within a town where stock were prohibited from running at large, held not liable, though the train was running at a high rate of speed and feed had collected on the right of way. *Missouri, K. & T. Ry. Co. of Texas v. Scales* (Civ. App.) 178 S. W. 692.

Although plaintiff knew of defective condition of gates and fences to defendant railroad's right of way when he turned his horse out to graze, he could not be said to be negligent so as to be precluded from recovering if he would otherwise be entitled to recover damages. *Quannah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

In action to recover for mules killed on defendant's railroad track, evidence not showing that their presence in a place of danger was discovered by defendant's employes in time to avoid accident is insufficient to raise an issue under doctrine of discovered peril. *Kansas City, M. & O. Ry. Co. v. Trammell* (Civ. App.) 194 S. W. 1130.

30. **Proximate cause of injury.**—The negligence of a railroad company in obstructing a private crossing does not render it liable for the death of a horse without any showing connecting the negligence with the death. *San Antonio & A. P. Ry. Co. v. Schendel* (Civ. App.) 161 S. W. 376.

The railroad company's negligence must be the proximate cause of the injury to stock on the track, to entitle the owner to recover therefor. *International & G. N. Ry. Co. v. Leuschner* (Civ. App.) 166 S. W. 416.

Negligence causing wreck of train held not proximate cause of death of cattle which escaped from their pasture through the pasture of another owner upon the right of way, where they drank cotton seed oil which had escaped from a tank car and which caused their death. *St. Louis Southwestern Ry. Co. v. Bailey* (Civ. App.) 168 S. W. 406.

The attempt of a horse to recross a trestle in doing which it fell and was injured, held the proximate cause of the injury, and not any negligence in the construction or maintenance of the trestle or the right of way fences. *Missouri, K. & T. Ry. Co. of Texas v. Lovell* (Civ. App.) 179 S. W. 1111.

31. **Presumptions and burden of proof.**—In view of this article held that, on showing that animals were within defendant's switchyards when killed, defendant had burden of establishing that it was not permitted by law to fence at that point. *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850.

In an action for killing stock entering the right of way at a crossing leading into a private lane, the burden was on the railroad company to show that it was not required by law to fence at that place so as to escape liability under Rev. St. art. 6603. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

33. **Sufficiency of evidence.**—In general.—Evidence held to sustain a finding that the horse killed entered on the track at a point where railroad employes putting in a new crossing negligently left an opening in the fence. *Texas & N. O. R. Co. v. Cunniff* (Civ. App.) 161 S. W. 396.

In an action for the value of plaintiff's horse, found dead upon defendant's right of way underneath a trestle, evidence held not sufficient to show the horse was killed by a train. *Stewart v. Texas & P. Ry. Co.* (Civ. App.) 165 S. W. 559.

In an action against a railroad company for injuries to an animal escaped onto the right of way through a defective fence, evidence held not to justify a finding that the ani-

mal was struck by a train. *St. Louis Southwestern Ry. Co. of Texas v. Tabb* (Civ. App.) 168 S. W. 866.

In an action for value of a horse killed on defendant's railroad track, evidence held sufficient to sustain a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Long* (Civ. App.) 174 S. W. 329.

In an action against a railroad for killing a mare on its track, evidence held to warrant verdict for plaintiff. *Trinity & B. V. Ry. Co. v. Williamson* (Civ. App.) 180 S. W. 283.

Evidence held insufficient to show liability of a railroad for killing plaintiff's mare. *International & G. N. Ry. Co. v. Bandy* (Civ. App.) 186 S. W. 781.

34. — **Negligence of defendant.**—In an action for killing plaintiff's cows at a point where defendant was not required to fence its tracks, evidence held to establish defendant's negligence. *Houston & T. C. R. Co. v. King* (Civ. App.) 160 S. W. 647.

In an action against a railroad for killing two horses, evidence merely that the horses were found dead by the track was insufficient to show negligence of the railroad. *International & G. N. R. Co. v. Holley* (Civ. App.) 160 S. W. 990.

In an action for killing plaintiff's mule while it was attempting to cross the track at night, evidence held insufficient to show actionable negligence of the railroad company. *Chicago, R. I. & G. Ry. Co. v. O'Dell* (Civ. App.) 160 S. W. 1098.

The evidence, not showing where a horse, killed by a train at a place not required to be fenced, got on the track, or whether its approach thereto was discoverable by the trainmen in time to avoid the accident, is insufficient to show negligence. *International & G. N. Ry. Co. v. Bandy* (Civ. App.) 163 S. W. 341.

Evidence in an action against a railroad company for injury to the stock on the track held to show that the trainmen were not negligent in failing to blow the whistle or sound the bell or keep a lookout. *International & G. N. Ry. Co. v. Leuschner* (Civ. App.) 166 S. W. 416.

Evidence, in an action for killing a mule on a railroad track, held to sustain a finding that the engineer could have seen the mule in time to stop and did not attempt to do so. *Galveston, H. & H. Ry. Co. v. Leggio* (Civ. App.) 166 S. W. 698.

In an action for injuries to plaintiff's mule at a crossing, evidence as to negligent construction of a cattle guard held sufficient to support a recovery. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

In an action for the killing of an animal by a train at a point at which the railroad company was not required to fence its track, evidence held not to show negligent operation of the train. *Abbott v. Beaumont, S. L. & W. Ry. Co.* (Civ. App.) 177 S. W. 1052.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6603, there is no prima facie case against a railway for the death of a horse, which was not struck by its trains, but which fell through a trestle on the defendant company's right of way. *Missouri, K. & T. Ry. Co. of Texas v. Lovell* (Civ. App.) 179 S. W. 1111.

Evidence in an action against a railroad for damages for killing a horse, alleging negligence in operating the train at a dangerous speed and in failing to ring the bell and blow the whistle, held to sustain a verdict for plaintiff. *Houston & T. C. Ry. Co. v. Holbert* (Civ. App.) 182 S. W. 1180.

36. **Measure of recovery—In general.**—One negligently injuring animals, resulting in their death soon afterwards, is properly charged with the cost of hay and medicine used by the owner in a good-faith effort to prevent their death. *Chicago, R. I. & G. Ry. Co. v. Clark* (Civ. App.) 166 S. W. 129.

Where animals negligently injured have a market value after the injury, the measure of damages is the difference between their value immediately before and immediately after the injury. *Id.*

One suing for injuries to animals dying soon after the accident held entitled to recover the full market value of the animals before the injury, though he testified that at the time of the injury he thought the animals had some value, but did not estimate it. *Id.*

**Art. 6603a. Report of animals killed; evidence.**—Whenever any animal is killed or found dead upon the roadbed or right of way of any railroad company in this State, the section foreman of the railroad where said animal is killed or found dead, shall take and make a description of such animal, stating its kind, the marks and brands, color, and apparent age, and any other description that may serve to identify said animal, which description must be taken and made before said animal is buried or otherwise disposed of, and shall transmit same to the County Clerk of the county in which said animal is found or killed, within ten days from the date of finding or killing, which description shall be by said County Clerk filed and kept of records in his office without exacting any fees from section foreman for filing same. A certified copy of said report so filed may be introduced in evidence in any case wherein the killing, death, or value of said animal is in question. [Act March 22, 1915, ch. 73, § 1.]

**Note.**—Sec. 2 makes it a misdemeanor to violate the act, and is set forth in *Vernon's Pen. Code 1916* as art. 1531h. The act took effect 90 days after March 20, 1915, the date of adjournment of the Legislature.

**Art. 6608. [4535] To receive freights and passengers from connecting lines.**

**Compelling performance of duty.**—Where a Texas railroad company wrongfully refused to exchange business with a foreign company, it may be required to discharge its duties by mandamus or injunction. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

**Defense in action for penalty.**—In suit for penalty for violation of articles 6670, 6671, and rule of Railroad Commission and in view of defendant's violation of articles 6589, 6608, it was no defense that goods were carried beyond connecting point and held for connecting carrier's failure to settle advances on freight delivered to it, and for delivery on payment to junction point. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

**Art. 6614. [4538] Declared to be trustees, etc.**

Cited, *Quanah, A. & P. Ry. Co. v. R. D. Jones* (Civ. App.) 178 S. W. 858.

**Art. 6615. [4539] Penalty for refusing to receive from connecting lines.**

**Refusal to receive—Wrongful refusal.**—Where a Texas railroad company wrongfully refused to exchange business with a foreign company, it is subject to the penalties provided by this article. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

**Art. 6616. [4540] Equal facilities to be furnished.**

**Constitutionality.**—This article held valid. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222. It is not in violation of Const. U. S. Amend. 14, or Const. Tex. art. 1, § 19, especially in view of article 10, § 2, and does not interfere with interstate commerce in violation of Const. U. S. art. 1, § 8, by requiring domestic railroad company to grant same facilities and accommodations to an express company afforded another express company, and a judgment requiring railroad company to grant facilities to express company on terms substantially similar to those accorded another express company held not an invasion of the province of the Legislature or railroad commission. *Trinity & B. V. Ry. Co. v. Empire Express Co.* (Civ. App.) 173 S. W. 217.

**Application.**—Under this article express company held not entitled to facilities equal to those afforded another company, unless it was willing to obligate itself to perform the same services for the railroad company that the other express company performed. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

**Exclusive right to use of cars.**—Express company held to have no exclusive right to use of railroad cars set apart to it, and, where they were ample to accommodate it and another express company desiring to do business, the railroad company was properly ordered to permit the use of such cars by the other express company. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

**Tender of business.**—Where railroad company had refused to grant equal facilities to express company and was not willing to accept its business, formal tender of such business held not necessary to justify a recovery of damages for noncompliance with this article. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

**Judgments.**—Judgment requiring railroad company to permit express company to use jointly with another express company cars set apart to such other express company held not broader than the relief prayed for. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

**Art. 6617. [4541] Damages for failure to comply, etc.**

**Who may sue.**—Since Acts 22d Leg. c. 45, relating to express companies, was intended to cover the entire field, as relating to such companies, as is covered by the act of the same Legislature (Acts 22d Leg. c. 51), relating to railroads, an individual cannot recover from an express company the penalty prescribed by the railroad act. *Helm v. Wells Fargo & Co. Express* (Civ. App.) 177 S. W. 134.

**Damages—In general.**—Expenses incurred and losses sustained in getting ready to do an express business in reliance on acts indicating that railroad company intended to permit express company to do business held recoverable as damages for the refusal to permit it to do business. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

— **Exemplary damages.**—Exemplary damages held properly awarded for railroad company's malicious refusal to permit express company to do business over its lines. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

**Mandamus.**—Where, in mandamus to compel railroad to grant facilities to express company, exceptions were sustained to the answer, held, that there was no error in refusing to submit the case to the jury. *Trinity & B. V. Ry. Co. v. Empire Express Co.* (Civ. App.) 173 S. W. 217.

## INJURIES FROM OPERATION OF RAILROAD

## II. COMPANIES AND PERSONS LIABLE FOR INJURIES

3. **Companies permitting use of road by others.**—Defendant railroad company, having without legal necessity permitted M.'s engines to use its tracks for a short distance, held liable for injuries to third persons from fires set out by the negligent operation of such engines by M.'s employés. *St. Louis Southwestern Ry. Co. of Texas v. McGrath* (Civ. App.) 160 S. W. 444.

It was not necessary that the defendant railroad should have had supervision of all construction details to render it liable for negligence of its servants in backing cars against a flat car on which plaintiff, the foreman of construction company, an independent contractor, was working, and thereby causing personal injury. *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 186 S. W. 387.

Contract of railroad and defendant held not to render defendant liable for personal injuries to a third person due to negligence of the road on spur track paid for by defendant and controlled by the road, although the language was broad enough to create such liability, but harsh and burdensome. *Houston & T. C. R. Co. v. Diamond Press Brick Co.* (Civ. App.) 188 S. W. 32.

## IV. INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL

7. **Degree of care in general.**—A railroad owes a bare licensee no duty to keep its premises safe, but to an invitee it owes the duty of exercising ordinary care to keep its premises reasonably safe. *Missouri, K. & T. Ry. Co. of Texas v. Kinslow* (Civ. App.) 172 S. W. 1124.

A railroad owes the duty to strangers who might be expected to be near a tank car to exercise ordinary care to see that car was in condition to avoid an explosion. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

8. **Injuries to persons at stations.**—A railroad company, which has permitted an express company to use its station for its business, owes to the express company's employés the duty to keep the premises in a reasonably safe condition. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

That a section hand was permitted to freely pass across tracks of defendant railroad when off duty did not entitle him as licensee to recover for injuries received while loitering behind standing box car after working hours while watching his children safely cross tracks. *Perez v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 192 S. W. 274.

A railroad is liable for negligently leaving an unlighted railway velocipede in a narrow passageway at its station which caused injuries to a policeman who fell over it. *Andrews v. York* (Civ. App.) 192 S. W. 338.

9. **Injuries to persons working on or about cars.**—A petition, alleging that defendant railway, negligently and in violation of an ordinance, permitted a fire near a car which plaintiff, an employé of a consignee, was unloading, the heat of which made him sick and caused him to fall into the fire, injuring him, held to state a cause of action. *Carter v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 897.

A public weigher who was injured while attempting to enter a car to get some cotton delivered to the railroad by mistake, held to be an invitee of the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Kinslow* (Civ. App.) 172 S. W. 1124.

10. **Injuries to persons on trains—Care required and liability as to trespassers.**—A railroad company was under no legal obligation to call in a physician or to care for a trespasser injured while attempting to steal a ride on its freight train. *Riley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 160 S. W. 595.

11. — **Care required and liability as to licensees.**—In an action for the death of a licensee who was killed by the moving of a bunk car, the question of the manner in which the coupling was made onto the car which was driven against the bunk car is immaterial. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

12. — **Care required and liability as to children.**—In an action for the wrongful death of plaintiff's minor child, killed by the moving of a bunk car in which the child was staying with his father, a charge to find for plaintiff, if defendant's servants backed the switch engine against the car without warning, and in disregard of the blue flag, held not improper, as a matter of law, on the ground that deceased, as a licensee, assumed the risk; the questions of the right of the child on the car, etc., being presented by conflicting evidence. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

A railroad company held liable for injuries to a child while in its locomotive with the knowledge of the hostler in charge. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 173 S. W. 967.

13. — **Persons riding at invitation or by acquiescence of employés.**—Railroad's engine hostler, who permitted boy to get upon engine while he was in charge, was under obligation to use care of ordinarily prudent person, under like circumstances, in turning on injector, to see if valve was closed, to prevent injury to boy. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184.

14. **Removal of trespassers.**—A watchman employed to arrest any depredator in railroad yards, negligently mistaking for such an innocent and rightful traveler, and assaulting him, was acting within his employment, rendering the employer liable. *Baker v. Ives* (Civ. App.) 188 S. W. 950.



15. **Contributory negligence of person injured—In general.**—A member of a city fire department, injured by one of a series of explosions constituting a continuing negligent act on defendant's part, held not negligent in entering upon the premises. *Houston Belt & Terminal Ry. Co. v. Johansen* (Sup.) 179 S. W. 853.

Where plaintiff attempted to cross defendant's tracks near a station about midnight in front of approaching train, but tripped, he was guilty of contributory negligence as a matter of law. *Schaff v. Combs* (Civ. App.) 194 S. W. 1159.

18. **Proximate cause of injury.**—Defendant's negligence per se, in keeping dynamite contrary to ordinance, was a concurrent proximate cause of injury from explosion, regardless of negligence or intent. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

19½. **Contracts of indemnity.**—One who leased a portion of a right of way of a railroad company and assumed all damage caused by the negligence of the company is not required to pay to the company damages recovered from it by the owner of a house on the right of way, who was not holding under the lessee, and of which house the company had never put the lessee in possession, for the negligent burning of the house. *Houston & T. C. R. Co. v. Eaves* (Civ. App.) 166 S. W. 453.

20. **Acts or omissions of employes or others.**—Where the superintendent of a railroad allowed the foreman in charge of construction to take his two sons with him, the sons were licensees, though the superintendent was specifically directed not to permit it. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

The son of foreman in charge of construction was a licensee upon a bunk car, even though express orders had been given against allowing him to accompany his father, where the superintendent of the railroad company, having actual knowledge that he was accompanying him, acquiesced in the arrangement. *Id.*

23. **Actions for injuries to licensees or trespassers—Weight and sufficiency of evidence.**—In an action for injuries caused by cotton seed cakes falling upon plaintiff in loading a car when another car was coupled to it, evidence held insufficient to show that defendant's employes knew that plaintiff was in the car. *Missouri, K. & T. Ry. Co. of Texas v. Sconce* (Civ. App.) 176 S. W. 833.

#### V. ACCIDENTS TO TRAINS

28. **Collisions—In general.**—A licensee injured while riding on a motor car, operated on defendant's railroad, in a collision with a hog on the track, did not assume the risk of injury from the negligence of the operator of the car; it being his duty to exercise ordinary care. *Waterman Lumber & Supply Co. v. Phelps* (Civ. App.) 175 S. W. 742.

In an action for injuries in a collision between a railroad motor car, on which plaintiff was riding as a licensee, and a hog on the track, evidence held to sustain findings that defendants were negligent as to the speed of the car and in failing to see the hog in time to avoid a collision. *Id.*

#### VI. ACCIDENTS AT CROSSINGS

33. **Public or private character of crossings.**—Where an underground passageway under defendant's track connecting portion of plaintiff's inclosure, which passageway was used by plaintiff and his landlord for six years, whether plaintiff's right to use such passageway was by implied contract or whether he was a mere invitee was immaterial in determining the defendant's negligence in maintaining a defective passageway. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

35. **Defects in crossings and approaches.**—See art. 1068 and notes.

The failure of a railroad to construct a temporary crossing, while the regular crossing upon which plaintiff was injured was torn up because of repairs, constituted negligence, if such a temporary crossing might easily have been constructed on either side of the regular crossing. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

The fact that a railroad bridge is constructed in the same manner as all other bridges of its kind is not conclusive that its maintenance for use as the roof of an underground passageway between portions of an inclosure was not negligence. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

39. **Signboards, signals, flagman and gates at crossings.**—Where an ordinarily prudent person would have maintained a flagman or watchman at the railroad crossing where an injury occurred, a failure to keep such flagman or watchman was negligence. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

A railroad company which maintained a much traveled crossing without a watchman held negligent, where a freight train was divided so as to obstruct vision of train on another track and traveler was struck by a train moving rapidly without signal. *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035.

The failure of a railroad company to have a watchman at a crossing on a city street constantly in use was no less negligence towards the inhabitants of the city because they knew of such failure. *Id.*

That travelers might, by using the greatest possible care at a crossing, escape danger, unless railroad employes were negligent, held not conclusive that a watchman or flagman was unnecessary. *St. Louis Southwestern Ry. Co. of Texas v. Waits* (Civ. App.) 164 S. W. 870.

Evidence held to support a jury finding that railroad crossing, because of the extraordinary hazards, required a watchman. *Id.*

Whether railroad company should have maintained flagman at crossing held to depend on whether the conditions rendered it extraordinarily hazardous, whether the company knew of such danger, and whether an ordinarily prudent person would have maintained a flagman there. *Id.*

**42. Lights, signals and lookouts from trains or cars.**—An instruction, in an action for injuries in a collision of an automobile and a train, that if the enginemens failed to exercise ordinary care to keep a lookout ahead to prevent injury to persons on the crossing, and such negligence proximately caused the accident without contributory negligence by plaintiff, held correct. *Adams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 853.

A railroad company must exercise ordinary care to discover and avoid injuring persons upon the track where and when one of ordinary prudence would expect to find them, whether trespassers or rightfully on the track. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

Where a locomotive approached public crossing at dusk, unlighted, and without noise, and without ringing the bell or blowing the whistle, and without giving any other warning, servants and employes of the railroad were guilty of negligence. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

Where a person was thrown from a wagon because, when he approached a crossing, a train standing nearby was started and moved partly over the crossing without ringing the bell, the railroad company was liable. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 189 S. W. 284.

When some other character of warning is relied upon by a railroad as a substitute for the statutory signals, it must appear that the injured party had actual notice of the substituted warning. *Id.*

If railroad employes could not by keeping a lookout have discovered an automobile stalled on the track in time to have prevented injuring it, there was no negligence. *Andrews v. Mynier* (Civ. App.) 190 S. W. 1164.

**43. Obstruction of view or hearing.**—Where view of defendant's trains approaching highway crossing was obscured by trees growing near the right of way on land of third person, defendant was not negligent in permitting trees to obscure view. *Missouri, K. & T. Ry. Co. of Texas v. Trochta* (Civ. App.) 181 S. W. 761.

**44. Rate of speed.**—A showing that a railroad train was running 15 or 20 miles an hour when it passed a crossing some distance out of a little town will not in itself establish that it was run at a dangerous or negligent speed. *Ft. Worth & D. C. Ry. Co. v. Harrison* (Civ. App.) 163 S. W. 332.

Running a passenger train at 35 miles an hour is not negligence per se. *Missouri, K. & T. Ry. Co. of Texas v. Trochta* (Civ. App.) 181 S. W. 761.

**45. Violation of ordinance as negligence.**—If a railroad blocked a street with its cars for more than five minutes in violation of a city ordinance, its act was negligence per se, and if such negligence, coupled with other alleged and proved negligent acts of defendant, was direct and proximate cause of plaintiff's injury, he could recover in absence of contributory negligence on his part. *Houston Belt & T. Ry. Co. v. Price* (Civ. App.) 192 S. W. 359.

**47. Precautions as to persons seen at or near crossing—In general.**—Those in charge of a train have the right to presume that persons about to cross a railroad track in plain view of an approaching train will either stop before attempting to cross or will hasten across the track, and hence the fact that the speed of the train is not decreased will not establish the failure to keep a proper lookout. *Ft. Worth & D. C. Ry. Co. v. Harrison* (Civ. App.) 163 S. W. 332.

Where defendant's engineer was obliged to choose instantly between attempting to stop train or blow whistle to warn decedent approaching highway crossing, choice of attempt to stop held not negligence. *Missouri, K. & T. Ry. Co. of Texas v. Trochta* (Civ. App.) 181 S. W. 761.

**49. Contributory negligence of person injured—Care in going on or near tracks in general.**—The driver of an automobile which was injured in turning to avoid a locomotive at a crossing was guilty of negligence per se in approaching at from 15 to 25 miles per hour in violation of Pen. Code 1911, art. 815, in the absence of any showing that a greater speed was permitted by ordinances. *Houston Belt & Terminal Ry. Co. v. Rucker* (Civ. App.) 167 S. W. 301.

The act of going upon a railroad in pursuance of a lawful right to do so, at a public crossing, or where the railroad has expressly or impliedly licensed the act, is not negligence per se. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

A person who goes upon a railroad track at a public crossing, or where the railroad has expressly or impliedly licensed the act, is not negligent per se. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

**51. — Use of defective or obstructed crossings.**—Plaintiff striking his head while passing under a bridge while on horseback held negligent. *Marshall & E. T. Ry. Co. v. Petty* (Sup.) 180 S. W. 105.

The mere attempt to pass under the bridge which was too low to permit passage would not alone establish contributory negligence on his part. *Id.*

Decedent, running automobile into traction car on much frequented highway crossing without swerving from course and where view was unobstructed, held guilty of contributory negligence. *Southern Traction Co. v. Kirksey* (Civ. App.) 181 S. W. 545.

Where plaintiff, knowing the dangerous character of an underground passageway under a railroad crossing his inclosure, was injured, while using it when his mule ran away, held, the fact there was a grade crossing 1,800 feet east of such passageway did

not make plaintiff negligent as a matter of law in not using such grade crossing. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

One crossing a railroad track at a place which has become a public crossing by custom has the right to pass around a car obstructing such crossing. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

**52. — Duty to stop, look, and listen.**—Persons about to cross a railroad track must look and listen for approaching trains, and a failure to do so bars recovery. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445; *Ft. Worth & D. C. Ry. Co. v. Hart* (Civ. App.) 178 S. W. 795.

Failure to stop, look, and listen before using a railroad crossing is not negligence per se. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025; *Texas & P. Ry. Co. v. Moody* (Civ. App.) 169 S. W. 1057.

In an action against a railroad for injuries at a crossing, plaintiff, failing to look or listen, held guilty of contributory negligence. *Teetz v. International & G. N. Ry. Co.* (Civ. App.) 162 S. W. 1000.

One is not guilty of contributory negligence as matter of law in not stopping before going on a railroad crossing, but it is a question for the jury. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

Evidence that plaintiff approached a railroad crossing at about dark and left the public highway a few feet from the track, and looked in front of her, but not behind her, and was struck by a locomotive as she was stepping off the track, which locomotive had given no signal and bore no light, and was proceeding at a slow speed and noiselessly, is insufficient, as a matter of law, to establish contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

**53. — Duty where view or hearing obstructed.**—In action against railroad for killing traveler at highway crossing, decedent held negligent in driving across a track without stopping and listening, where view was obstructed. *Missouri, K. & T. Ry. Co. of Texas v. Trochta* (Civ. App.) 181 S. W. 761.

Driver who neither looked nor listened for train that struck him, and who, inattentive to any warning, went on track behind a train without trying to ascertain whether another train was about to pass in other direction, was guilty of such negligence as to preclude recovery for damages to automobile. *St. Louis, B. & M. Ry. Co. v. Paine* (Civ. App.) 188 S. W. 1033.

**54. — Knowledge of danger.**—Plaintiff, who was injured by his head striking the end of a projecting bolt while riding a mule through a passage underneath defendant's railway, when his mule ran away, was not negligent as a matter of law although he knew the bridge to be so low that a man on horseback must lean over to guard against injury. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

**56. — Effect of directions of railroad employés.**—The issue raised by the action of the driver of a horse and buggy in attempting to cross a railroad, which was torn up because of repairs, at the invitation of the foreman in charge, was one of contributory negligence, and not assumption of risk. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

**58. — Crossing near approaching trains or cars.**—It cannot be said, as matter of law, that one who, at night, saw a passenger train, which was 60 or 70 feet from the crossing, and approaching at a speed two or three times the 6 miles per hour allowed by ordinance, when he was 15 feet from the crossing, was guilty of contributory negligence in increasing his speed and attempting to cross ahead of it. *Gulf, C. & S. F. Ry. Co. v. Gaddis* (Civ. App.) 166 S. W. 124.

An attempt to cross a railroad track before a train is not negligence per se. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

**59. — Acts in emergencies.**—The failure of a person placed in a position of imminent danger at a railroad crossing where he had to act hastily, through the negligence of the company, to pursue the wisest course, was not negligence. *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035.

**60. — Effect in general.**—Where plaintiff was injured at railroad crossing, while riding in automobile, negligence of his companion, who was engaged in joint enterprise with him, could not be imputed to plaintiff. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

If plaintiff was negligent in going upon defendant's track with his automobile, and defendant's employés did not discover him and could not by ordinary care have discovered him in time to prevent injury, he could not recover for destruction of automobile. *Andrews v. Mynier* (Civ. App.) 190 S. W. 1164.

**61. Proximate cause of injury.**—Where plaintiff was injured when his horse became frightened at steel rails which defendant railroad piled in or near a crossing, the fact that the old wagon gear into which the horse backed had been placed there by another did not excuse the railway. *Quanah, A. & P. Ry. Co. v. Goodwin* (Civ. App.) 177 S. W. 545.

**62. Injury avoidable notwithstanding contributory negligence.**—An engineer, after discovering the peril of a person on a crossing, held negligent if he realizes that the person would not probably extricate himself from the perilous position. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

Evidence in a pedestrian's action for injuries received at a railroad crossing held insufficient, as a matter of law, to justify the court in saying that her peril was not discovered by the employés of the railroad in time to avoid the accident. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

Admission of driver of automobile damaged by defendant's train that he saw the approaching train 20 feet away when he was proceeding slowly and could have stopped in 3 feet, but did not reverse because he thought quickest way was to go ahead, in effect asserted that there was no discovered peril. *St. Louis, B. & M. Ry. Co. v. Paine* (Civ. App.) 188 S. W. 1033.

**63. Acts or omissions of employes or others.**—A railroad foreman, in charge of repair work at a crossing, was the representative of the company, to give notice of its condition to travelers ignorant thereof, and the company was liable for injuries to a traveler, if due to negligence of the foreman in stating that he could cross over. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

**67. — Sufficiency of evidence.**—Evidence held sufficient to support a judgment for plaintiff. *International & G. N. Ry. Co. v. Walker* (Civ. App.) 161 S. W. 961, rehearing denied 162 S. W. 921.

In an action for injury from having his foot caught between defendant's rails at a crossing, holding him until struck by a switch engine, evidence held to sustain a verdict for plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Matthews* (Civ. App.) 164 S. W. 1092.

Evidence, in an action for injuries to an automobile in turning to avoid a locomotive at a crossing, held to show that the negligence of the driver in approaching at an excessive speed, in violation of Pen. Code 1911, art. 815, concurred with the negligence, if any, of the railroad company in causing the accident. *Houston Belt & Terminal Ry. Co. v. Rucker* (Civ. App.) 167 S. W. 301.

Evidence where the person injured attempted to cross in front of the train, after he, when 20 or 25 feet from the track, had seen the train, held to support a verdict for plaintiff on the theory of exoneration from contributory negligence by reason of his having acted on sudden impulse, when in a perilous situation, in which he had been placed by defendant's negligence. *International & G. N. Ry. Co. v. Isaacs* (Civ. App.) 168 S. W. 872.

In an action for death on a crossing, evidence held to sustain a finding of negligence in not avoiding the injury after discovering the peril. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

In an action for the death of plaintiff's son, evidence held to show as a matter of law that the son was contributorily negligent in driving an automobile upon defendant's track in front of a train. *Beaumont, S. L. & W. Ry. Co. v. Moy* (Civ. App.) 174 S. W. 697.

Evidence in action for death of mules and injuries to wagon at railroad crossing held to show defendant's negligence either in running at reckless speed or in making a slight attempt to stop. *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504.

Evidence held to support a special finding that defendant's train was moving faster than six miles an hour over a crossing. *Texas & P. Ry. Co. v. Eddleman* (Civ. App.) 175 S. W. 775.

A finding that a train approaching the crossing did not sound the whistle or ring the bell held sustained by the evidence. *Galveston, H. & H. R. Co. v. Copley* (Civ. App.) 176 S. W. 665.

In an action against a railroad and its subcontractor for injury to plaintiff when his horse became frightened by a pile of rails which they had placed on or near a crossing, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence. *Quanah, A. & P. Ry. Co. v. Goodwin* (Civ. App.) 177 S. W. 545.

Evidence, in action against railroad for injury from collision with plaintiff's automobile, held sufficient to sustain finding that plaintiff was not guilty of contributory negligence in not again looking before he reached a point which rendered the collision inevitable. *Missouri, K. & T. Ry. Co. of Texas v. Thayer* (Civ. App.) 178 S. W. 988.

Where negligence could be predicated on the failure to ring an engine bell, that the testimony may not have been sufficient to support findings of negligence in other respects alleged held not a reason for reversing the judgment. *Texarkana & Ft. S. Ry. Co. v. Rea* (Civ. App.) 180 S. W. 945.

Evidence held to sustain a finding that a railroad company negligently maintained a crossing in an unsafe condition for travel. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

Evidence held sufficient to warrant the conclusion that the train which killed decedent was moving north. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

In an action against a railroad for personal injuries to a minor alleged to have been caused by defendant's negligence in blocking a street for more than five minutes in violation of an ordinance and in suddenly moving cars upon plaintiff without warning, at a rate forbidden by ordinance, evidence held to support a verdict for plaintiff. *Houston Belt & T. Ry. Co. v. Price* (Civ. App.) 192 S. W. 359.

Evidence held to sustain verdict for plaintiff in action for death of her husband when struck by a locomotive at a railway crossing. *Texas & P. Ry. Co. v. Miles* (Civ. App.) 192 S. W. 1139.

In an action for damages to an automobile struck at a crossing, evidence held to warrant a finding that defendant was negligent. *San Antonio & Aransas Pass Ry. Co. v. Schaeffer* (Civ. App.) 194 S. W. 684.

In an action for damages to an automobile struck at a crossing, evidence held to warrant a finding that the driver of the motorcar was not contributorily negligent. *Id.*

Evidence held to warrant jury in finding that party whose automobile collided with railway motorcar was negligent. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

## VII. INJURIES TO PERSONS ON OR NEAR TRACKS

70. **Right to go on or near track—In general.**—A driver of an automobile in a city street had no greater right therein than a railroad, whose team track lay along the side. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

71. — **Customary use of track.**—Where a railroad company knows that the public habitually uses its tracks in passing and repassing, notwithstanding a notice inhibiting such use, the users become licensees, instead of trespassers, but they must accept the tracks as they find them, and are guilty of negligence if they use the most dangerous way instead of the safest. *Holt v. Texas Midland R. R.* (Civ. App.) 160 S. W. 327.

Where a railroad company acquiesced in the public's use of a path on its right of way for many years, there was an implied permission to use the path, which rendered the users licensees. *St. Louis Southwestern Ry. Co. of Texas v. Balthrop* (Civ. App.) 167 S. W. 246.

Where a pathway crossing a railroad track had been generally used by the public, the road's implied permission to so use it might be inferred, and it was bound to use such vigilance and caution as a person of ordinary prudence would use under like circumstances. *Texas & P. Ry. Co. v. Key* (Civ. App.) 175 S. W. 492.

If a railway company habitually permits the public to use its track as passways at places other than public crossings, such persons become licensees, to whom the railway owes a higher degree of care to avoid injury than it owes to a mere trespasser. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

72. **Care required in general.**—A railroad is guilty of actionable negligence in failing to exercise ordinary care to avoid injuring persons on its track at such places and times as one of ordinary prudence would expect to find them there, regardless of whether they are trespassers or not. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

Two railroads maintaining parallel tracks held not guilty of actionable negligence toward a passenger on one road who jumped from the train under the erroneous belief that a collision with a train on the other road was imminent. *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 450.

74. **Care required as to trespassers.**—Where railroad company fenced its right of way and attempted to keep trespassers off, it is not, though children occasionally came on the premises, obliged before starting a train which had been stopped a few minutes to take steps to discover whether any small children were under the cars or in danger. *Gulf, C. & S. F. Ry. Co. v. Moss* (Civ. App.) 180 S. W. 1128.

A minor child, who spent the night on a railroad right of way in company with and at the invitation of a watchman at an embankment which had begun to wash out, is not a trespasser, but a licensee. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

76. **Defects in roadbed, tracks or equipment.**—It is not negligence per se for a railroad to leave a freight car for unloading by consignee on a track on a street having arc lights, and, in the absence of notice the car had been unloaded, to allow it to remain during the night following the day it was placed, where the usual time for unloading is about 48 hours, and sometimes the work is completed at night. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

78. **Articles projecting, falling or thrown from trains.**—A railroad company was bound to operate its train so as not to interfere with plaintiff's enjoyment of his premises near the right of way by casting missiles from the train and injuring plaintiff. *Trinity & B. V. Ry. Co. v. Blackshear* (Civ. App.) 161 S. W. 395.

Where a licensee on a path adjoining railroad tracks was injured by a piece of scantling, which the movement of the train threw from one of the cars, the company was liable. *St. Louis Southwestern Ry. Co. of Texas v. Balthrop* (Civ. App.) 167 S. W. 246.

A railroad negligently allowing spikes to lie on the ground could not foresee that a rapidly moving train would pick up a spike and hurl it 50 feet into a field, and was not liable to plaintiff, struck and injured thereby. *Trinity & B. V. Ry. Co. v. Blackshear*, 172 S. W. 544, 106 Tex. 515, L. R. A. 1915D, 278, reversing judgment (Civ. App.) 161 S. W. 395.

80. **Signals and lookouts—In general.**—A railroad engineer must keep a lookout for persons or obstructions on the track. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

Trainmen must exercise proper care to keep a lookout to discover persons on the track. *St. Louis Southwestern Ry. Co. of Texas v. Watts* (Civ. App.) 173 S. W. 903.

It is the duty of a railroad company's servants operating its trains to use ordinary or reasonable care to discover persons on tracks. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

81. — **Persons entitled to benefit of signals and lookouts.**—The fact that one injured on a railroad track was a trespasser did not relieve train employes of the duty of keeping a lookout or justify them in running over such trespassers without endeavoring to discover them on the track. *Galveston, H. & S. A. Ry. Co. v. Huegle* (Civ. App.) 158 S. W. 197.

Though a railroad track has been so notoriously used in the daytime by pedestrians as to charge the company with notice thereof, yet, in the absence of evidence of the

use of the track for the same purpose at night, the company need not keep a lookout for persons who may walk thereon at night, because they are trespassers. *Massey v. International & G. N. Ry. Co.* (Civ. App.) 162 S. W. 371.

One negligently jumping from a moving train and falling on a track is not a willful trespasser, and the company owes the duty of a lookout. *St. Louis Southwestern Ry. Co. of Texas v. Watts* (Civ. App.) 173 S. W. 909.

Though employes in charge of a train knew that the tracks were in the daytime used by the public, they are not bound, when in charge of a train running at night or in the early morning, to anticipate persons on the tracks. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

Persons loitering upon a railroad right of way and walking across it at other places than the necessary crossings necessarily impose upon the railroad an added burden to keep a lookout for them. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

**82. — Places for giving signals or keeping lookout.**—While ordinarily railroad companies may rely upon having a clear track, except at public crossings, etc., they must keep a lookout to prevent injury to any one who may be on the track. *Galveston, H. & S. A. Ry. Co. v. Huegle* (Civ. App.) 153 S. W. 197.

Train employes on a train passing through a town at a rapid rate of speed about 8 o'clock in the evening at a place habitually used by pedestrians are required to keep a reasonable lookout for pedestrians at such place. *Id.*

**88. — Infirm or helpless persons.**—A railroad company owes the duty as to a drunken trespasser lying on the track within the limits of a village at a place where the track is commonly used as a footpath to keep a reasonable lookout. *San Antonio & A. P. Ry. Co. v. Jaramilla* (Civ. App.) 180 S. W. 1126.

The duty of the operatives of a locomotive to use reasonable care to avoid injury after discovering the presence of a trespasser lying on the track is not destroyed or weakened by the fact that the trespasser is drunk. *Id.*

**89. Contributory negligence of person injured.—Care required of persons on or near tracks in general.**—Where plaintiff, a permission licensee, used defendant's railroad track, which he knew consisted of a trestle over a part of the public street, he was negligent, where there was another and safe way leading to his home, but little longer. *Holt v. Texas Midland R. R.* (Civ. App.) 160 S. W. 327.

Plaintiff, a licensee on defendant's tracks, was guilty of contributory negligence, barring recovery for injuries occasioned by a fall from defendant's trestle, where, though one side was guarded by a railing, he voluntarily chose the other side. *Id.*

In an action for injuries to plaintiff by being struck by a train in a city railway yard, plaintiff held negligent as a matter of law. *Chicago, R. I. & G. Ry. Co. v. La Grone* (Civ. App.) 167 S. W. 7.

Subject to exceptions in favor of minors and those mentally irresponsible, a trespasser upon a track is guilty of contributory negligence as a matter of law which bars a recovery for injury by a train, in absence of any liability on the ground of discovered peril. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

One going into an elevator shed and sitting so that his feet were inside the rail of a switch track, and who was killed by a car shunted into the elevator, was a trespasser, and, as such, guilty of contributory negligence as a matter of law. *Id.*

One going into an elevator shed and voluntarily exposing himself to the known danger of being run over by cars which defendant might switch into the shed, even though not a trespasser, was guilty of contributory negligence as a matter of law, barring a recovery. *Id.*

It is the duty of one walking on or crossing a track to use ordinary care to protect himself from danger from moving cars, and if he fails to do so, or is injured at a place not commonly used by the public with the road's knowledge, he cannot recover. *Texas & P. Ry. Co. v. Key* (Civ. App.) 175 S. W. 492.

In an action for injuries received while walking along the street beside a railroad track, there being no contention that plaintiff was on the track or a trespasser, there could be no presumption of negligence on his part because he did not walk elsewhere. *Atchison, T. & S. F. Ry. Co. v. Shadden* (Civ. App.) 185 S. W. 629.

Where plaintiff drove along a dim road near defendant's tracks instead of one well traveled, and, failing to watch road, was thrown out by buggy hitting a steel boundary post plainly visible, a finding of contributory negligence, held justified. *Masterson v. Panhandle & S. F. Ry. Co.* (Civ. App.) 193 S. W. 461.

**90. — Care required of children and others under disabilities.**—One killed by a train having been lying on the track, drunk or asleep, was guilty of contributory negligence. *Devance v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 164 S. W. 13.

That which would be contributory negligence in an adult while crossing railroad track would not necessarily be such in case of a child. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

**92. — Knowledge of danger.**—Plaintiff, struck by train he had seen in street railway yard while walking along tracks, held negligent as a matter of law. *La Grone v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 189 S. W. 99.

**95. Proximate cause of injury.**—The negligent construction of a railroad trestle over a street, without which a lump of coal would not have fallen and injured plaintiff, driving in the street below, held in law the proximate cause of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158.

Negligence of one in jumping from a moving train and falling injured on a track is not the proximate cause of his death by being run over by an engine while lying on the track. *St. Louis Southwestern Ry. Co. of Texas v. Watts* (Civ. App.) 173 S. W. 909.

That plaintiff in a suit for damages is guilty of negligence will not preclude recovery if such negligence did not proximately contribute to his injuries. *Scott v. Northern Texas Traction Co.* (Civ. App.) 190 S. W. 209.

**96. Injury avoidable notwithstanding contributory negligence.**—If one who negligently went on a right of way was discovered by train employes in a place of danger in time to have stopped the train and avoided his injury, the company would be liable for failure to do so, notwithstanding the injured person's contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Huegle* (Civ. App.) 158 S. W. 197; *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

A railroad company is not liable, on the theory of discovered peril, for the death of a trespasser on its track, struck by a train, unless it has actual notice of his peril, and fails to use every means within its power to prevent injuring him. *Massey v. International & G. N. Ry. Co.* (Civ. App.) 162 S. W. 371.

A railroad cannot be held liable because its servants were negligent in failing to discover a person in a place of peril, or in failing to recognize his peril, but is liable only when they actually saw him and realized his peril in time by the use of the means at hand to stop the train before a collision. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

An actual discovery of the peril of deceased when cars were shunted on a switch track was a necessary predicate for liability on the ground of discovered peril. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

Where defendant's engine crew was negligent after discovery of one on the track, it was immaterial that such person was negligent in entering thereon. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 179 S. W. 930.

Where, after a pedestrian's left leg had been cut off the engineer, acting on the supposition that he had not been struck, released the emergency brakes, in consequence of which the train moved forward, and caused loss of the right leg, held, that the railroad company was liable, under the doctrine of discovered peril, for loss of the right leg. *St. Louis Southwestern Ry. Co. of Texas v. Aston* (Civ. App.) 179 S. W. 1128.

Facts held sufficient to charge engineer with negligence under the doctrine of discovered peril, where it showed that he knew of plaintiff's perilous position, though it did not show that he knew certainly that he would be injured unless the train was stopped. *Id.*

The duty of an engineer to use all means consistent with the train's safety to avoid striking decedent, who was discovered sitting on the track, did not arise until, after seeing decedent, it was reasonably apparent that he probably could not or would not remove himself from the track. *Gulf, C. & S. F. Ry. Co. v. Phillips* (Civ. App.) 183 S. W. 806.

To render a railroad company liable under the theory of discovered peril, it must appear that engineer in charge of train realized the person's danger, and that he could not or would not extricate himself from his position, yet failed to take precautions to avoid injury. *International & G. N. Ry. Co. v. Logan* (Civ. App.) 184 S. W. 301.

Under the doctrine of discovered peril, plaintiff must show that he was in a perilous position, that defendant discovered it in time to avert accident, and had no reason to believe that plaintiff could or would free himself from impending injury. *Horwitz v. Jefferson County Traction Co.* (Civ. App.) 188 S. W. 26.

**98. Acts or omissions of employes or others.**—That a brakeman on a freight train gave a warning cry, and a person walking between the tracks stepped in front of the passenger train and was killed, held not to charge the railroad company with negligence. *Barnes v. Texas & N. O. Ry. Co.* (Civ. App.) 177 S. W. 214.

**102. Actions for injuries—Sufficiency of evidence.**—In an action for injuries from a lump of coal falling upon plaintiff as he was driving underneath defendant's railroad trestle, evidence held sufficient to sustain a finding that the trestle was negligently constructed. *Missouri, K. & T. Ry. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158.

Evidence, in an action for the killing by a train of a person asleep or drunk, with his head on a rail of the track, his body outside the track, held to show no failure of duty as to lookout, or after discovering the peril. *Devance v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 164 S. W. 13.

In an action for injuries to plaintiff's wife, hurt by a piece of scantling, which was thrown from a moving train, a finding that the railroad company was negligent in not discovering and removing the scantling from its car held justified under the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Balthrop* (Civ. App.) 167 S. W. 246.

A finding by the jury that plaintiff's wife was struck by a piece of scantling thrown from a moving train, as she was proceeding on a path adjacent to the tracks, held not in conflict with the physical facts. *Id.*

Evidence held not to sustain a recovery for injuries to a pedestrian on a track struck by a train, on the theory of the failure of the trainmen to exercise proper care after the discovery of the pedestrian's peril. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 168 S. W. 473.

In an action for the death of a person run over by an engine, evidence held to support a finding of negligent failure to keep a lookout. *St. Louis Southwestern Ry. Co. of Texas v. Watts* (Civ. App.) 173 S. W. 909.

Evidence in an action for the death of plaintiff's son, killed from being struck by a train while walking on the track, held to show that the defendant railroad company was not negligent, and to authorize an instructed verdict for defendant. *Barnes v. Texas & N. O. Ry. Co.* (Civ. App.) 177 S. W. 214.

Evidence that the headlight on the freight engine, which decedent was approaching when he stepped in front of a passenger train, was not hooded, held not to show that defendant was negligent. *Id.*

Evidence held to authorize finding that defendant's engine crew discovered the child on the track, unaware of the approaching train in time to have avoided the death. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 179 S. W. 930.

Evidence in an action for the death of an intoxicated trespasser held to show that the operatives of defendant's locomotive were willfully and wantonly negligent in failing to use proper means to avoid injury after discovering that deceased was in a position of peril. *San Antonio & A. P. Ry. Co. v. Jaramilla* (Civ. App.) 180 S. W. 1126.

Where the manner in which a small child trespassing on railroad tracks met his death under a train was not disclosed, it not being shown whether he attempted to board the train or whether he was underneath the cars when started, the failure of the railroad company to maintain a lookout to discover children's presence before starting the train was not the proximate cause of the injury. *Gulf, C. & S. F. Ry. Co. v. Moss* (Civ. App.) 180 S. W. 1128.

Evidence held sufficient to show that those in charge of a train which struck plaintiff's minor child were guilty of negligence after discovering his position of peril. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

In an action for injuries to plaintiff, when he drove his automobile at night into a freight car left for unloading on a street track, evidence held to sustain finding that the injuries were not proximately caused by intoxication. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

In an action for a death on a railroad track, evidence held to justify a finding that the operators of defendant's engine negligently failed to discover deceased in time to have stopped the engine before striking him. *Houston Belt & Terminal Ry. Co. v. Lee* (Civ. App.) 185 S. W. 393.

In an action for injuries received while walking along a street beside a railroad track, evidence held sufficient to support a jury finding that some object, the nature of which was unknown to plaintiff, projected over the side of the car and struck him. *Atchison, T. & S. F. Ry. Co. v. Shadden* (Civ. App.) 185 S. W. 629.

In an action for injuries received while walking along a street beside a railroad track, evidence held to support a finding that the defendant railroad was guilty of negligence. *Id.*

In an action for injuries received while walking along a street beside a railroad track, evidence held to support a jury finding that the plaintiff was struck while walking clear of the cars. *Id.*

In action for death of child, struck in a manner not accounted for while crossing track, evidence held sufficient to show company's negligence proximately causing death. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

## IX. FIRES

**111. Preventing spread of fire.**—A railroad, on whose boarding car a fire started, and which failed to extinguish it before it reached plaintiff's land and destroyed the grass, was liable. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 173 S. W. 908.

Where fire started in boarding cars on a side track, it was gross negligence in the foreman to stand by without any effort to prevent its spread to plaintiff's nearby seedhouse, etc., whether it was Sunday or not. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

**112. Contributory negligence of owner of property—In general.**—Plaintiff held not guilty of contributory negligence in locating his building too near the tracks. *Missouri, K. & T. Ry. Co. of Texas v. Marshall* (Civ. App.) 160 S. W. 427.

Plaintiff's refusal of permission to a railroad to burn necessary fireguards on his land, except upon an unreasonable condition that it pay for damage in advance, is contributory negligence barring recovery against the railroad for burning his land. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 184 S. W. 1075.

Where the owner of loose cotton had stored it on the compress platform near railway tracks, and it was burned by fire started by sparks from a locomotive negligently operated, the owner could not recover. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas* (Sup.) 193 S. W. 134.

**114. — Precautions against communication of fire.**—To leave open a window in the loft of a barn, in which there was loose straw, is not contributory negligence defeating recovery for fire set by sparks from defendant's locomotive. *Arey v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 170 S. W. 802, judgment affirmed *St. Louis Southwestern R. Co. of Texas v. Arey* (Sup.) 179 S. W. 860.

Owner of barn destroyed by fire caused by a spark from railroad locomotive held debarred from recovery by his own contributory negligence in leaving open a window facing the road; the interior being littered with straw. *St. Louis Southwestern Ry. Co. of Texas v. Arey* (Sup.) 179 S. W. 860, affirming judgment *Arey v. St. Louis Southwestern R. Co. of Texas* (Civ. App.) 170 S. W. 802.

Where a fire started in boarding cars on railroad siding near plaintiff's seedhouse, the duty to prevent its spread was on the railroad, and not upon the plaintiff. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

Where one occupying a house on right of way of railroad operated by lumber company knew that sparks escaping from the engine had started fires on different occasions, she was not guilty of contributory negligence in failing to remove her property from the house, having the right to assume that the company would not operate its locomotives so as to endanger her property. *Blount-Decker Lumber Co. v. Martin* (Civ. App.) 190 S. W. 232.



116. **Proximate cause of injury—Spread of fire.**—Leaving combustible material on the right of way held the proximate cause of the burning of a barn on adjoining land. *Marshall & E. T. Ry. Co. v. Killingsworth* (Civ. App.) 162 S. W. 1181.

117. **Injury avoidable notwithstanding contributory negligence.**—The doctrine of discovered peril defeats contributory negligence on the part of the owner of goods burned by a fire set by locomotive only when the danger arising therefrom is imminent, is actually discovered by the railroad, and could have been averted by it. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas* (Sup.) 193 S. W. 134.

119. **Contracts for exemption from liability.**—A contract between an adjacent proprietor and a railroad company held to waive all claims for loss by fires ignited from trains on the main as well as the switch track. *Talley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 176 S. W. 65.

120. **Persons entitled to damages.**—It was no defense that the burned building constituted a trespass, where it was on the right of way with defendant's consent. *Missouri, K. & T. Ry. Co. of Texas v. Marshall* (Civ. App.) 160 S. W. 427.

Where a lumber company owning houses occupied by its employes consented to an employe subletting his house, sublessee was not a trespasser, and the company owed her duty of exercising ordinary care in operating its locomotives so as not to fire house and destroy her household goods. *Blount-Decker Lumber Co. v. Martin* (Civ. App.) 190 S. W. 232.

124. **Actions for injuries by fire—Sufficiency of evidence.**—Where proof of the source of the sparks was wholly circumstantial, the court properly charged that plaintiff must show by a preponderance of evidence that his property was burned by negligent emission of sparks from such engines. *Roman v. St. Louis Southwestern Ry. Co.* (Civ. App.) 160 S. W. 431.

Burden of showing that sparks, negligently emitted, caused the loss, is sustained by proof that sparks escaped from defendant's engines and burned the property. *Id.*

Evidence held to warrant the jury in finding that the engine which caused the fire was not properly equipped, or that proper care had not been exercised to maintain the equipment. *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 160 S. W. 607.

Evidence held to support findings that fire which injured plaintiff's property spread from one set by railroad company's section foreman; that he was negligent in leaving smoldering ends of ties; and that such negligence was the proximate cause of the injury. *St. Louis Southwestern Ry. Co. of Texas v. Garner* (Civ. App.) 164 S. W. 385.

Where railroad employes were using boarding car before it caught fire, and railroad offered no evidence of probability that fire started through some other agency than negligence of its employes, there was showing prima facie that fire originated through their act or omission. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 173 S. W. 908.

Evidence in action for the loss of a seedhouse, etc., by fire negligently communicated from boarding and lodging cars on defendant's side track, held sufficient to sustain a verdict for the plaintiff. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

In a suit against defendant for negligently firing house in which plaintiff was living, evidence held to warrant a finding that plaintiff was continuing to occupy the premises which belonged to defendant, with its acquiescence. *Blount-Decker Lumber Co. v. Martin* (Civ. App.) 190 S. W. 232.

Evidence held to sustain a finding that fire was communicated to plaintiff's sawmill plant as a result of failure of defendant's employes in charge of its locomotive to use ordinary care in operating it. *St. Louis Southwestern Ry. Co. of Texas v. Wood* (Civ. App.) 192 S. W. 812.

Evidence held to sustain a finding that fire which destroyed defendant's sawmill plant escaped from one of defendant's locomotives. *Id.*

125. — **Damages.**—The measure of damages for the negligent burning of grass in a pasture includes, not only the value of the grass, but the expense of feeding the cattle which had been pastured thereon occasioned by the loss of the grass. *Chicago, R. I. & G. Ry. Co. v. Word* (Civ. App.) 158 S. W. 561.

Where plaintiffs' land was negligently fired by a railroad company, and the grass was burned off, plaintiffs may recover damages for the difference between the value of the land before and after the fire without grass for pasture purposes; it appearing that the land had been so used before the fire. *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 160 S. W. 606.

One's loss from the burning of his stock of goods, is what the goods would have sold for in bulk or in convenient lots. *Missouri, K. & T. Ry. Co. of Texas v. Cadenhead* (Civ. App.) 164 S. W. 395.

An instruction allowing recovery for the value of a building destroyed by fire on a lot owned by the plaintiff, instead of for the difference in the value of the lot before and after the destruction of the building, held not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Mitchell* (Civ. App.) 166 S. W. 126.

Where plaintiff was using his land for pasturage and hay, the measure of damages for burning the grass was the depreciation in its market value for that or any lawful purpose. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 173 S. W. 908.

Verdict for \$813, with interest, in action for burning plaintiff's grass and for injury to his land, held, on the evidence, not excessive. *Id.*

The measure of damages for the destruction of growing crops being their value immediately before destruction, the jury must consider the probable yield, the market

price, and the cost of production. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

In action for value of property destroyed by fire verdict held not excessive. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

## CHAPTER ELEVEN

### COLLECTION OF DEBTS FROM RAILROAD CORPORATIONS

Art.	Art.
6623. When wages to be paid discharged employé.	6630. After sale, old directors to be trustees.
6624. Road liable to be sold for debt.	6631. Suit not to abate, when.
6625. New corporation in case of sale.	

#### Article 6623. [4547] When wages to be paid discharged employé.

See arts. 5246—98 to 5246—100, inclusive, ante.

#### Art. 6624. [4549] Road, etc., liable to be sold for debts.

**Rights and liabilities of purchasers.**—Under this article, held, that petition in a shipper's action for damages to goods, charging negligence by employés of the receiver of a railroad, was sufficient to show liability on the part of the company which had taken over the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Gray* (Civ. App.) 160 S. W. 434.

Under Const. art. 5, §§ 16, 19, and Rev. St. 1911, arts. 1767, 2291, 6624, 6625, on appeal to county court in action against receiver of railroad, plaintiff held entitled to bring in purchaser of the railroad's property and franchises. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

Injury to good name by libel held "personal injury" within articles 6624, 6625, as to liabilities of a railroad assumed by its purchaser. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

Injury to express messenger, who also handled the railroad's baggage, by false charge of railroad superintendent to superintendent of express company, causing his discharge, held "sustained in the operation of the railroad," so that, under articles 6624, 6625, the purchaser of the road assumed liability therefor. *International & G. N. Ry. Co. v. Perkins* (Civ. App.) 185 S. W. 657.

**Nature of liability.**—The charter of a railroad to construct, maintain, and operate a line constitutes a contract, binding not only on it, but the purchasers of its property, to maintain and operate it. *State v. Enid, O. & W. Ry. Co.* (Sup.) 191 S. W. 560.

#### Art. 6625. [4550] New corporation, in case of sale, may be formed, how.

**Constitutionality.**—Prohibiting the owners of a railroad, though financially unable to operate it, to remove its main track, contrary to statute in force when the charter was granted, is not depriving them of property without due process. *State v. Enid, O. & W. Ry. Co.* (Sup.) 191 S. W. 560.

**Duties and liabilities of purchaser of railroad in general.**—Under the Carmack amendment relating to the liability of an initial carrier for damage to an interstate shipment, and this article, defining the liability of a railroad succeeding to the property of another road, held that liability of the purchaser of the road of an initial carrier on foreclosure did not include its predecessor's liability for damage to an interstate shipment occurring on the line of a connecting carrier. *Hudgins v. International & G. N. Ry. Co.* (Civ. App.) 162 S. W. 1016.

Under Const. art. 5, §§ 16, 19, and Rev. St. 1911, arts. 1767, 2291, 6624, 6625, on appeal to county court in action against receiver of railroad, plaintiff held entitled to bring in purchaser of the railroad's property and franchises. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

Where an insolvent railroad company was sold by a receiver under order of court, the court cannot, the operation being unprofitable, require the purchasers to continue operation, for that would work a confiscation, and it would be impracticable to enforce the judgment. *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 493.

Where the property of an insolvent railroad is sold by the receiver, purchasers become in effect the stockholders, and are bound by its charter provisions and the common law, though they form no corporation for its operation. *Id.*

Injury to good name by libel held "personal injury" within articles 6624, 6625, as to liabilities of a railroad assumed by its purchaser. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

Generally the purchaser of railroad at sale under order of court holding custody of property by receiver takes property free from claims against receiver arising from operation of road, unless court, ordering sale, imposes on purchaser liability for such debts as part consideration. *International & G. N. Ry. Co. v. Perkins* (Civ. App.) 185 S. W. 657.

Injury to express messenger, who also handled the railroad's baggage, by false charge of railroad superintendent to superintendent of express company, causing his discharge,

held "sustained in the operation of the railroad," so that, under articles 6624, 6625, the purchaser of the road assumed liability therefor. *Id.*

**Removal of tracks and abandonment of road.**—Under articles 6550, 6625, in absence of express legislative grant, a railroad company cannot abandon or remove any part of its track after it has been located, and operations begun. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

The Railroad Commission has no power to permit a railroad company to abandon and remove a part of its track which is being operated; such authority not being given to the Commission by statute. *Id.*

The provision of this article that in case of the sale of a railroad, new corporations may be formed to operate and maintain the railroad, and that no main track of any railroad once constructed and operated shall be abandoned or moved, is merely declarative of the common law. *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 498.

Where a railroad became insolvent, ceased operation, and was sold by a receiver under order of court, held that purchasers who secured no charter to continue operation could not be restrained from removing the rails and ties for use elsewhere. *Id.*

Where 10 miles of a proposed railroad was constructed within the two years provided by article 6633, but no more was constructed, such 10 miles constituted the main track of the railroad, and could not, under section 6625, be removed. *Id.*

While a railroad upon construction is dedicated to public use, the operation having been abandoned, the physical properties such as the rails and ties may be removed. *Id.*

Where the property of a railroad company which had no rolling stock and the operation of which had been abandoned was sold, the right to dismantle the road existed independent of the judgment. *Id.*

The purchasers of the property of a railroad take it subject to the provision, prohibiting the main track of a railroad once constructed and operated being abandoned or removed. *State v. Enid, O. & W. Ry. Co.* (Sup.) 191 S. W. 560.

The main track of a railroad does not lose its entity as such, within the provision, prohibiting its removal, because of insolvency of the company. *Id.*

To remove the track from the constructed end of a railroad line to other counties to be used at the other end of the line or in construction of another railroad, would be a removal of the main track within the inhibition of this article. *Id.*

— **Remedy.**—Mandamus or mandatory injunction is a proper remedy to prevent a railroad company from abandoning a part of its road after completion. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

**Location of offices.**—A corporation organized under this article, by a purchaser of the property and franchises of a railroad company sold to pay debts, held governed by article 6423 as to location of offices. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

### Art. 6630. [4555] After sale old directors to be trustees.

**Suits—Parties.**—Where, in a suit to cancel a note given for railroad stock, the company's assets, franchises, and charter were sold, and a receiver discharged, it was plaintiff's duty to join the managers and directors of the company, and, not having done so, a judgment of cancellation was a nullity. *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

Where, in a suit on a note secured by a deed of trust, recovery is denied because held as collateral security for a railroad note which was void, cancellation of the note and deed of trust cannot be had in the absence of either the railroad or the receiver, as parties, under arts. 6630, 6631. *Jones v. Nix* (Civ. App.) 174 S. W. 685.

**Failure to settle affairs of former company.**—Under articles 6539, 6630, where directors of a railroad corporation for 27 years after the sale of its franchise, etc., did not settle its affairs, or take charge of land owned by it, held that their interest therein had ceased. *Allison v. Richardson* (Civ. App.) 171 S. W. 1021.

### Art. 6631. [4556] Suits not to abate.

**Suits—Parties.**—See *Jones v. Abernathy* (Civ. App.) 174 S. W. 682; *Jones v. Nix* (Civ. App.) 174 S. W. 685; notes under art. 6630.

## CHAPTER TWELVE

### FORFEITURE OF CHARTER

Art.	Art.
6633. Forfeiture for failure to build, etc.	6635d. Extension of time to build branches; restoration of franchises, etc.
6635b. Extension of time to build branches; restoration of franchises, etc.	6635e. Further extension of time.
6635c. Extension of time to build and equip; corporate existence continued; proviso.	6635f. Further extension of time to build branches, etc.

### Article 6633. [4558] Forfeiture for failure to build and equip.

**Effect of article.**—This article, held self-executing and to preclude, after loss of charter rights by nonconstruction, the completion of the road. *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 498.

**Right of removal of main track.**—Where 10 miles of a proposed railroad was constructed within the two years provided by this article, but no more was constructed, such 10 miles constituted the main track of the railroad, and could not, under section 6625, be removed. *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 498.

**Art. 6635b. Extension of time to build branches; restoration of franchises, etc.**

**Note.**—Act June 4, 1915, relieving the Sugar Land Railway Company from the necessity of rebuilding part of its road removed under permission of the Railroad Commission, is omitted as special and local (Acts 1st Called Sess., 34th Leg. c. 29, p. 57).

**Art. 6635c. Extension of time to build and equip; corporate existence continued; proviso.**—That the time in which any railway corporation chartered under the laws of the State of Texas since the first day of January, 1892, or the charter of which has been amended since that date, is required to begin construction of its road, and construct, equip and put the same in good running order as required by Article 6633 of the Revised Statutes of the State of Texas of 1911, be and the same hereby is, as to any unfinished portion of such road, extended two years from the taking effect of this Act; and any railroad company having been chartered since January 1, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said Article 6633, or any part of said Article, shall have restored and preserved to it its corporate existence, and it shall have and enjoy all of the corporate franchises, property rights and powers held or acquired by it previous to any cause or forfeiture as aforesaid; provided that no railway company which shall be revived or the time extended by virtue of this Act shall claim or exercise any franchise not allowed, granted or permitted to other railway corporations under the law as now in force in this State. [Act March 15, 1915, ch. 50, § 1.]

Became a law March 15, 1915.

**Art. 6635d. Extension of time to build branches; restoration of franchises, etc.**—Any railway corporation chartered since the first day of January, A. D. 1892, and which by its original charter or by amendment thereto, filed since said first day of January, A. D. 1892, has further provided for the locating, constructing, maintaining, owning and operating of any extension or branch line or lines of railway, and which has failed or is about to fail to complete the same, or any part thereof, within the time required by law, shall, upon payment of all its franchise tax, be and is hereby restored to and granted all and singular the rights, privileges and franchises acquired by its original charter, or by such amendments to its articles of incorporation, as if the same was filed and recorded in the office of the Secretary of State on the day of the taking effect of this Act, and such corporation shall, upon payment of its franchise tax, be and is hereby authorized to project, complete, construct, own and operate any such extension and branch line or lines of railway under and as provided for in its charter or in any amendment to its articles of incorporation; provided, that such extension and branch line of railway shall be by such corporation completed and put in good running order at the rate of at least ten miles in one year from the taking effect of this Act, and twenty additional miles for each and every year thereafter, until all the branch line or lines of extension as provided for are completed; provided, that the provisions of this Act shall not apply to any railroad company which has been chartered by the State of Texas for a period of ten years or more, and which has twenty miles or less of railroad to build in order to comply with its original charter, or any amendment thereto. [Id., § 2.]

**Art. 6635e. Further extension of time.**—That the time in which any railway corporation chartered under the laws of the State of Texas since the first day of January 1892, or the charter of which has been amended, since that date, is required to begin construction of its road, and construct, equip and put the same in good running order as required by Article 6633 of the Revised Civil Statutes of the State of Texas of 1911, be and the same hereby is, as to any unfinished portion of such road extended two years from the taking effect of this Act; and any railroad company having been chartered since January 1, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said Article 6633, or any part of said Article, shall have restored and preserved to its corporate existence, and it shall have and enjoy all of the corporate franchises, property rights and powers held or acquired by it previous to any cause or forfeiture as aforesaid; provided that no railway company which shall be revived or the time extended by virtue of this Act shall claim or exercise any franchise not allowed, granted or permitted to other railway corporations under the law as now in force in this State. [Act May 17, 1917, 1st C. S., ch. 18, § 1.]

Became a law May 17, 1917.

**Art. 6635f. Further extension of time to build branches, etc.**—Any railway corporation chartered since the first day of January A. D. 1892, and which by its original charter or by amendment thereto, filed since said first day of January A. D. 1892, has further provided for the locating, constructing, maintaining, owning and operating of any extension or branch line or lines of railway, and which has failed or is about to fail to complete the same, or any part thereof, within the time required by law, shall, upon payment of all its franchise tax, be and is hereby restored to and granted all and singular the rights, privileges and franchises acquired by its original charter, or by such amendments to its articles of incorporation, as if the same was filed and recorded in the offices of the Secretary of State on the day of the taking effect of this Act, and such corporation shall, upon payment of its franchise tax, be and is hereby authorized to project, complete, construct, own and operate any such extension and branch line or lines of railway under and as provided for in its charter or in any amendment to its articles of incorporation; provided, that such extension and branch line of railway shall be by such corporation completed and put in good running order at the rate of at least ten miles in one year from the taking effect of this Act, and twenty additional miles for each and every year thereafter until all the branch line or lines of extension as provided for are completed; provided, that the provisions of this Act shall not apply to any railroad company which has been chartered by the State of Texas for a period of ten years or more, and which has twenty miles or less of railroad to build in order to comply with its original charter, or any amendment thereto. [Id., § 2.]

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## CHAPTER THIRTEEN

### TICKET AGENTS—AUTHORITY AND DUTY

#### Article 6637. [4560a] Authorized agents for the sale of tickets.

**Authority of ticket agent.**—A carrier held not liable for damages caused plaintiff by failure to connect with a train on another road, where defendant's agent sold a ticket only to the connecting point, though its trainmen, without authority, represented to the plaintiff that she could catch a train and would not have to stay all night at the connecting point. *Texas & P. Ry. Co. v. Conway* (Civ. App.) 180 S. W. 666.

## CHAPTER FOURTEEN

## LIABLE FOR INJURIES TO EMPLOYÉS

Art.		Art.	
6640.	Liabile for injuries to fellow-servants.	6646.	No assumed risk where safety appliance not provided.
6641.	Who are vice-principals.	6648.	Liabile for injury or death of employé.
6642.	"Fellow servants" defined.	6649.	Contributory negligence, rule as to.
6644.	Contributory negligence a defense, except, etc.	6650.	Assumed risk, rule as to.
6645.	When assumed risk not available as a defense.	6651.	Contract changing liability void.

**Article 6640. Liabile for injury to fellow-servant.**

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132; *Gulf, C. & S. F. Ry. Co. v. Webb* (Civ. App.) 164 S. W. 920; *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

**Effect of statute in general.**—An employé of a smelting company operating ore cars to haul ores from the roaster to the reverberatory, engaged in sweeping ore from the car track, was not a railway employé; and the common-law rule as to nonliability for the negligence of a fellow servant applied. *Consolidated Kansas City Smelting & Refining Co. v. Lopez* (Civ. App.) 166 S. W. 498.

Refusal to charge on the issue of negligence of a fellow servant is not erroneous; the common-law rule exempting the master because of such negligence being abrogated. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 635.

Statute abrogating fellow-servant doctrine when servants are operating car held to apply if injured section hand and coemployé went upon hand car and put it in motion without order from foreman to take it to point to which they returned at night. *St. Louis S. W. Ry. Co. of Texas v. Blevins* (Civ. App.) 173 S. W. 281.

A railroad company would be liable, under the federal act or the state law (this article), for injury to a member of a section crew from collision of the hand car, on which he was riding, through negligence of his coworkers. *Houston, E. & W. T. Ry. Co. v. Samford* (Civ. App.) 181 S. W. 857.

Amendment of complaint under arts. 4694, 4695, by alleging as ground for recovery negligence of fellow servant based on this article, held not to state new cause of action so as to bar recovery thereon under two-year statute of limitations (art. 5687, par. 7). *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

**What constitutes railroad.**—A railroad of standard gauge, extending 10 or 12 miles into the forest, with spurs, owned and operated by a lumber company for the transportation of logs to its mill, is within this article. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

**What constitutes operating cars, etc.**—Under this article, held that plaintiff, unloading iron from a car moved about on the switch by a wrecking car, which also operated the hoist, was "operating" a car. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

Under this article, held, that a construction company operating an engine and work train in surfacing a railroad was operating a railroad, and hence was liable to a servant engaged in such work for injury from the negligence of fellow servants. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

The car need not be actually moving, nor the injured servant actively engaged in manual or other labor. *St. Louis S. W. Ry. Co. of Texas v. Blevins* (Civ. App.) 173 S. W. 281.

**Interstate commerce.**—Where a section hand was injured while removing a wreck to repair the track of his employer engaged in interstate commerce, the state fellow-servant statute had no application, but the case was governed by the federal Employers' Liability Act. *Missouri, K. & T. Ry. Co. of Texas v. Mooney* (Civ. App.) 181 S. W. 543.

**Art. 6641. Who are vice-principals.**

**Who are vice-principals—In general.**—Where plaintiff, while performing with his men specified work was subject to the orders of a coemployé, and he and his coemployé were under the general superintendence of a third person, plaintiff and his coemployé were not fellow servants, within this article. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

— **Foremen.**—Railroad company's foreman having authority to direct a boiler maker to assist in moving a boiler in the roundhouse held a vice principal under this article. *St. Louis Southwestern Ry. Co. of Texas v. Freles* (Civ. App.) 166 S. W. 91.

Under this article held, that the foreman of a railroad construction company engaged in operating a railroad, and particularly in surfacing a railroad, was not an independent contractor, but a vice principal, for whose negligence the company was liable. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

**Art. 6642. "Fellow-servants" defined.**

**Who are fellow servants—In general.**—Men under section foreman held his fellow servants, and under Laws 1893, c. 91, there could be no recovery for his death through the act of one of them. *Gulf, C. & S. F. Ry. Co. v. Webb* (Civ. App.) 164 S. W. 920.

**Art. 6644. Contributory negligence a defense, except, etc.**

**1. Application of the doctrine of contributory negligence in general.**—Where the death of an employé is solely the result of his negligent act of commission, his legal representative cannot recover damages for his death. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

Contributory negligence and assumption of risk are distinct defenses. *Missouri, K. & T. Ry. Co. v. Burton* (Civ. App.) 162 S. W. 479.

Distinction between "contributory negligence" and "assumption of risk" is that contributory negligence implies fault or breach of duty on part of injured servant, while assumption of risk is assumption by employé of risk of dangers known or obvious to him as incident to his employment. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

**5. Care required of servant.**—While the promise of a master to repair a defective appliance casts the liability for injuries upon the master, it does not relieve the servant from the duty to exercise reasonable care for his safety. *Missouri, K. & T. Ry. Co. v. Burton* (Civ. App.) 162 S. W. 479.

Proof that it was not customary in operating a hand car to look at the target to see whether a switch was open or closed would not relieve the operator from the exercise of ordinary care. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 171 S. W. 806.

Where a switchman not actively engaged in his duties took his position near a platform and practically under a tier of trunks which were being piled, and one of them fell on and hurt him, he was guilty of contributory negligence. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

**7. Reliance on care of master.**—An employé may only assume that his employer will use reasonable care to discharge the duty of furnishing safe appliances, instrumentalities, etc., of work. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

**9. Tools, machinery, appliances or places for work.**—If the conductor of a freight train voluntarily connects with the train two "bad order" cars, and thereby reduces the number of cars equipped with air brakes below the 75 per cent. limit fixed by law, he cannot recover for any injury proximately caused thereby. *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126.

**15. Duty to discover or remedy defects or dangers—Reliance on care of master or fellow employés.**—A licensee company's servant could assume that the yard was in a safe condition, and need not inspect the premises for obstructions along the track. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 160 S. W. 471.

Unless a locomotive engineer knew, or must have necessarily acquired knowledge, that the company had not inspected the yard for obstructions, he could presume that it was safe, and need not look for obstructions along the track, which might trip him. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 160 S. W. 471.

A railroad company's employés may rely on its performance of the duty of inspecting its tracks and bridges. *Missouri, K. & T. Ry. Co. of Texas v. Cassady* (Civ. App.) 175 S. W. 796, writ of error denied (Sup.) 184 S. W. 180.

**16. — Duty to examine or inspect appliances or places.**—Under a rule requiring conductors, with the assistance of the trainmen, to inspect the cars and see that the doors are closed, imposed on the conductor alone the duty of initiating an inspection, and a brakeman who was injured by an open door had no other duty than to assist the conductor when he initiated an inspection. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

**18. — Obvious or latent defects or dangers.**—Since train employés have but slight opportunity to inspect tracks for obstructions or defects, they are only required to take notice of such defects as are obvious in the discharge of their duties. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 160 S. W. 471.

**31. Disobedience of rules or orders—In general.**—The violation of a rule of the employer by a servant under certain circumstances may amount to contributory negligence. *Bogue v. Texas Traction Co.* (Sup.) 177 S. W. 954, denying rehearing 173 S. W. 875.

**38. Acts in emergencies.**—Negligence, if any, of section hand struck by rear approaching train while removing his hand car, held not such negligence as would defeat his recovery, since he was performing a duty to protect those on the train. *Mitchum v. Chicago, R. I. & G. Ry. Co.* (Sup.) 173 S. W. 878, reversing judgment *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.

**39. Proximate cause of injury.**—In an action for injuries to a railroad employé when the car on which he was riding was struck by another car, evidence held insufficient to show that the servant's negligence in failing to flag the car was the proximate cause of the accident. *Texas Traction Co. v. Nennet* (Civ. App.) 178 S. W. 797.

**40. Injury avoidable by care of master.**—Contributory negligence on the part of a railway employé, who slipped and fell in front of a moving train, would neither defeat a recovery nor diminish the amount thereof, if those in charge of the train discovered his peril in time to have prevented the injury. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

To support a charge of actionable negligence of a railroad company on the doctrine of discovered peril, the employé, injured by being struck by an engine, must show facts authorizing a finding that the trainmen realized that the employé was in danger and neglected to resort to means they should have resorted to. *Paris & G. N. R. Co. v. Lackey* (Civ. App.) 171 S. W. 540.

The negligence of an employé is no defense to an action for his death based on discovered peril. *Pecos & N. T. Ry. Co. v. Rosenbloom* (Sup.) 173 S. W. 215, affirming judgment (Civ. App.) 141 S. W. 175. Rehearing denied (Sup.) 177 S. W. 952.

Although injured railroad employé was negligent in not flagging an approaching car, which struck its own car, such injured employé's negligence did not bar his recovery, when the other car's crew jumped from their car upon discovering the danger in time to have stopped. *Texas Traction Co. v. Nenny* (Civ. App.) 178 S. W. 797.

45. **Sufficiency of evidence—Contributory negligence shown.**—Motorman suing for personal injuries received in collision between his own car and another held guilty of contributory negligence, through having violated rules of the company. *Bogue v. Texas Traction Co.* (Sup.) 177 S. W. 954, denying rehearing 173 S. W. 875.

Employé, injured while on the tender of an engine switching cars loaded with logs, held negligent. *Kirby Lumber Co. v. Henry* (Civ. App.) 178 S. W. 23.

46. — **Contributory negligence not shown.**—Evidence held to sustain finding that plaintiff was not guilty of contributory negligence. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691; *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

Evidence held to authorize jury to find that stop signal, which resulted in the fall of deceased, was given by a fellow servant, and not by deceased himself. *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

50. — **Dangerous operations and methods of work.**—In suit against railroad for death of its yard clerk, evidence held to reasonably show that decedent did not fall from train which killed him while riding thereon, or under it while trying to get on engine. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

52. — **Compliance with commands.**—Evidence in an action for the death of a railroad engineer alleging negligence of defendant's conductor in ordering him to move his train causing a collision held to show that the engineer was justified in obeying the orders of the conductor. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

### Art. 6645. When assumed risk not available as defense.

1. **Constitutionality.**—This article is not unconstitutional as denying to an employing railroad the equal protection of the laws and as making an arbitrary classification based upon no just and proper relation or difference. *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94.

2. **What law governs and interstate commerce.**—Under federal Employers' Liability Act, defense of assumed risk is open to interstate railway carrier in action for injury to employé engaged in interstate commerce, notwithstanding the defense does not obtain under state statutes. *Texas & P. Ry. Co. v. White* (Civ. App.) 177 S. W. 1185.

Under federal Employers' Liability Act, § 4, in action against railroad by its employé for injuries in interstate commerce, doctrine of assumed risk applies, and has same effect as at common law; i. e., employé does not assume negligence of the master unless he knew of it or must have known of it. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Under federal Employers' Liability Act, railroad brakeman killed between two cars when engineer failed to obey his stop signal held not to have assumed risk in placing himself before standing car; the engineer's act being that of the master. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

Federal Employers' Liability Act does not abolish assumed risk as a defense, except where failure of railway to comply with act as to safety appliance equipment has contributed to injury. *Id.*

Where employé was injured while engaged in interstate commerce knowing of employer's negligence, the case was governed by common-law doctrine of assumption of risk, and not by this article. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

Where a federal law has occupied the field on a question of interstate commerce, all state laws relating thereto must yield. *Id.*

Federal Employers' Liability Act, § 4, eliminating assumption of risk defense, where injury was contributed to by employer's violation of statute, excludes state legislation on the same subject. *Id.*

3. **Construction and application of statute.**—Private carrier operating narrow gauge railroad in its own yards held a person operating a railroad, within this article, to render proper refusal of charge upon assumed risk in suit for killing of servant. *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94.

The defense of assumption of risk being expressly limited under certain conditions by this article, an instruction requested by defendant on the issue of assumption of risk, which failed to negative those conditions, is properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

The common-law defense of assumed risk still obtains except as limited by this article. *Id.*

4. — **Assumed risk merged in contributory negligence.**—This article held not to merge that defense with that of contributory negligence, and hence assumed risk is a defense, notwithstanding article 6649, providing that contributory negligence shall work only a diminution of damages. *Galveston, H. & H. R. Co. v. Hodnett*, 106 Tex. 190, 163 S. W. 13, reversing judgment (Civ. App.) 155 S. W. 678.

5. — **Risks assumed in general.**—The risk of the ordinary dangers of the employment assumed by the servant are distinct from the risk incurred from the negligence of the master, the rule concerning which was modified by this article. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.



6. — **Knowledge or means of knowledge of servant.**—Under Assumed Risk Act April 24, 1905, continuation in the service with both knowledge of the defect and danger is essential to charge a servant with the risk. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13.

Under this article instruction that, if person of ordinary care would have continued in the service with knowledge of the "defect," injured employé did not assume risk held erroneous. *Galveston, H. & H. R. Co. v. Hodnett*, 106 Tex. 190, 163 S. W. 13, reversing judgment (Civ. App.) 155 S. W. 678.

Under this article held that, as applied to railway employés when employer knows of a defect, there is no assumption of risk on part of employé because he also knew of it. *Marshall & E. T. Ry. Co. v. Riden* (Civ. App.) 194 S. W. 1163.

7. — **Notice to or knowledge of employer.**—An employé may assume on entering the employment that his employer has performed every duty which the law or the contract of employment imposes, in the absence of contrary knowledge. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

8. — **Prudence in continuing work.**—In view of Acts 29th Leg. c. 163, the defense of assumption of risk does not apply to an employé having knowledge of a danger if a person of ordinary care and prudence would have continued in the service with such knowledge. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

Under this article whether engineer, who had been promised that equipment for operating blow-off cock from the cab would be installed, assumed the risk of injury in operating it from the running board held for the jury as a question of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 166 S. W. 133.

11. **Nature and extent of risks assumed in general.**—Contributory negligence and assumption of risk are distinct defenses. *Missouri, K. & T. Ry. Co. v. Burton* (Civ. App.) 162 S. W. 479.

Assumption of risk defined, and the distinction between assumption of risk and contributory negligence stated. *Galveston, H. & H. R. Co. v. Hodnett*, 106 Tex. 190, 163 S. W. 13, reversing judgment (Civ. App.) 155 S. W. 678.

Where a railroad engineer upon signal proceeded with his train, without ascertaining that the track ahead was clear, his conduct, if he was bound to ascertain whether the train ahead had been moved, as to give him a clear track, amounted only to contributory negligence, and not assumption of risk. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

When an employé is injured as the result of an assumed risk, it is immaterial what care he exercised. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

Where a servant assumes a risk, it will defeat recovery for injuries caused thereby in any sum. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Assumption of the risk causing his injury will defeat an injured brakeman's action for damages for the injury. *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392.

15. **Dangers incident to nature of work.**—A section foreman, whose hands were injured by handling creosoted ties, assumed the risk of such injury if the ties were in the usual condition and if the injuries from handling them were ordinarily incident thereto. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

17. **Defective or dangerous tools, machinery, appliances or places.**—Cars and locomotives.—The failure of an employer, operating a narrow gauge railroad, within its own yards, to equip its cars with automatic couplers, was a defect, within this article. *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94.

20. **Dangerous operations and methods of work—In general.**—In a railroad servant's action for injury from falling from a car load of lumber which he was trying to straighten with a defective pinch bar, held, that the facts appearing established the defense of assumption of risk. *Houston & T. C. R. Co. v. Smallwood* (Civ. App.) 171 S. W. 292.

A switchman near a platform held not to have assumed the risk of a trunk being cast upon him. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

21. — **Operation of trains.**—An experienced switchman thoroughly familiar with the work at which he was engaged, and with the customary methods of doing the work, assumes the risk of injuries resulting from the ordinary and customary switching of cars. *Ft. Worth & D. C. Ry. Co. v. Copeland* (Civ. App.) 164 S. W. 857.

Where it was the custom of the servants of a railroad company, engaged in repair work, to pass between the cars of long freight trains so as to reach the repair tracks, and those in charge of the trains always gave warnings of any movement, a repairman did not assume the risk of injury occasioned by the failure of the operators to give the usual warning. *Missouri, O. & G. Ry. Co. v. Dereberry* (Civ. App.) 167 S. W. 30.

Where a car inspector went between cars without setting warning lights, in reliance on a custom of trainmen to give warning before moving cars, held not to have assumed the risk. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729.

Evidence in a railroad servant's action for injuries by falling from a gasoline motor car which he had attempted to start by pushing it held to support a verdict that he did not assume the risk in attempting to board the moving car. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

29. **Knowledge by servant of defect or danger—Necessity and effect in general.**—A servant does not assume the risk of injury from negligence of the master of which he is ignorant. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750; *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835; *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143; *Chicago, R. I. & G. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

A servant assumes dangers that are obvious, or of which in the necessary discharge of his duties he must know, but does not assume, without due warning, unknown and unappreciated dangers. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

It is not technically true that an employé does not assume any risk of dangers arising from the employer's negligence, where he actually knows or must necessarily become aware of the negligence in the ordinary performance of his work. *Texas Midland R. Co. v. Geron* (Civ. App.) 162 S. W. 471.

An employé does not assume a risk arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

30. — **Extent of knowledge.**—Assumption of risk is not in all cases predicable from the employé's knowledge of the conditions alone, but an appreciation of the danger, as well as knowledge, is an essential element. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

32. — **Constructive notice.**—A servant engaged in throwing rails off a flat car will not be deemed to have knowledge of the danger from a defective drawhead because he had knowledge that it is defective. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13.

A brakeman, who knew of the existence and general location of a switch stand near a track, but not that it would not clear a man riding on the side of an engine or car, held not chargeable with knowledge of the dangerous proximity of the stand to the track, but the question was for the jury. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Plaintiff, a brakeman, injured by a handhold pulling out, did not assume the risk, though he knew it was a bad order car being moved for repairs. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835.

37. — **Obstructions or erections on, over, or near tracks.**—Assuming that a freight conductor by walking rapidly in the yards at night assumed the risk of presence of mesquite bushes, grass or weeds, of whose presence he knew, he did not necessarily assume the risk of a stake concealed by such bushes and of which he did not know. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

38. — **Dangerous operations and methods of work.**—That plaintiff, a section foreman, knew that hand cars were sometimes accidentally checked or slowed up, was not ground for holding that he assumed the risk of being thrown from his hand car by the negligence of defendant's section hands. *Missouri, K. & T. Ry. Co. of Texas v. Robeson* (Civ. App.) 178 S. W. 862.

A car repairer held not to have assumed the risk of cars being unintentionally kicked onto repair track on which he was working, by the mere act of working on a car outside a derail switch, without knowledge of any danger. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

39. — **Insufficient force for work.**—An employé assisting in moving a rail with knowledge of insufficient help held to assume the risk of injury. *Missouri, O. & G. Ry. Co. of Texas v. Black* (Civ. App.) 176 S. W. 755.

42. **Obvious or latent dangers.**—Locomotive fireman, engaged, under direction of foreman, in temporary work of blocking wheels of automobile being shipped, did not, as matter of law, assume risk incident to the employment from a sliver of steel splitting off from a nail which his fellow servant was hammering and entering his eye. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

An employé assumes risks which are so obvious that an ordinarily prudent person must necessarily have appreciated them. *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

That a roadmaster ran his motorcar into an open switch, the position of which was correctly indicated by the switch target, does not charge him with assumption of risk of an obvious danger as a matter of law. *Id.*

Servant employed for other work than that at which he was hurt held not precluded from recovery by his mature years or obviousness of danger. *Texas & P. Ry. Co. v. Bursey* (Civ. App.) 192 S. W. 809.

43. **Notice to or knowledge of master.**—Employé held to assume risk of injury from defective tool by continuing work without protest, or after protest if nothing is said or done to induce belief that repairs will be made. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 180 S. W. 1117.

44. **Promise to remedy defect or remove danger.**—A promise by an employer not to subject an employé to danger in the future if he would hazard it is not a promise by the employer to assume the risk of the danger. *Missouri, O. & G. Ry. Co. of Texas v. Black* (Civ. App.) 176 S. W. 755.

Employé, continuing to work for a reasonable time in reliance on promise that defect in appliance will be remedied, held not to assume the risk. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 180 S. W. 1117.

Section hand held entitled to rely on foreman's promise to furnish jack in place of defective one, though not made to him individually or in response to complaint by him personally. *Id.*

46. **Risk outside scope of employment—Voluntary act of servant.**—Where a railroad company expressly authorized trainmen to ride on switch engines in going to and from their work, a brakeman attempting to board a switch engine to ride to his home after completing his run was not a mere licensee, and he did not act at his own risk. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Where the servant is injured while at work, but in doing an unnecessary act of his own volition he assumes the risk, and the master is not liable. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

**48. Concurrent negligence of master—In general.**—A servant assumes risks ordinarily incident to employment, but not risk from master's negligence, unless danger is obvious or he has actual knowledge thereof. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

**55. Sufficiency of evidence—Assumption of risk not shown.**—In section hand's action for injuries, held, that it reasonably appeared that foreman's promise to furnish new jack was relied on, notwithstanding testimony and finding that plaintiff intended to continue work. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 180 S. W. 1117.

In an action by a servant for injuries received while working on a snowshed, being wrecked, evidence held not to show that servant's injuries were due to dangers assumed by him. *Southern Pac. Co. v. Gordon* (Civ. App.) 193 S. W. 471.

In an action for death of railway conductor from derailment of train, evidence held to show that defective condition of trucks which caused derailment was known to defendant's master mechanic, so that defense of assumption of risk was not available. *Marshall & E. T. Ry. Co. v. Riden* (Civ. App.) 194 S. W. 1163.

### Art. 6646. No assumed risk where safety appliance not provided.

Cited, *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126.

**Operation and effect in general.**—In an action for injuries to a railroad brakeman by reason of defendant's violation of the safety appliance acts, assumed risk, and contributory negligence constitute no defense. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

### Art. 6648. Liable for injury or death of employé.

Cited, *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

## II. NATURE AND EXTENT OF LIABILITY IN GENERAL

**6. What law governs, and interstate commerce.**—Where an engineer when injured by being struck by train while going through the yards to his work was employed by a railroad company engaged in interstate commerce any claim for damages for such injuries was governed by the federal Employers' Liability Act. *Missouri, K. & T. Ry. Co. of Texas v. Rentz* (Civ. App.) 162 S. W. 959.

An assistant gardener, employed by a railroad company engaged in interstate commerce to cultivate the yard about one of its stations and gather trash and burn it, is not engaged in interstate commerce. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 163 S. W. 1011.

One employed as an "extra" brakeman, at all times subject to call, with headquarters at C., and when sent out paid till returned there, was an employé, engaged in interstate commerce, when injured, while returning on a pass, on a train engaged in interstate commerce, after being sent out as brakeman on such a train, so that the federal Employers' Liability Act governs action for his death. *St. Louis Southwestern Ry. Co. v. Brothers* (Civ. App.) 165 S. W. 488.

An employé repairing in railroad shops a car which was intended to be used indiscriminately in interstate and intrastate commerce is within the federal Employers' Liability Act. *Missouri, K. & T. Ry. Co. of Texas v. Denahy* (Civ. App.) 165 S. W. 529.

Railroad yard clerk checking cars in trains is not, while walking through the yard, engaged in interstate commerce within federal Employers' Liability Act, in absence of any connection with interstate train in the yard. *Pecos & N. T. Ry. Co. v. Rosenbloom* (Sup.) 177 S. W. 952, denying rehearing 173 S. W. 215.

Section foreman of interstate railway run down while helping his crew to lift their hand car from the track for a train made up of cars bound for intrastate and interstate points held engaged in interstate commerce within federal Employers' Liability Act. *Texas & P. Ry. Co. v. White* (Civ. App.) 177 S. W. 1185.

Before recovery can be had under the federal Employers' Liability Act, it must appear first that the defendant railroad was engaged at the time in interstate commerce, and that the employé was injured while actually so employed. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

Where, at the time of shipment, a destination within the state only was contemplated the state statutes control the railroad's liability for injury to a servant while engaged in such transportation. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

Federal Employers' Liability Act, § 5, rendering any contract void, the purpose or intent of which is to exempt the carrier from liability created by the act, has no application to the case of a release of liability given a railroad by its injured employé after the accident, in consideration of being furnished further employment for one day. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Where plaintiff brakeman was assisting in placing coal car upon elevated tracks leading to employer's coal chutes when injured, he was then engaged in interstate commerce, and his action was one triable under the federal Employers' Liability Act. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

The federal Employers' Liability Act excludes state laws covering same field. *Geer v. St. Louis, S. F. & T. Ry. Co.* (Sup.) 194 S. W. 939.

Brakeman, killed by being thrown from top of car being switched to repair track, but enroute to another state held engaged in interstate commerce and the right of action was controlled by federal Employers' Liability Act of April 22, 1908. *Id.*

**7. Relation of parties—In general.**—A railroad company is not liable for injuries to an employé of a lumber company resulting from the negligence of other employés of that company, which was engaged at the time in constructing a track to be later turned over to the railroad company upon payment of the cost of construction. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

That a company other than the defendant paid the wages of a train crew is not conclusive of the fact that such company, and not the defendant, employed such servants, in view of other evidence supporting a contrary conclusion. *Manning v. Beaumont, S. L. & W. Ry. Co.* (Sup.) 181 S. W. 687.

**11. — Acts done under employment or by invitation of master's servants.**—One whom defendant's vice principal requested to assist in work on defendant's premises is not a mere licensee, and defendant owes him a higher duty than that of not merely intentionally injuring him. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

A vice principal of a corporation who was authorized to move the corporation's tower car may request assistance, and his request to third persons renders the corporation liable for any negligence in moving the car. *Id.*

That a railroad employé needed assistance to load a trunk onto a passenger train was not such an emergency as authorized him to employ a third person to assist, and such person was but a volunteer. *Missouri, K. & T. Ry. Co. of Texas v. Moore* (Civ. App.) 169 S. W. 916.

**12. — Agreement between railroads for joint use of yard.**—A railroad company, which permitted its yard to be used under agreement by another company, owed to the latter's servants the same duty of providing a safe place to work as it owed to its own servants. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 160 S. W. 471.

**13. — Commencement, suspension or termination of relation.**—An employé is deemed to be in the employer's service whenever he is present to perform his duties as servant and subject to orders, though at a given time he may not be engaged in the actual performance of a duty. *Missouri, K. & T. Ry. Co. of Texas v. Rentz* (Civ. App.) 162 S. W. 959.

Where a railroad engineer was struck by an engine while he was going through the yards as usual on his way to the roundhouse to work and when he had stopped for a moment to talk to another engineer who had called him, held, that the relation of master and servant existed at the time plaintiff was injured. *Id.*

Where a railroad employé was sitting on the edge of a platform waiting for other employés to perform certain labor which had to be done before he could commence work, he was in the discharge of his duties as an employé of the company. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

Defendant railroad was not liable for injuries to section hand after quitting work, and while he was engaged in watching that his children safely crossed tracks. *Perez v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 192 S. W. 274.

That section hand was subject to emergency calls to duty at any hour did not entitle him to damages for injuries received by him not in performance of duty, not during working hours, and while he was engaged in personal undertaking of watching his children safely cross tracks. *Id.*

**14. Scope of employment—In general.**—A track laborer, injured by a hand car derailling while he and his foreman and other laborers were running it at night to take camp cooks to town on a social visit, held not entitled to recover, though plaintiff was required by his foreman to make the trip and told that he would be allowed extra time therefor. *Beaumont & G. N. R. Co. v. Gonzales* (Civ. App.) 163 S. W. 619.

A conductor, injured while attempting to board a train, being entitled to board any part of it, it was immaterial that he boarded the car in question to determine whether unauthorized persons were riding therein. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

**16. Care required in general.**—The duty of railroad companies to guard employés against the hazard of the employment must be performed in a reasonable manner. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 160 S. W. 471.

A railroad owed its lineman, riding in its engine to inspect its telegraph wires, the duty to use ordinary care to furnish a safe place to work, and the lineman had the right to believe the road had performed its duty. *Detro v. Guif, C. & S. F. R. Co.* (Civ. App.) 188 S. W. 517.

A railroad fireman, injured by the giving away of an apron connecting the tender and the engine, was under no duty of inspection, though he had been told to fix the apron. *San Antonio, U. & G. R. Co. v. Hagen* (Civ. App.) 188 S. W. 954.

**17. Care required as to inexperienced or minor servant.**—Railroad company held not guilty of negligence in employing callboy 14 years old, where it did not appear that his immaturity prevented him from realizing danger. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 187 S. W. 491.

**19. Cause of injury—In general.**—The negligence causing a fire was not the proximate cause of the death of an employé caused by injuries sustained while fighting such fire. *Bennett v. Guif, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

**21. Accidental or improbable injury—In general.**—A master is not liable for systemic effects resulting from injuries to a servant's hands, where it was uncontradicted that

no similar effects had ever been known to result from such injuries. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

22. — **Anticipation of consequences.**—To make the crew of a train, backed with force onto a side track, killing a car repairer, guilty of negligence, it is enough that they might have reasonably foreseen that some one might be so working there. *Missouri, K. & T. Ry. Co. of Texas v. Perryman* (Civ. App.) 160 S. W. 406.

Evidence as to custom of repairing cars on a side track held to show the crew of a train, which backed it in on such track against cars standing thereon with such force as to drive them against a car being repaired killing the car repairer, should have reasonably anticipated his presence, making them guilty of negligence. *Id.*

In a car repairer's action for injuries after he had jumped from cars on a side track and ran in front of an engine on a parallel track, held, on the facts, that those in charge of the engine could not anticipate injury to plaintiff as probable until it appeared that he was nearing the track without knowing of the engine's approach. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing 165 S. W. 525.

In a car repairer's action for injuries caused by being struck by an engine on an adjoining track when he jumped from a car, evidence held to support a finding that those in charge of the engine should have foreseen that, when plaintiff should jump off, he would be in close proximity to the engine, and might step in front thereof, if ignorant of its approach. *International & G. N. R. Co. v. Walters* (Civ. App.) 165 S. W. 525, reversing judgment on rehearing 161 S. W. 916.

Where plaintiff while assisting in moving a boiler by rolling it was injured by his glove catching on a bolt throwing him over and in front of the boiler, and he had prepared the boiler for moving, held, that his injuries were due to an inevitable accident and not to negligence; the danger not being such as should have been anticipated. *St. Louis Southwestern Ry. Co. of Texas v. Freles* (Civ. App.) 166 S. W. 91.

Where an employer did not know of a danger and could not reasonably have discovered it by the exercise of such diligence as the circumstances reasonably demanded, he is not liable for an unforeseen injury. *Id.*

Where the engineer and fireman of a work train started it without giving any warning, although they knew that there were a number of workmen around the train, they must have anticipated that such negligence might result in injury to a workman. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

A master is not liable for the effects of disease resulting from injuries to a servant, where it could not have been reasonably anticipated that the disease would result. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

Where rules of railroad company forbade employes going between cars, act of brakeman in going between cars to effect a coupling, the automatic couplers having failed to work, was contributory negligence, if anything, and does not raise the question of assumed risk. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In section hand's action for injuries sustained from a fall in hurriedly attempting to remove hand car to avoid approaching train, to warrant recovery for negligence of foreman or train crew in not giving warning of approach of train, it must appear that fall was due immediately to haste to remove car, and that an injury of character alleged ought reasonably to have been foreseen as a result of alleged negligence. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

### III. APPLIANCES AND PLACES FOR WORK

27. **Nature of master's duty and liability and care required in general—Appliances.**—It is the rule in Texas, as held by the Supreme Court of the United States, that a master must use ordinary care to furnish his servant safe tools and instrumentalities with which to do his work. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

28. — **Places for work.**—It is the duty of the master to exercise at least ordinary care to provide his servants with a reasonably safe place to work, and not to expose them to unknown and unappreciated hazards. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

Action for personal injury held based on the theory that plaintiff, as an employe of a construction company, was lawfully working upon a flat car when servants of defendant railroad negligently backed other cars against it, and not on the theory of defendant's duty to provide a safe place to work. *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 186 S. W. 387.

A railroad owed its lineman, riding in its engine to inspect its telegraph wires, the duty to use ordinary care to furnish a safe place to work. *Detro v. Gulf, C. & S. F. R. Co.* (Civ. App.) 188 S. W. 517.

29. — **Not an absolute duty.**—An employer is only required to exercise ordinary care to furnish safe appliances, instrumentalities, etc., of work, and is not under an absolute duty to do so. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

31. — **Care exercised by other railroads.**—The master, in order to avoid the charge of negligence, cannot rely upon failure of other masters in similar circumstances to perform a duty, the violation of which is the subject of complaint. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

A railway company is not guilty of negligence per se for failure to take precautions which other railways observe in keeping their engines in repair. *Id.*

36. **Appliances or places owned, controlled or provided by third persons.**—Where a conductor was injured by the pulling out of an insecurely fastened handhold on a for-

sign car, an instruction precluding a recovery, if the default was that of the owner of the car, held properly refused. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

**40. Cars—In general.**—The rigidity in trucks of a freight car which caused the wheels to mount the rails and the car to be derailed is a defect, for failure to discover which, on inspection, the master is liable for injury to a servant. *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424.

Improper placing or looseness of bolts, making trucks of railway car rigid so they would leave the track on curves, held a defect in the car. *Galveston, H. & S. A. Ry. Co. v. Moses* (Civ. App.) 184 S. W. 327.

**43. Tracks and roadbeds—In general.**—It is a railroad's duty to use ordinary care to keep its roadbed and track in reasonably safe condition. *Trinity & Brazos Valley Ry. Co. v. Lunsford* (Civ. App.) 160 S. W. 677.

Where a railroad employé struck by an engine did not of necessity assume the position he did with reference to an adjacent track, the fact of the nearness of the two tracks could not be relied on as negligence. *Paris & G. N. R. Co. v. Lackey* (Civ. App.) 171 S. W. 540.

**52. Inspection and test—Duty to make in general.**—The employer's duty to furnish reasonably safe tools and place of work implies a further duty of seasonably inspecting them. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

In an action for injuries by the explosion of a locomotive, defendant held negligent in failing to apply the hydrostatic test after the engine had been repaired. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

The duty of the master to inspect the place provided for his servants to work in is not a continuing duty requiring inspection from time to time to ascertain whether the servant is exposed to those dangers which arise from the manner in which the details of the work are carried out. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389.

Where a switchman was injured by jumping from a freight car when it was derailed because of a defect in the trucks, the master was liable, where the defect was such that inspection must have discovered it. *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424.

A railroad owes the duty to its employés, other than its car inspector, who might be expected to be near a tank car, to exercise ordinary care to see that car was in condition to avoid an explosion. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

**53. — Care required in inspecting.**—Aside from simple tools, the master must make such inspection of appliances furnished servant as would satisfy a prudent person of their safety. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Civ. App.) 180 S. W. 300.

**54. — Things to be inspected.**—A railroad company owes the duty of inspecting its roadway and bridges to make them reasonably safe. *Missouri, K. & T. Ry. Co. of Texas v. Cassady* (Civ. App.) 175 S. W. 796, writ of error denied (Sup.) 184 S. W. 180.

Railroad company, before turning hand car over to employé for use, held bound to inspect same, though bought from reputable manufacturer. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Civ. App.) 180 S. W. 300.

A simple tool, like a hammer or nails, does not impose upon the master the duty of inspection. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

**55. — Foreign cars.**—Where a switchman was injured by jumping from a car derailed because of rigid trucks, the fact that the car did not belong to the employer did not relieve him of the duty of inspection, where the car had been in his possession long enough to give opportunity for an inspection, and some inspection was made. *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424.

That railway company's inspectors did not discover defect in car not belonging to it held not to relieve it of liability for injuries to an employé. *Galveston, H. & S. A. Ry. Co. v. Moses* (Civ. App.) 184 S. W. 327.

**57. — Time and opportunity for making.**—Where the danger of a place to work arises from the work itself, and there is no evidence that the master had knowledge of the danger, or was, by the length of time it had existed, charged with knowledge of it, the mere failure to inspect does not determine his liability. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 182 S. W. 389.

**58. — Delegation of duty.**—The master is not relieved of the duty he owes his servant to inspect the place of work to discover dangerous conditions, unless by his contract of employment the servant is required to perform the duty of inspection himself. *Halbrook v. Orange Ice, Light & Water Co.* (Civ. App.) 181 S. W. 751.

**61. Knowledge by master of defect or danger.**—A master's ignorance of the probable danger from an act or omission is not necessarily an excuse, as it is his duty to know what he could learn by exercising such diligence as the circumstances reasonably demand. *St. Louis Southwestern Ry. Co. of Texas v. Freles* (Civ. App.) 166 S. W. 91.

An employer is not liable to the servant for injuries caused by abnormal dangerous conditions, unless they were known to him or could have been known by the exercise of reasonable care. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

Knowledge that employés might be in a place of danger renders the master liable for injuries to one in that place, though he had no knowledge that the particular employé was there. *Texas & P. Ry. Co. v. Hall* (Civ. App.) 173 S. W. 548.

Railroad is not negligent in permitting stob or stake to remain in path used by its employés unless it knew that the same was there prior to alleged accident, or would,

in the exercise of ordinary care, have known that it was there and removed it. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

66. **Proximate cause of injury—Cars.**—That a brakeman, on the breaking loose of cars, exposed himself to danger in an attempt to catch them to use the brakes, and was thrown therefrom when they struck a stationary one, did not break the causal connection between the negligence of the railroad company, in furnishing insufficient couplers and defective tracks, and the injury. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Where car was not properly secured and it ran down incline, inflicting injuries from which brakeman died, failure of railroad company to secure car was negligence, regardless of what set it in motion. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

67. — **Tracks and roadbeds.**—Where the negligence of a railroad company was either the sole cause of the derailment of a locomotive, or without its negligence the derailment would not have occurred, the company was liable to an employé injured in the accident. *Kansas City Southern Ry. Co. v. Coomber* (Civ. App.) 173 S. W. 544.

Where freight conductor hurrying along a path in the yards in performance of his duties stumbled over a stake and fell, presence of the stake was the cause of his injuries, and it was immaterial whether he fell upon a rock in the path. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

#### IV. METHODS OF WORK, RULES AND ORDERS

72. **Customary methods.**—Where it was the custom of a railroad to give warnings of movements of freight trains between the cars of which servants engaged in repair work were compelled to pass, the failure of those in charge of a train, between the cars of which a servant was passing, to give the customary warning will support a finding of negligence. *Missouri, O. & G. Ry. Co. v. Dereberry* (Civ. App.) 167 S. W. 30.

Where for over a year freight trains had stopped between the carpenter shop and repair tracks so carpenters had to cross between the cars, but those in charge always gave warning of any movement, the railroad cannot deny knowledge of the custom, so as to excuse the failure of the operators of a train to give warning before they moved it. *Id.*

73. **Knowledge of danger.**—An engineer of a construction train held to have had reason to believe that a member of the crew was in the caboose at the time he negligently collided therewith, so that the master was liable for his injuries. *Texas & P. Ry. Co. v. Hall* (Civ. App.) 173 S. W. 548.

75. **Care required in operating locomotives, trains and cars—Employés riding on locomotives, trains, or cars.**—The sudden stopping of a freight train with an unusual jar or jolt, in the absence of ordinary care, may be negligence entitling a servant injured thereby to recover. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

The rule that conductors must see that trainmen are on the train before starting from a station does not prevent conductors from relying on the presumption that trainmen will be at their places of duty. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

76. — **Employés on or near tracks.**—An instruction that, where persons have a right to be on the track near a train that is standing still, it is the duty of the employés to give a warning before starting the train, and that the failure to do so would be such negligence as would entitle another employé injured as a result thereof to recover, is not erroneous. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

A railroad company owes a duty to a switchman, sitting on a velocipede near its platform, to prevent other employés piling trunks thereon from casting one over on the switchman. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

Engine crew not in possession of facts from which ordinarily prudent man would have foreseen that a car inspector on a "kicked" car might alight and be injured by the engine upon a parallel track held under no duty to ring bell or blow whistle. *International & G. N. R. Co. v. Walters* (Sup.) 179 S. W. 854.

79. — **Collision.**—Where defendant's switching foreman, directing the running of cars in the nighttime at the rate of 10 miles an hour, failed to know the condition of the track on which they were run, whereby there was a collision injuring a switchman, the defendant was liable, irrespective of whether the foreman actually gave the signal to go at that rate or not. *Missouri, K. & T. Ry. Co. of Texas v. Leabo* (Civ. App.) 161 S. W. 382.

80. **Proximate cause of injury.**—Where an employé carrying with coemployés a tie, was injured by the coemployés dropping it pursuant to the order of the foreman, the giving of the order was the proximate cause of the injury, authorizing a recovery if the foreman negligently gave it. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

83. **Rules—Customary violation.**—If a rule of a railroad company that trains should not exceed a speed of six miles an hour within its yards was generally ignored by plaintiff and its other employés and not enforced by the company, its nonenforcement could not be alleged as a ground of negligence by the company. *Missouri, K. & T. Ry. Co. of Texas v. Rentz* (Civ. App.) 162 S. W. 959.

87. **Orders—Negligence in giving.**—Where it was the duty of a railroad conductor to read his orders, and then read them to the other train employés, and he read only the order given to the engineer which differed from the one given to him, he was neg-

ligent in ordering a movement according to the order given to the engineer. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

A foreman is charged with constructive notice of what will naturally happen from an order given by him, and, where he saw an employé's position, or, by ordinary care, could have seen it, the employer was liable for a negligent order causing injury to the employé. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 635.

That a foreman ordered five men to lift a crank pin was no defense to the action of one of two men whom he allowed to lift it for injuries; for it was negligence of the foreman to permit less than the number ordered to lift the pin. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 181 S. W. 238.

Where two servants under orders lifted a crank pin from a truck, and in lifting it one was injured, the question whether removing the truck so that the pin could not be lowered to it was negligence was immaterial; the negligence of the master being shown by ordering the lifting of the pin. *Id.*

#### V. WARNING AND INSTRUCTING SERVANT

**88. Duty to warn and instruct in general.**—An employer is not required to instruct an employé as to the rules of the service or warn him of the danger, unless the servant seeks information, or the risk is out of the ordinary. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

**92. Inexperienced or youthful employé.**—Where railroad callboy 14 years old knew and appreciated danger of trains in yards where he was required to work, railroad company's failure to warn him does not constitute negligence. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 187 S. W. 491.

Where servant solicits employment in particular calling, master has the right to assume that he is qualified therefor; the duty of cautioning servant other than as to latent or extraordinary dangers arising only from facts brought to the master's notice. *Texas & P. Ry. Co. v. Bursey* (Civ. App.) 192 S. W. 809.

Servant who took a job to do certain work held not to have so held himself out as competent to do mechanical work as to absolve the master from warning him of danger causing his injuries at mechanical work. *Id.*

**93. Dangers known to employé.**—Failure of the foreman in railroad yard to inform switchman as to the position of a car with which another upon which he was setting brakes might collide held not ground of recovery, if he knew from other sources the position of the car. *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98.

#### VI. FELLOW SERVANTS

**99. Nature and application of doctrine in general.**—Under federal Employers' Liability Act, rule of fellow servant does not preclude recovery. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 523.

**100. Duty to provide adequate number.**—The duty of an employer to furnish a sufficient number of employés to perform the required service applies to the assignment of an adequate number of men to each particular piece of work undertaken. *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 160 S. W. 432.

It is the duty of the master to use ordinary care to see that there are sufficient servants present at a particular piece of work to insure the safety of all engaged therein. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 181 S. W. 238.

Evidence in a servant's action for injuries in lifting a crank pin which was too heavy to be lifted by the men ordered to do so held sufficient to sustain a verdict for plaintiff. *Id.*

Negligence of railroad company in letting down a car unattended by switchman, held no ground for recovery where it was not cause of injury to plaintiff who was crushed between the running board of such car and the one on which he was riding. *Southern Pac. Co. v. Evans* (Civ. App.) 183 S. W. 117.

Where a railroad car was kicked at excessive speed into another, on which plaintiff brakeman was standing, without a rider to check its speed, the absence of such rider was the proximate cause of plaintiff's injury. *Southern Pac. Co. v. Evans* (Civ. App.) 192 S. W. 268.

#### IX. ACTIONS

**126. Parties entitled to recover.**—Articles 6648-6652 held not to change the rule under articles 4698, 4699, giving an action for wrongful death, and permitting one or more beneficiaries to sue for all, that the plaintiff might join the other statutory beneficiaries for determination of their rights, though alleging that they had none, so that in an action by the widow and minor child for wrongful death of the husband and father there was no error in rendering judgment against the parents of the deceased who were not notified that they had been made parties to the suit. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

In an action under the statute by the surviving wife, parents, etc., there can be no recovery, unless plaintiffs had reasonable expectation of pecuniary benefit from deceased. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 166 S. W. 1190.

Where a son contributed money at times to the support of his father, the irregularity of such contributions will not prevent the father from recovering damages for the son's wrongful death. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.



129. **Weight and sufficiency of evidence in general.**—In an action for injuries to a servant, the jury must base their verdict upon evidence that shows a reasonable probability that the injuries would produce a given effect, not on conjecture. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

130. — **Existence of relation.**—Evidence on the question whether one was actually a servant of defendant, or of another company, held sufficient to support a verdict for the injured servant. *Manning v. Beaumont, S. L. & W. Ry. Co.* (Sup.) 181 S. W. 687.

In an action for personal injury to plaintiff, one of a gang employed by a railroad construction company, while surfacing a railroad, evidence held to show the relation of employer and employé. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

131. — **Scope of employment.**—In a brakeman's action for injuries by slipping on a worn step on the tender while attempting to board after opening a gate, evidence held sufficient to show that at the time of his injury he was in the discharge of his duty. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

132. — **As to particular facts.**—In action to recover of employer to which plaintiff had paid hospital fees the reasonable amount paid for medical treatment, when defendant failed to receive him into its hospital for treatment, evidence held not to sustain cause of action pleaded. *Gulf, C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

133. **Evidence as to cause of injury—In general.**—Evidence held insufficient to show that negligence, if any, of railroad employing deceased in permitting excavations near track or failing to keep watchman was proximate cause of injury. *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

135. — **Defects in cars and locomotives.**—In an action for personal injuries, evidence consisting of experiments and photographs held insufficient to show that it was physically impossible for a brakeman to be knocked from a dump car by the door swinging out and striking the arm by which he was holding to the grabiron as he testified. *St. Louis Southwestern Ry. Co. of Texas v. Tune* (Civ. App.) 158 S. W. 238.

In a brakeman's action for injuries, evidence held sufficient to show that by use the outer top edge of a step on a tender had worn off, so that instead of presenting a square edge on top it slanted downward. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

Evidence in an action by a brakeman held sufficient to support findings that an open car door struck him as claimed. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

In a suit by a brakeman for injuries from the breaking of a handhold on a car, evidence held to justify a finding that the injuries were suffered in the manner asserted. *Missouri, O. & G. Ry. Co. v. Plemmons* (Civ. App.) 171 S. W. 259.

In action against railroad for death of yard clerk, evidence held insufficient to show causal connection between road's failure to have light on engine and the death. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

136. — **Obstructions on, over or near tracks.**—Evidence held to sustain verdict for freight conductor injured in yards on theory that he had, as alleged, fallen or stumbled over a stake or stob protruding from the ground. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

137. — **Operation of trains, cars and locomotives.**—Evidence in an action for injuries to an engineer in a collision of his train with another standing on the main track held to sustain a finding that negligence in not having the other train on siding, or in not warning plaintiff that the main track was obstructed and turning the switch for the siding, was the proximate cause of plaintiff's injury. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

In a section foreman's action for injuries, evidence held to show that he was injured by the negligent handling of the train. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

Evidence, in an action for the death of a brakeman, held to show that his fall from a freight car was caused by defendant's negligence in suddenly stopping the train with unusual force and jar. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

Evidence held to justify findings of jury that plaintiff's injury was caused by negligence of defendant railroad company in moving an engine against the one he was working under. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750.

In an action against a railroad for death of its employé, evidence held insufficient to show that injuries received when jumping from a motor car about to be run into by another car were the proximate cause of deceased's death by tuberculosis. *Texas Traction Co. v. Nenny* (Civ. App.) 178 S. W. 797.

Evidence held to authorize finding that the proximate cause of injury to one on a hand car running into a train on its stopping was negligent operation of car. *Houston, E. & W. T. Ry. Co. v. Samford* (Civ. App.) 181 S. W. 857.

In railroad employé's action for injuries, evidence held to support the jury's findings that another employé of the road was guilty of negligence which was the proximate cause of the injury. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

In an action for injuries to a roadmaster who ran his motorcar into an open switch, evidence held sufficient to support the jury's finding that defendant was negligent in leaving the switch open. *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

139. **Evidence as to master's negligence—In general.**—Evidence held to warrant a finding that the death of plaintiff's intestate resulted from negligence of other servants of the railway company. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729; *Galveston, H. & S. A. Ry. Co. v. Reinhart* (Civ. App.) 182 S. W. 436.

In an action by a railroad employé for injury to his eyes, caused by the alleged explosion of a torpedo in a stove where he was burning rubbish, evidence held insufficient to show defendant's failure of duty. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 180 S. W. 141.

Evidence in a railroad servant's action for injuries held sufficient to show defendant's negligence. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

Evidence held insufficient to show liability of a railway company for injuries to a car inspector received when inspecting a locomotive on a turntable when the turntable was moved without warning. *Galveston, H. & S. A. Ry. Co. v. Muhlemann* (Civ. App.) 182 S. W. 448.

Evidence held insufficient to show negligence of railroad employing deceased in permitting excavations near track or failing to keep watchman. *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184.

In an action for the death of a railroad employé from injury received when a trunk was thrown over or slipped from a pile of trunks on a platform and struck him, evidence held to warrant a finding that the porter handling the trunks was negligent. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

142. — **Defective or dangerous places.**—Evidence held sufficient to sustain finding that defendant negligently failed to provide a reasonably safe place for plaintiff to work. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

143. — **Cars and locomotives.**—Evidence held sufficient to show that a step on the tender of a locomotive was provided for the use of employés in going upon the tender and train. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

Evidence in an action by a brakeman held sufficient to support findings that defects in a car door which struck plaintiff were due to the railroad's negligence, and that the door was closed shortly before the accident. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

Evidence held insufficient to show that the door came open because of negligence on the part of the railroad. *Id.*

In railway engineer's action for injuries caused by slipping on running board, evidence held to support finding of negligence in failing to equip the engine with appliances for operating the blow-off cock from the cab without going on the running board. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 166 S. W. 133.

Evidence held to support a finding that defendant was negligent in equipping its locomotive with a dangerous air brake and that defendant's servants had been negligent in applying the air brake too suddenly. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1093, affirming judgment (Civ. App.) 142 S. W. 604.

In a freight brakeman's action for injuries through breaking of a handhold, evidence held to support the jury's answers, favorable to plaintiff, to the special issues of defendant's negligence and proximate cause. *St. Louis, B. & M. Ry. Co. v. Bell* (Civ. App.) 183 S. W. 823.

144. — **Tracks and roadbeds.**—Evidence held to show that stake or stob over which freight conductor stumbled in yards and was injured had been in path for such time as to impute to employer negligence in permitting it to remain. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

145. — **Operation of trains, cars and locomotives.**—Evidence in an engineer's action for injuries in a collision of his train with another standing on the main track at a station held to sustain a finding of defendant's negligence in failing to have the other train on the side track, or if not, in failing to warn plaintiff that the main track was obstructed, and in not turning the switch for the side track. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

In a personal injury action by the engineer of a passenger train, who was hurt in a collision with a freight, evidence held sufficient to establish the negligence of the defendant railroad company. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

In an action for injuries to a section hand while attempting to remove from a track a hand car, evidence held to justify a finding that the accident was caused by the negligence of the foreman in causing the weight of the car to fall on the section hand. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

In an action for injuries received by a railroad construction employé, evidence held sufficient to warrant findings that the engineer and fireman of the work train were negligent in starting the train without warning, and that those operating the train saw him in time to avoid the injury and failed to use proper care to prevent it. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

The instant stop of a train while going several miles an hour not being an ordinary occurrence, if those having its control use proper care, its occurrence, in the absence of any explanation, affords reasonable evidence, in a servant's action for injury therefrom, that such stop was due to want of ordinary care. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545

Evidence held to sustain a finding that an engineer of a passenger train negligently failed to keep a proper lookout. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

Evidence held not to show the negligence of a freight conductor in failing to discover his brakeman on a passenger track in time to prevent a passenger train running over him. *Id.*

Evidence held insufficient to sustain a verdict for a brakeman based on the negligence of the engineer. *Texas & P. Ry. Co. v. Prothro* (Civ. App.) 174 S. W. 302.

Evidence, in a section foreman's action for injury from being thrown from and in front of a hand car when defendant's section hands operating it checked it without

warning, held sufficient to sustain a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Robeson* (Civ. App.) 178 S. W. 862.

In an action against a railroad for death of one of a switching crew, evidence of the engineer's negligence in checking his engine too sharply held sufficient to support verdict for plaintiffs. *Texas & P. Ry. Co. v. Griffin* (Civ. App.) 184 S. W. 305.

In an action by a freight conductor who was thrown from the train by a sudden start by engineer, evidence held to warrant a finding that the engineer was negligent. *Missouri, K. & T. Ry. Co. of Texas v. Ellison* (Civ. App.) 185 S. W. 1020.

147. — **Knowledge by master of defect or danger.**—In railroad employe's action for injury from cave-in of sides of a ditch in which he was working, evidence held to justify finding that the dangers incident to the work were known to defendant and its foreman, and not known to plaintiff. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

In an action for injuries to a brakeman, caused by being knocked from a dump car when the door swung out and struck him, evidence held sufficient to show that the company knew or should have known that the door of the car was unfastened. *St. Louis Southwestern Ry. Co. of Texas v. Tune* (Civ. App.) 158 S. W. 238.

149. — **Warnings and instructions.**—Evidence held sufficient to warrant the jury in finding that the master was negligent in not warning the servant of the danger in handling creosoted ties which were not in their usual condition. *Pecos & N. T. Ry. Co. v. Collins* (Civ. App.) 173 S. W. 250.

Evidence held insufficient to sustain finding that the injury was the proximate result of alleged negligence in failing to warn servant. *Missouri, K. & T. Ry. Co. v. Masqueda* (Civ. App.) 189 S. W. 328.

156. **Damages.**—In an action by a wife for the wrongful death of her husband, she can only recover her pecuniary loss and cannot recover for loss of care and attention. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

158. **Excessiveness of verdict.**—See notes under arts. 2022 and 4694.

Verdicts held not excessive: *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171; *Missouri, K. & T. Ry. Co. of Texas v. Leabo* (Civ. App.) 161 S. W. 332; *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405; *Houston & T. C. R. Co. v. Barlett* (Civ. App.) 162 S. W. 1039; *St. Louis, S. F. & T. Ry. Co. v. Overturf* (Civ. App.) 163 S. W. 639; *Southern Pac. Co. v. Vaughn* (Civ. App.) 165 S. W. 885; *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279; *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140; *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229; *San Antonio, U. & G. R. Co. v. Moya* (Civ. App.) 173 S. W. 608; *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880; *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194; *Texas & P. Ry. Co. v. Conway* (Civ. App.) 182 S. W. 52; *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392; *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424; *Galveston, H. & S. A. Ry. Co. v. Reinhart* (Civ. App.) 182 S. W. 436; *St. Louis, B. & M. Ry. Co. v. Bell* (Civ. App.) 183 S. W. 823; *Texas & P. Ry. Co. v. Griffin* (Civ. App.) 184 S. W. 305; *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566; *San Antonio, U. & G. R. Co. v. Hagen* (Civ. App.) 188 S. W. 954; *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593; *Andrews v. Wilding* (Civ. App.) 193 S. W. 192; *Marshall & E. T. Ry. Co. v. Riden* (Civ. App.) 194 S. W. 1163.

Verdicts held excessive: *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 159 S. W. 907; *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24; *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 166 S. W. 1190; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 181 S. W. 238; *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 184 S. W. 1100.

## Art. 6649. Contributory negligence; rule as to.

See notes under art. 6644.

Cited, *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24; *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

**Federal employers' liability act.**—Federal Employers' Liability Act, § 4, eliminating assumption of risk defense where the injury was contributed to by employer's violation of a statute enacted for employe's safety, indicates legislative intent that in all other cases such defense shall have its common-law effect. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Civ. App.) 192 S. W. 767.

**Application and effect of statute.**—In general.—The provision that the damages shall be diminished in proportion to the amount of negligence attributable to a plaintiff, did not abrogate the rule placing the burden of proving contributory negligence upon defendant. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

— **To whom applicable.**—This article applies to a helper in the railroad shops. *Texas & N. O. Ry. Co. v. Siewert* (Civ. App.) 163 S. W. 624.

This article applies to a railroad operated by a lumber company in conducting its own business, as well as to a common carrier. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

A servant need not be at labor to claim benefit of this article. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

— **Contributory negligence.**—Under the statutes contributory negligence of servant is not complete defense, but only reduces damages in action against master for negligent injury. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580; *Missouri, K. & T. Ry. Co. of Texas v. Perryman* (Civ. App.) 160 S. W. 406; *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84; *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405; *Stephenville, N. & S. T. Ry. Co. v. Shelton* (Civ.

App.) 163 S. W. 1034; Galveston, H. & S. A. Ry. Co. v. Boshier (Civ. App.) 165 S. W. 93; San Antonio, U. & G. R. Co. v. Green (Civ. App.) 182 S. W. 392; San Antonio, U. & G. R. Co. v. Galbreath (Civ. App.) 185 S. W. 901.

In a railroad employé's action for personal injuries under Employers' Liability Act, it is the better practice to have the jury find whether plaintiff was negligent, and, if so, find the damages sustained by him and the extent his damages are diminished because of his own negligence. St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

Under this article, the negligence of an engineer co-operating with that of the company was not a complete bar, and an instruction that if he was negligent he could not recover was properly refused. Gulf, C. & S. F. Ry. Co. v. Riordan (Civ. App.) 166 S. W. 133.

A brakeman's action for injuries in coupling cars cannot be wholly defeated by a showing of his greater comparative negligence, unless his negligence alone caused the injury. San Antonio, U. & G. R. Co. v. Green (Civ. App.) 182 S. W. 392.

The rule of comparative negligence prescribed by this article, does not prevail in other cases of injury from negligence, and in them contributory negligence is a complete defense. Andrews v. Mynier (Civ. App.) 190 S. W. 1164.

— **Applies to negligence in law or fact.**—Under this article, an employé's contributory negligence, either in fact or in law, would not defeat his recovery. International & G. N. Ry. Co. v. Williams (Civ. App.) 160 S. W. 639.

Even where plaintiff's proof shows that he is guilty of contributory negligence as a matter of law, under this article, the court can only direct the jury to diminish the damages in proportion to plaintiff's negligence. St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

— **Effect on assumption of risk rule.**—Article 6645, relative to defense of assumed risk in actions against railroad corporations, held not to merge that defense with that of contributory negligence, and hence assumed risk is a defense, notwithstanding this article. Galveston, H. & H. R. Co. v. Hodnett, 106 Tex. 190, 163 S. W. 13, reversing judgment (Civ. App.) 155 S. W. 678.

— **Discovered peril rule.**—This article does not apply where the law of discovered peril imposes a liability on an employer for the death of an employé, and contributory negligence on the part of a railway employé, who slipped and fell in front of a moving train, would neither defeat a recovery nor diminish the amount thereof, if those in charge of the train discovered his peril in time to have prevented the injury. Pecos & N. T. Ry. Co. v. Welshimer (Civ. App.) 170 S. W. 263; Pecos & N. T. Ry. Co. v. Rosenbloom (Sup.) 173 S. W. 215, affirming judgment (Civ. App.) 141 S. W. 175. Rehearing denied (Sup.) 177 S. W. 952.

### Art. 6650. Assumed risk, rule as to.

Cited, San Antonio & A. P. R. Co. v. Wagner (Civ. App.) 166 S. W. 24.

**Knowledge of defect.**—Under arts. 6646 and 6650, a brakeman injured by the giving way of a defective handhold did not assume the risk although he knew of the defect. Missouri, O. & G. Ry. Co. v. Plemmons (Civ. App.) 171 S. W. 259. See, also, arts. 6645 and 6646, and notes.

### Art. 6651. Contract changing liability void.

**Contracts exempting from liability—Public policy.**—Application for employment by railroad reciting existence of obstruction and assumption of risk is void as against public policy. Barnhart v. Kansas City, M. & O. Ry. Co. of Texas (Sup.) 184 S. W. 176.

**Release of claims—In general.**—Where injured railroad employé signed agreement releasing company from all liabilities in consideration of \$1 and its engaging to employ him for one day, and the company's agreement to furnish one day's work rested at employé's option, he, by doing the work furnished him, accepted the proposition and rendered the contract executed. Panhandle & S. F. Ry. Co. v. Fitts (Civ. App.) 188 S. W. 528.

— **Consideration.**—Where injured railroad employé executed release of liability under consideration of company's promise to employ him further for one day and an order on its treasurer for one dollar, the release was executed though such employé did not work for the day or receive his dollar. Panhandle & S. F. Ry. Co. v. Fitts (Civ. App.) 188 S. W. 528.

— **Fraud or mistake.**—Evidence held to support a finding that a release for personal injuries was invalid for fraud. Missouri, K. & T. Ry. Co. of Texas v. Ellison (Civ. App.) 185 S. W. 1020; Atchison, T. & S. F. Ry. Co. v. Skeen (Civ. App.) 174 S. W. 655.

Where servant because of reliance on false representations signs a release for damages for personal injuries, the release is invalid, though he did not read it before signing. Texas City Transp. Co. v. Winters (Civ. App.) 193 S. W. 366; Missouri, K. & T. Ry. Co. of Texas v. Morgan (Civ. App.) 163 S. W. 992.

If representations made to secure a release from liability because of personal injuries were in fact false, the fact that the person making them believed them to be true would not prevent the injured person from having the release set aside. Texas Cent. R. Co. v. Neill (Civ. App.) 159 S. W. 1180.

False statements by physician in defendant's employ to injured railroad employé, relative to effect and permanency of his injuries, held to constitute fraud invalidating the release. Missouri, K. & T. Ry. Co. of Texas v. Maples (Civ. App.) 162 S. W. 426.

A release of an employé's claim for personal injuries induced by a promise of employment not made in good faith is voidable, and may be set aside for fraud. Atchison, T. & S. F. Ry. Co. v. Skeen (Civ. App.) 174 S. W. 655.

Where the injured servant, when told by physicians in the master's employ that his broken bones had set, and would be as good in two months as ever, signed a release for a certain sum, and the injury probably would never heal, he could avoid the release and sue for his injuries. *Alenkowsky v. Texas & N. O. Ry. Co.* (Civ. App.) 188 S. W. 956.

The rule that false representation by employer's surgeon as to physical condition of servant will not justify avoidance of release where the surgeon has no connection with the settlement and the claim agent was ignorant of the representation does not apply if the claim agent procured the representation. *Id.*

In railroad employé's action for injuries, evidence held insufficient to support findings that he was mentally incompetent to make a valid contract of settlement, and that he was induced to make it by misrepresentations by the claim agent of the railway and by undue influence exercised upon him. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

Misrepresentations by railroad's claim agent to its injured employé concerning the services to be rendered by some of his attorneys did not of themselves constitute a sufficient basis for rescission of the contract of settlement, where the employé's incompetency and the claim agent's fraud were not shown. *Id.*

\$3,750 paid injured railroad employé for settlement held not so grossly inadequate as of itself to constitute a badge of fraud practiced upon him. *Id.*

— **Duress.**—Arguments made to its injured employé by railroad's claim agent, to induce him to settle, relative to delays and uncertainties of suits, held fraudulent, but not to amount to undue influence. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

— **Rescission.**—Where an employé is induced by the employer's claim agent to believe that a check tendered in settlement of his claim for wages, when it states on its face that it is in full for personal injuries, and he cashes the check without knowledge thereof, he may avoid its effect as an accord and satisfaction for his injuries. *Mis-souri, K. & T. Ry. Co. of Texas v. Morgan* (Civ. App.) 163 S. W. 992.

The distressed financial circumstances of railroad's employé when he settled his claim did not furnish sufficient basis for rescission of the settlement. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

— **Construction and effect.**—Where railroad's injured employé signed contract, releasing road from liability in consideration of its furnishing him one day's employment, not being induced thereto by mistake or fraud, he was bound by such release. *Pan-handle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

## CHAPTER FIFTEEN

### RAILROAD COMMISSION OF TEXAS

Art.	Art.
6654. Powers and duties, etc.	6694. Railroad commission to require compliance.
6656. Rates to be held conclusive, etc.	6695. Commission may order construction of union depots.
6657. When railway dissatisfied, may, etc.	6696. Penalty for failure to comply.
6658. Burden of proof, etc.	6708a. Maintenance of roadbed and tracks; powers of commission.
6659. To be furnished with schedules of rates fixed.	6708b. Same; penalty for failure to comply with orders of commission.
6669. Penalty for extorting, etc.	6708c. Same; issuance of bonds.
6670. "Unjust discrimination" defined.	6709. Equipment to be used; commission to supervise.
6671. Damages; penalty; venue in cases of discrimination.	6710. Improved couplers to be used, and how.
6672. Penalty not otherwise provided.	6713. Rolling stock to be provided with grab irons, etc.
6675. All violations of duty to be reported.	6714. Penalty, and how recovered.
6676. "Railroad," etc., defined; intra-state shipments; one train daily.	6715. To build sidings and spur tracks.
6677. Law cumulative, etc.	6716. Railroad commission to enforce compliance.
AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS	6716a. Duty to provide switch connections with private spur tracks.
6677d. Rules and regulations for issuance of stock and bonds.	6716b. Application to and order of Commission.
6679. Application shall state what.	6716c. Commission to fix rates, prevent discrimination, and make regulations for use of switches.
6680. Penalty for failure to furnish.	6716d. Railroad Commission empowered to regulate private sidetracks or spur tracks.
6682. To deliver loaded cars in reasonable time.	6716e. Sidetracks or spurs to be constructed for all persons similarly situated.
6684. Duty to furnish cars and other rolling stock.	6716f. Failure to comply with orders of Commission as to sidetracks, etc.
6685. Railroad commission to require and authorize mortgage, etc.	6716g. Action for damages.
6687. Shall furnish freight facilities and interchange cars with connecting roads.	6716h. Provision cumulative.
6688. To interchange cars at junction points.	
6689. Railroad commission to make rules and regulations.	
6690. Liable for damages, when.	

**Article 6654. [4562] Powers and duties.**

**Note.**—Act March 18, 1915, c. 61, p. 110, makes an appropriation for expenses of investigation to aid commission in passing on application of railroad companies to increase rates. It is omitted as temporary.

**Constitutionality.**—While the power of the Legislature, under Const. art. 10, § 2, to correct abuses by railroads, may be delegated to the Railroad Commission, the declaration of what is an abuse must be by an act of the Legislature. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

**Jurisdiction of commission.**—The Railroad Commission has no power to permit a railroad company to abandon and remove a part of its track which is being operated; such authority not being given to the Commission by statute. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

Railroad commission may, under articles 6552, 6654, 6670, order division between connecting carriers of revenue earned in transporting coal not owned by either. *Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 175 S. W. 1116.

**Fixing rates.**—The fact that a particular public service required of a railroad company may not be immediately remunerative is no reason for relieving the railroad company of the duty to perform it. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Discrimination.**—A carrier may lawfully require one shipper to pay freight charges in cash before delivery of the goods and extend credit to another shipper. *Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 402.

**Construction of orders.**—Railroad Commission Circular 18, requiring railroads to start passenger trains from their points of origin on schedule time, is a general order applying to all roads in the state, and can be enforced by the courts, without the road having first been cited by the commission to show cause why it did not comply with the order. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 167 S. W. 822, writ of error denied (Sup.) 181 S. W. 721.

**Art. 6656. [4564] Rates to be held conclusive until, etc.**

**Conclusiveness of rates and orders.**—The filed and published freight rates for an interstate shipment are conclusive as to the rate to be charged. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

Cause of action of a railroad for freight charges fixed in accordance with articles 6656, 6659, held for a liquidated demand rendering proper entry of default judgment without proof under arts. 1938, 1939. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Interstate shipment.**—A published tariff, not affecting an initial carrier, may be considered in determining the through rate on an interstate shipment from a combination of the local rate of the initial carrier and the published rate of the other carrier. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

**Art. 6657. [4565] When railway dissatisfied, may file petition, etc.**

Cited, *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192.

**Review of rates and orders—In general.**—The answer of railroads, amounting to a plea in reconvention or cross-bill, in a suit brought by the Attorney General, by order of the Railroad Commission against them for enforcement of its order, is a substantial invoking of their remedy against the order, under articles 6657, 6658, namely, an action against the commission to have the order set aside. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

**Art. 6658. [4566] Burden of proof.**

Cited, *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192.

**Construction.**—Under this article, the presumption given a judgment of a trial court that it is justified by the facts must be accorded an order of the railroad commission, till the contrary is clearly and satisfactorily shown, both in the district court, in an action to set aside the order, and on appeal from its judgment. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

**Burden of proof on plaintiff.**—In a suit to enjoin enforcement of an order of Railroad Commission requiring plaintiff to build a station at a designated place, by direct provisions of this article, burden was on plaintiff to show by clear and satisfactory evidence that such order as fixing cost of depot ordered to be erected at place indicated was unreasonable and unjust to plaintiff. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

**Review of rates and orders—In general.**—The answer of railroads, amounting to a plea in reconvention or cross-bill, in a suit brought by the Attorney General, by order of the Railroad Commission against them for enforcement of its order, is a substantial invoking of their remedy against the order, under articles 6657, 6658, namely, an action against the commission to have the order set aside. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

**Art. 6659. [4567] Railroads to be furnished with schedule of rates fixed.**

**Review of rates and orders—In general.**—Cause of action of a railroad for freight charges fixed in accordance with articles 6656, 6659, held for a liquidated demand rendering proper entry of default judgment without proof under arts. 1938, 1939. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Art. 6669. [4573] Penalty for extorting.**

**Penalty—In general.**—A statutory penalty cannot be recovered unless it is clearly authorized by statute. *Helm v. Wells Fargo & Co. Express* (Civ. App.) 177 S. W. 134.

**Art. 6670. [4574] "Unjust discrimination" defined.**

**Constitutionality.**—The provision as to transportation and delivery of passengers, freight or cars, destined to point on connecting railroad, held constitutional. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

**Relation to other articles.**—Since Acts 22d Leg. c. 45, relating to express companies, was intended to cover the entire field, as relating to such companies, as is covered by the act of the same Legislature (Acts 22d Leg. c. 51), relating to railroads, an individual cannot recover from an express company the penalty prescribed by the railroad act. *Helm v. Wells Fargo & Co. Express* (Civ. App.) 177 S. W. 134.

**Rule of Railroad Commission imposing penalty for delay in delivery of goods, adopted under article 6687, did not supersede article 6670, subd. 2, imposing a penalty for failure to promptly deliver goods.** *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

**Construction of statute in general.**—Arts. 6670, 6671, 6677, are to be strictly construed, and any doubt resolved in favor of the railroad. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

**To recover a statutory penalty, plaintiff must bring his case strictly within the terms of the statute.** *Id.*

**Interstate commerce.**—See notes under art. 6676.

**Unjust discrimination—In general.**—Where a carrier authorized its agent to place on sale two kinds of return trip tickets containing different date limits, and established rates for each class of tickets, the carrier could not discriminate against a passenger by refusing to sell a ticket of the class demanded. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

**In intrastate commerce a railroad may not have the benefit of through rates on its own line in the carriage of its own property apart from contract.** *Rio Grande & E. P. Ry. Co. v. Texas-Mexican Ry. Co.* (Civ. App.) 173 S. W. 236.

**A railway company, contracting with a lumber company for a spur track for the exclusive use of the lumber company, held not liable to another as a member of the public to furnish cars on the spur.** *Beaumont, S. L. & W. Ry. Co. v. Moore* (Civ. App.) 174 S. W. 844.

**Under this article, defendant railroad held properly ordered by mandatory injunction to extend, pending litigation, to plaintiff on its spur track the privileges in regard to deliveries of shipments coming in over competing lines which it extended to others situated on the spur.** *Missouri, K. & T. Ry. Co. of Texas v. Seeger* (Civ. App.) 175 S. W. 713.

**In action against railroad to secure deliveries to plaintiff over a spur track, mandatory injunction ordering that deliveries be made until final hearing, without limitation as to continuance of plaintiff's operation of the spur, held proper, where the contract for establishment of the track had 20 years to run.** *Id.*

**Under this article, a railroad, by refusing to deliver to plaintiff, doing business on its spur track, shipments from localities or persons served not by its own, but by connecting, lines, unlawfully discriminates against such localities or persons, and may be enjoined.** *Id.*

**Permitting a carrier in an intrastate shipment to have benefit of a through rate on its own line for carrying coal belonging to it is to permit a discrimination.** *Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 175 S. W. 1116.

**Articles 6670, 6671, govern shipments in car load lots and smaller shipments.** *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

**Where a railroad company unreasonably delays a shipment destined to a connecting carrier, the shipper's remedy is under subdivision 2, and not subdivision 1, of this article.** *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

**A carrier's agreement to pay a certain amount in settlement of a disputed claim for negligence, in consideration of future interstate shipments over its road, held violative of the law against rebating.** *St. Louis, I. M. & S. Ry. Co. v. Landa & Storey* (Civ. App.) 187 S. W. 358.

**Payment of switching charges from plaintiff's gravel pit in excess of certain figure per car, fixed by order of Railroad Commission, to other railroads than defendant held to make no cause against defendant for statutory damages for extortion or unjust discrimination.** *White Rock Gravel & Sand Co. v. International & G. N. Ry. Co.* (Civ. App.) 188 S. W. 280.

**Under rule of Railroad Commission, railroad held not required to absorb switching charges in excess of a fixed amount per car, incurred in obtaining possession of the cars at point of origin.** *Id.*

**The idea prominent in legislation as to receiving and transporting freight is equality, and carriers are not permitted to exercise their charter rights so as to benefit an individ-**

ual of the community to detriment of another. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

Subd. 1 contemplates a delay caused by unjust discrimination, and not a merely negligent delay. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

Subd. 1 is declaratory of the common law, under which it is an unjust discrimination for a common carrier "to make or give any undue or unreasonable preference or advantage to any particular person," etc. *Id.*

Under subds. 1, 4, railroad, whose trains from station at which plaintiff purchased ticket were delayed by heavy rains, refusing to give plaintiff transportation in exchange for his ticket, such as was given through passengers, held, not guilty of an unjust discrimination. *Id.*

Under subds. 1, 4, and article 6671, plaintiff under the circumstances held not entitled to recover penalty for unjust discrimination in refusal to transport him by detoured route on exchange of tickets and without additional fare. *Ft. Worth & D. C. Ry. Co. v. Wells* (Civ. App.) 191 S. W. 815.

— **Connecting carriers.**—It is contemplated by this article that the Railroad Commission shall establish rules against unjust discrimination against freight destined to a connecting carrier. *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

Under this article, subds. 1, 2, and article 6671, penalty for delay in delivery to connecting carrier, held to accrue though Railroad Commission has made no regulation, but governed by subdivision 1. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

Under articles 6670, 6671, carrier held liable for damages and penalty for delaying or refusing delivery to connecting carrier, though shipment is not a through shipment. *Id.*

Under articles 6670, 6671, party held entitled to recover penalty for railroad's delay in delivering shipment to connecting carrier, delay constituting discrimination. *Id.*

**Actions—Jurisdiction.**—Articles 6670, 6671, make a distinction between penalties recoverable by the state and by a person injured, and Const. art. 5, § 8, requiring actions by the state for penalties to be brought in the district court, does not prevent action by a person injured in county court. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

— **Defenses.**—In an action against a railroad company for the penalty for an overcharge, it was no defense that the shipper did not pay the charges at the point of shipment, but at another station. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 163 S. W. 376.

Testimony by a shipper that he did not have enough money to pay the legal rate, which was more than the quoted rate, was immaterial. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

In suit for penalty for violation of articles 6670, 6671, and rule of Railroad Commission and in view of defendant's violation of articles 6589, 6608, it was no defense that goods were carried beyond connecting point and held for connecting carrier's failure to settle advances on freight delivered to it, and for delivery on payment to junction point. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

In suit for penalty for violation of articles 6670, 6671, that defendant could not deliver goods to connecting carriers without taking them beyond for a separation from other freight was no defense, unless such condition was made known to shipper before delivery of goods to defendant. *Id.*

— **Questions for court.**—Under subds. 1, 4, unjust discrimination is usually a question for jury; but when facts are undisputed, and lead to but one reasonable conclusion, it becomes question of law for court. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

**Railroad commission—Powers.**—Railroad commission may, under articles 6552, 6654, 6670, order division between connecting carriers of revenue earned in transporting coal not owned by either. *Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 175 S. W. 1116.

Under articles 6670, 6671, Railroad Commission held without power to prescribe damages recoverable for failure to deliver shipment without delay to connecting carrier. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

— **Orders.**—Under rule 2 of the Railroad Commission, held, that a carrier was not excused, by reason of local custom to observe the following Monday, from duly transporting freight on Monday, because Sunday, as March 2d, was a legal holiday. *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

Reply by chairman of Railroad Commission to an inquiry by railroad company as to whether the following Monday would be recognized as free time, when Sunday was also a legal holiday, held not to show a rule of the Commission to that effect. *Id.*

Where plaintiff alleged that refusal to deliver shipment to connecting carrier was in violation of this article and order of Railroad Commission, failure to show such order held fatal. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

**Damages.**—In suit against carrier for penalty for its violation of articles 6670, 6671, in wrongfully refusing to deliver goods, plaintiffs' profits on goods sold held not a proper measure of damages. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

### Art. 6671. [4575] Damages; penalty; venue in cases of discrimination.

See notes under art. 6670.

Cited, *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

**Discrimination.**—Under this article, plaintiff, holding ticket from W., and twice refused carriage given through passengers by detoured route, was not entitled to recover



penalty, where carrier on next day gave him such transportation without extra charge. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

**Burden of proof.**—Under this article, the burden is upon the railroad company to prove mistake. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 163 S. W. 376.

**Pleading.**—A petition, in an action against a railroad for the penalty for an overcharge, though subject to special exceptions for failing to state that the charges were in excess of those fixed by the Railroad Commission, held not subject to attack by general demurrer. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 163 S. W. 376.

### Art. 6672. [4576] Penalty not otherwise provided.

See *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

**Penalties—In general.**—Even if the Railroad Commission had authority to direct a railroad company to replace track removed pursuant to another order of the Commission, a penalty will not be assessed in mandamus against the company for failure to comply with the order to replace the track, since it had reasonable grounds to believe it was justified in doing so. *State v. Sugarland Ry. Co.* (Civ. App.) 163 S. W. 1047.

— **For separate offenses.**—Under this article each failure of a railroad to start its train from the point of origin on schedule time, as required by Railroad Commission Circular 18, is a separate offense, and subjects the railroad to liability for the penalty. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 167 S. W. 822, writ of error denied (Sup.) 181 S. W. 721.

Where a railroad company, for a considerable time, violated an order of the Railroad Commission requiring it to stop certain trains at a designated station, the railroad company was guilty of as many offenses as there were separate violations of the order. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 169 S. W. 385, writ of error denied (Sup.) 181 S. W. 685.

**Excessive damages.**—Under this article, the imposition of a fine of \$22,400 upon a railroad company, which 224 times violated an order requiring it to stop certain through trains at a designated station, was not excessive. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 169 S. W. 385, writ of error denied (Sup.) 181 S. W. 685.

### Art. 6675. [4579] All violations of duty to be reported to attorney general.

**Railroad commission—Powers.**—Railroad Commission empowered by this article, to enforce laws, may not enforce a contract binding a railway company to maintain a depot at a particular place, notwithstanding article 6550. *Mosel v. San Antonio & A. P. Ry. Co.* (Civ. App.) 177 S. W. 1048.

### Art. 6676. [4580] "Road," "railroad," "railroad companies," etc., defined. Law applies only to railroads in this state. One train a day to be run.

**Interstate commerce.**—In case of a passenger traveling on a pass good from one point in the territory of New Mexico to another point, there is no interstate carriage or question of interstate commerce. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

The rate prescribed by the Interstate Commerce Commission controls the rate for an interstate shipment. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

Under Const. art. 10, § 1, a Texas railroad company has no powers outside of the state, and a passenger train received by it at the state line from a connecting company and hauled to other points within the state is an instrument of intrastate commerce which must be started on schedule time from its point of origin at the state line under Railroad Commission Circular 18. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 167 S. W. 822, writ of error denied (Sup.) 181 S. W. 721.

A state regulation, which required a railroad company to stop through trains engaged in interstate commerce at a particular point, was not invalid as an interference with interstate commerce, where the railroad company, as a public carrier, owed the inhabitants of that locality the duty of stopping its trains there. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 169 S. W. 385, writ of error denied (Sup.) 181 S. W. 685.

Under subd. 2, the Railroad Commission has jurisdiction to order a railroad company to stop through trains engaged in interstate commerce at a county seat station, where the stopping of such trains is necessary to furnish the inhabitants of that locality with adequate train service. *Id.*

A shipment of goods which traverses another state, though the points of origin and destination are in the same state, is interstate commerce. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

A misquotation of an interstate freight rate by a carrier's agent gives the shipper no right of action. *Id.*

The rulings of the Interstate Commerce Commission permit a railroad to take advantage of through rates in hauling its own property, but require that the carriage be in good faith, with intention to use the property at the point where the transit ends. *Rio Grande & E. P. Ry. Co. v. Texas-Mexican Ry. Co.* (Civ. App.) 173 S. W. 236.

A shipment from point in the state to point in sister state is interstate shipment, though initial carrier obligated itself to transport wholly in the state. *Galveston, H. & S. A. Ry. Co. v. Carmack* (Civ. App.) 176 S. W. 158.

The validity of a provision in a bill of lading issued for an interstate shipment must

be determined under the Federal Interstate Commerce Acts. *Hovey v. Tankersley* (Civ. App.) 177 S. W. 153.

An agreement of the agent of a carrier to reimburse the plaintiff for damages suffered by injury to goods in shipment is not an agreement for a rebate, sufficient to make it discriminatory within the interstate commerce law. *Missouri, K. & T. Ry. Co. of Texas v. A. E. Want & Co.* (Civ. App.) 179 S. W. 903.

A freight rate approved by the Interstate Commerce Commission becomes effective immediately, though the carrier does not post the tariff in its local station. *Wardlow v. Andrews* (Civ. App.) 180 S. W. 1161.

An agent's wrong quotation of lower rates for interstate shipments than that fixed by the Interstate Commerce Commission gives no right of action to the shipper injured thereby. *Id.*

Although a railway corporation has power to operate its trains within one state, where it by contract operates the trains of another railroad which originate outside the state, the operation of such trains is "interstate commerce." *Missouri, K. & T. Ry. Co. of Texas v. State* (Sup.) 181 S. W. 721.

A state enactment may be valid, though it incidentally affects interstate commerce, where it is an aid to, rather than a burden on, such commerce. *Id.*

Although Congress has the power to regulate commerce among the several states, there are certain duties whose performance by common carriers the police power of the state may exact, notwithstanding such carriers engage in interstate commerce. *Id.*

The state is not prohibited absolutely from regulating interstate commerce, but its powers are restricted only where Congress has exercised its power of regulation. *Id.*

**Stopping trains at county seat towns.**—The state, under this article, may require the stoppage of interstate trains at a county seat within its limits, where the carrier has not otherwise provided sufficient railway facilities for it, and an order requiring a railroad company to stop through trains which carried Pullman accommodations, besides the two trains which it usually stopped at a county seat, was not unreasonable, and not invalid as furnishing a precedent for requiring the stopping of such trains at other stations. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 169 S. W. 385, writ of error denied (Sup.) 181 S. W. 685.

— **Remedies.**—Where a railroad company willfully fails to comply with Const. art. 10, § 9, requiring railroads to pass through county seats within three miles of their line, the court can enforce obedience thereto by mandatory injunction. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

#### Art. 6677. [4581] Law cumulative.

**Construction.**—Arts. 6670, 6671, 6677, defining and prohibiting unjust discrimination by railroads in respect to services rendered, are to be strictly construed, and any doubt resolved in favor of the railroad. *Ft. Worth & D. C. Ry. Co. v. Frazier* (Civ. App.) 191 S. W. 808.

### AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS

**Art. 6677d. Rules and regulations for issuance of stocks or bonds.**—Said Railroad Commission shall have the same power to make and prescribe rules and regulations for the government and control of all such persons, associations and corporations as is or may be conferred upon said commission for the regulation of railroad companies, and such persons, associations and corporations shall issue no stock or bonds, except such as are authorized by the Railroad Commission under the provisions of the railroad stock and bond law of this State. And such persons, associations, and corporations are hereby expressly authorized to create indebtedness and to issue stocks and bonds to the same extent and amount that railroad corporations are permitted to do under the provisions of the Railroad Stock and Bond Law of Texas, and the Railroad Commission of Texas shall have and exercise the same power, jurisdiction and authority over and with respect to such creation of indebtedness and issuance of stocks and bonds by such persons, associations and corporations, that said commission has and exercises over the creation of indebtedness and the issuance of stocks and bonds by railroad corporations under the laws of said State. [Acts 1911, p. 157, § 4; Act June 4, 1915, 1st C. S., ch. 24, § 1.]

**Explanatory.**—The act amends section 4, chapter 86, of Gen. Laws 32d Leg. so as to read as above. The act took effect 90 days after May 28, 1915, date of adjournment.

#### Art. 6679. Application shall state what.

See *Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co.* (Civ. App.) 187 S. W. 376; note under art. 6680.

**Art. 6680. [4499] Penalty for failure to furnish.**

**Pleading.**—A complaint in action for penalties prescribed by this article for alleged failure to furnish a car, alleging application for car to be placed on a spur track of another railroad, not designating as the place where the car was desired one at some station or switch of defendant, is demurrable under art. 6679. *Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co.* (Civ. App.) 187 S. W. 376.

**Art. 6682. To deliver loaded cars in reasonable time.**

**Damages.**—If the carrier's delay occurred after the car was loaded, with oil by the consignee and returned to the carrier, the carrier was liable for such damages as would ordinarily result from a failure to deliver the oil for the use to which it was to be applied. *San Antonio & A. P. Ry. Co. v. Houston Packing Co.*, 106 Tex. 333, 167 S. W. 228.

**Art. 6684. Duty to furnish cars, etc.**

**Duty to furnish facilities.**—It is a common-law duty of railroads to furnish reasonable facilities for the transaction of public business. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Art. 6685. Commission to require and authorize mortgage, etc.**

Cited, *Lane v. Chappell* (Civ. App.) 159 S. W. 905; *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Art. 6687. Shall furnish freight facilities, interchange cars, etc.**

**Relation to art. 6670, subd. 2.**—Rule of Railroad Commission imposing penalty for delay in delivery of goods, adopted under this article did not supersede article 6670, subd. 2, imposing a penalty for failure to promptly deliver goods. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

**Duty to furnish facilities.**—A domestic railroad company cannot be required to build an inclosure for the transfer of freight at the center of an international bridge owned half by it and half by a foreign company. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

A railway company, contracting with a lumber company for a spur track for the exclusive use of the lumber company, held not liable to another as a member of the public to furnish cars on the spur. *Beaumont, S. L. & W. Ry. Co. v. Moore* (Civ. App.) 174 S. W. 844.

A railway company, contracting with a lumber company to construct and maintain a spur track, held not liable for special damages claimed by a subsequent seller of timber to the lumber company for delivery on cars on the spur. *Id.*

**Interchange of cars and freight—Negligence of connecting carrier.**—See *Broughton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 186 S. W. 354; note under art. 6688.

**Art. 6688. To interchange cars at junction points.**

**Negligence of connecting carrier.**—A railroad permitting the connecting carrier to use its tracks in delivering loaded cars, as required by articles 6687, 6688, is not liable for injuries caused by the negligence of such connecting carrier on its track. *Broughton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 186 S. W. 354.

**Art. 6689. Commission to make rules and regulations.**

**Demurrage.**—A carrier held not liable for demurrage paid by shipper because owing to delay in the shipments the cars arrived at a time of money stringency, when the carrier refused to accept the shipper's checks for freight which would not have been then honored, though plaintiff had funds to meet them in the bank, as the carrier's acts were the proximate cause of the loss. *Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 402.

A carrier must furnish a shipper reasonable facilities for unloading, but the shipper must exercise reasonable diligence, and the carrier need not permit him to use the car as a storehouse in which to carry on his business as a seller on the payment of demurrage charges. *Wattam v. International & G. N. R. Co.* (Civ. App.) 168 S. W. 973.

**Connecting carriers—Division of receipts.**—Ruling of railroad commission as to division of receipts between connecting carriers held not to apply where the second carrier did not in good faith haul the goods to the terminus to which they were billed for disposition there. *Rio Grande & E. P. Ry. Co. v. Texas-Mexican Ry. Co.* (Civ. App.) 173 S. W. 236.

**Art. 6690. Liable for damages, when.**

**Actions for damages.**—A seller of timber to a lumber company for delivery on cars at a spur erected for its exclusive benefit may not recover from the railway company for failure to furnish cars. *Beaumont, S. L. & W. Ry. Co. v. Moore* (Civ. App.) 174 S. W. 844.

**Liability for breach of special contract.**—A carrier is liable for the consequences of its breach of contract to furnish cars within a shorter time than required by statute,

though the result of inability due to an unusual demand for cars. *Texas & N. O. R. Co. v. Weems* (Civ. App.) 184 S. W. 1103.

Damages for carrier's breach of contract to furnish cars on private tracks held not limited to cost of hauling property to depot, where cars could not have been obtained thereto. *Id.*

#### Art. 6694. Commission to require compliance.

**Where commission can compel erection of depots.**—In a suit to enjoin enforcement of an order of the Railroad Commission requiring plaintiff to build a station at a designated place, for the purposes of the suit, two places separated only by railroad track are one and the same place. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

**Mandamus.**—In mandamus to compel railroad companies to comply with an order of the Railroad Commission commanding them to file plans and specifications for the construction of a union passenger depot, the court may issue a writ of mandamus commanding the filing of such plans and specifications; its power not being confined to the issuance of a writ commanding the construction and maintenance of such a depot. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192.

#### Art. 6695. Commission may order construction of union depots.

**Constitutionality.**—Arts. 6695 and 6696 held constitutional. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192. It is a valid law, as, in effect, a declaration that railroads shall, under certain conditions, construct a union depot, leaving to the Railroad Commission merely the determination, in the first instance, whether those conditions exist, and as such is not the delegation of legislative power. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491; *Gulf, C. & S. F. R. Co. v. State* (Civ. App.) 167 S. W. 192. The law is not invalid as authorizing the Commission to waive or enforce the statute at their pleasure, and does not work a deprivation of property without due process, contrary to Const. U. S. Amend. 14, and Const. Tex. art. 1, § 19, because provision is made for notice and public hearing for the railroad companies before the order. Nor is the act too vague for enforcement because its leaves to the railroad companies the right to determine for themselves the location and the character of the depot. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192.

**Construction.**—The grant in terms, by this article, of power to the Railroad Commission to require railroads to build union depots, carries by implication every power necessary to accomplishment of such object, including that to select the site; the companies failing or refusing to agree thereon. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

An abuse by a railroad, which the Railroad Commission may correct, is declared by an act, not using the word "abuse," but imposing a duty on the railroad; the disregarding of such duty by the railroad being the abuse. *Id.*

#### Art. 6696. Penalty for failure.

**Constitutionality.**—See *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 167 S. W. 192; notes under art. 6695.

**Penalties—When imposed.**—The penalties prescribed by this article should not be imposed; they not acting willfully, but standing on what they believed and counsel advised to be their legal rights. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

**Art. 6708a. Maintenance of roadbed and tracks; powers of commission.**—The Railroad Commission of Texas shall have authority and it is hereby made its duty to see that each and every railroad corporation owning or operating a line of railroad in this State shall maintain its roadbed and track in such condition as to enable it to perform all of its duties as a common carrier with reasonable safety to persons and property carried by it and its employes and with reasonable dispatch.

The Railroad Commission of Texas shall be vested with full power to require of any such railroad company to purchase or secure for installation in its roadbed or track all such ties, rails, ballast and other materials and equipment as may, in the judgment of the Railroad Commission of Texas, be necessary for the proper maintenance of such track and roadbed so as to enable such railroad corporation to adequately perform its duties to the public and to transport freight and passengers with safety thereunto and without delay.

The Railroad Commission of Texas is hereby empowered to require any such railroad company to acquire and install in the whole of such track or roadbed, or any portion thereof that may be designated by the Railroad Commission of Texas, such ties, rails, ballast and other mate-

rials as may, in the judgment of the Railroad Commission, be adequate and sufficient to place such track or roadbed in safe condition. [Act March 30, 1915, ch. 129, § 1.]

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

**Art. 6708b. Same; penalty for failure to comply with orders of Commission.**—When the Railroad Commission of Texas shall have made any such order as authorized by Section 1 of this Act [Art. 6708a], it shall be the duty of any such railroad company or receiver subject thereto, to promptly comply with the terms thereof, and for failure or refusal to do so, such company or receiver shall become liable to the State of Texas, “as in other cases of failure to comply with orders of the Railroad Commission as provided by law.” In addition to such penalties, any court of competent jurisdiction shall have the power to, and it shall be its duty to, issue writs of mandamus and mandatory injunctions and other proper writs to compel the compliance with such orders. [Id., § 2.]

**Art. 6708c. Same; issuance of bonds.**—In any case where the Railroad Commission of Texas shall make an order in accordance with the preceding sections of this bill for the improvement of the line of railway of any railroad corporation, then and in such event the Railroad Commission of Texas, at the time of making such order, may, and it is hereby authorized, in its discretion, to make an order permitting said railroad corporation to issue bonds sufficient to raise the money necessary to make such improvements; to authorize such railroad corporation to secure the same by proper mortgage upon its property, and to designate such bonds and mortgage as “Improvement Bonds and Mortgages”; provided, the entire amount of bonds of said railroad company, including the new bonds, shall not exceed the assets of said company, and the said Railroad Commission is hereby vested with power and authority to make such orders.

It is also the duty of said Railroad Commission of Texas to see that the funds arising from the sale of such bonds shall be applied to the making of such improvement as it ordered said railroad corporation to make, and it is hereby vested with power and authority to regulate the same in the proper manner, and any sale of any such “Improvement Bonds and Mortgages” at less than par value thereof must, in order to be valid, be approved by the Railroad Commission. Provided, that the provisions of this Act shall not be considered as a repeal or modification in any manner of the present stock and bond law of the State governing the issuance of stocks and bonds by railroads. [Id.]

**Explanatory.**—The above section of the act is erroneously designated as section 2 instead of section 3, thus causing a duplication of section 2, and omitting a section 3. The act relating to stocks and bonds, referred to above, is set forth post as arts. 6717-6732.

**Art. 6709. Equipments to be used; commission to supervise.**

**Interstate commerce.**—When cars or locomotives which are required to be equipped with safety appliances under the federal Safety Appliance Act are used upon or pass over a railroad which is used for interstate commerce, the federal act applies and is supreme. *State v. Beaumont & G. N. R. R.* (Civ. App.) 183 S. W. 120; *State v. Orange & N. W. Ry. Co.* (Civ. App.) 181 S. W. 494.

In view of exception of logging trains in federal Safety Appliance Act enacted under Const. U. S. art. 1, § 8, subd. 3, held, that the Texas Safety Appliance Act was inoperative as to logging trains of railroads engaged in interstate commerce; Congress' inaction showing that it did not intend any regulation. *State v. Beaumont & G. N. R. R.* (Civ. App.) 183 S. W. 120.

**Injuries to servant.**—Negligence due to the violation of a statute does not give a right of action, unless the violation was the proximate cause of the injury. *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126.

If the conductor of a freight train voluntarily connects with the train two “bad order” cars, and thereby reduces the number of cars equipped with air brakes below the 75 per cent. limit fixed by law, he cannot recover for any injury proximately caused thereby. Id.

**Art. 6710. Improved couplers to be used.**

**Sufficiency of couplers.**—Where plaintiff, a switchman, kicked the knuckle of a flat car coupler to bring it in line with the knuckle of an engine coupler and when the coupling was made plaintiff's foot was caught therein, that the coupler on the car had too much play did not constitute a violation of Safety Appliance Act, as amended by act April 1, 1896, and as further amended by act of March 2, 1903, and Rev. Civ. St. 1911, art. 6710. *Morris v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 158 S. W. 1055.

Where couplers were so equipped that it was necessary for brakemen to go between the cars to adjust them, so that they would couple by impact, they were not a compliance with the safety appliance acts adopted by Congress or by the state. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

**Effect of violation of statute.**—Failure of a railroad company to equip its engines and cars with couplers that will couple automatically by impact, without requiring brakemen to go between the cars to adjust the same, as required by safety appliance acts, is negligence per se. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

**Art. 6713. Rolling stock to be provided with grab irons, etc.**

**Validity.**—This article held not invalid for indefiniteness as to what is required. *Galveston, H. & S. A. Ry. Co. v. Enderle* (Civ. App.) 170 S. W. 276.

**Construction and operation in general.**—In view of this article, and in view of defendant's nonperformance of the duty imposed, its requested instruction that it was not required to maintain foot stirrups upon its engines or tenders held properly refused. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

"Sufficient" and "secure," as used in this article defined. *Galveston, H. & S. A. Ry. Co. v. Enderle* (Civ. App.) 170 S. W. 276.

The rule of strict construction does not apply to the construction of this article when sought to be enforced in a civil action. *Id.*

Under this article it is the duty of railway companies to furnish sufficient and secure handholds on cars, and not merely to exercise ordinary care. *Id.*

**Application.**—Under Acts 31st Leg. c. 26, § 5, Acts 31st Leg. (1st Ex. Sess.) c. 10, § 3, and Federal Safety Appliance Act, together with Act Cong. April 22, 1908, a railroad company, sued for injuries, caused by the giving way of a defective handhold, cannot escape liability on the ground that the car belonged to a different company, which it was only bound to inspect for apparent defects. *Missouri, O. & G. Ry. Co. v. Plemmons* (Civ. App.) 171 S. W. 259.

The handhold statute applies to a car used for transporting local freight between points within the state, though not owned by the carrier using it. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229.

Handhold statute held to apply where railway employé, after letting out brakes, walked along the running board one or two car lengths before descending to perform a duty. *Id.*

**Interstate commerce.**—A railroad employé injured by breaking of a defective handhold while setting brakes on a car loaded with intrastate freight which was a part of a string of cars being switched at the time loaded with interstate freight had a cause of action under the federal act as well as under state statutes requiring that cars be equipped with secure handholds. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

**Assumption of risk.**—Under this article and art. 6650, a brakeman injured by the giving way of a defective handhold did not assume the risk although he knew of the defect. *Missouri, O. & G. Ry. Co. v. Plemmons* (Civ. App.) 171 S. W. 259.

**Negligence per se.**—A railroad's failure to comply with this article is negligence per se. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

**Pleading.**—Under this article a person injured by a defective handhold need not prove that the particular handhold was necessary; it being a matter to be pleaded as a defense that it was not for the use of brakemen. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229.

In a railroad employé's action for injuries, allegations of the petition held sufficient to plead a cause of action under this article. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

**Art. 6714. Penalty, how recovered.**

See *Gulf, T. & W. Ry. Co. v. Lunn*, 171 S. W. 1121, 106 Tex. 511, affirming judgment (Civ. App.) 141 S. W. 538.

**Art. 6715. To build sidings, etc., when.**

**Constitutionality.**—The Legislature may properly leave to the discretion of the Railroad Commission the manner in which railroad companies shall perform their duties to furnish adequate transportation facilities. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

Want of due process of law may arise either from the fact that the law attempted to be enforced is void or that the forms of law have not been observed. *Id.*

**When and where switches, etc., can be required.**—This article construed with article 6716, held to require spur tracks for the handling of "public business" existing at points

on the railroads which would be given to the company if proper facilities were furnished, and was not restricted to terminal and junction points. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Special contracts.**—A railway company, contracting with a lumber company to construct a spur, held under no contract obligation to furnish cars to a subsequent seller of timber to the lumber company to be delivered on board cars on the spur. *Beaumont, S. L. & W. Ry. Co. v. Moore* (Civ. App.) 174 S. W. 844.

**Jurisdiction of courts.**—The Legislature having provided a method to compel railroad companies to furnish shipping facilities by proceedings before the Railroad Commission, as provided by articles 6715, 6716, the courts have no jurisdiction to enforce the statute until the matter has been passed on by the Commission, and then only to determine whether the Commission's order is unjust and unreasonable. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

**Evidence.**—Where, in a suit to restrain enforcement of the Railroad Commission's order requiring the installation of a spur track at R., complainant alleged that the people of that town were actuated by spite in building it, evidence as to why it was built, and that complainant's manager said he would spend a million dollars to destroy the town, was admissible. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

Evidence held to show the reasonableness of an order of the Railroad Commission requiring a railroad company to install a spur track at a particular town, both from the standpoint of the public and from a consideration of the financial condition of the railroad company. *Id.*

### Art. 6716. Commission to enforce compliance.

**Construction.**—See *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038; note under art. 6715.

**Jurisdiction of courts.**—See *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038; note under art. 6715.

**Art. 6716a. Duty to provide switch connections with private spur tracks.**—Any railroad company or receiver thereof upon application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms, a switch connection with any such private sidetrack or spur track which has been or shall hereafter be constructed by any such shipper, to connect with its railroad where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against such shipper. [Act March 5, 1915, ch. 35, § 1.]

This act took effect 90 days after adjournment of the Legislature, which occurred March 20, 1915.

Cited, *Cortonelia v. State* (Cr. App.) 189 S. W. 139.

**Art. 6716b. Application to and order of Railroad Commission.**—If any railroad company or receiver thereof shall fail to install and operate any such switch connection as aforesaid, on application therefor by any shipper, such shipper may make application to the Railroad Commission of Texas, and said commission shall be authorized and empowered to enter such orders as may be necessary governing the construction, maintenance and operation of said switch connection with said private sidetrack or spur track, where such connection is reasonably practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same. [*Id.*, § 2.]

**Art. 6716c. Railroad Commission to fix rates, prevent discrimination, and make regulations for use of switches.**—The Railroad Commission of Texas shall fix just and reasonable rates to be charged by railroad companies or receivers thereof for traffic moved and handled over such private sidetracks or spur tracks extending to private industries, and it shall be the duty of the Railroad Commission to adopt such rates, rules, and regulations as will prevent any discrimination in the operation of such tracks or the handling of such traffic. Whenever any railway company or receiver thereof shall operate any private sidetrack or spur

track without charge, the Railroad Commission of Texas shall have power and authority to compel the operation without charge of and private sidetrack or spur track similarly situated. [Id., § 3.]

**Art. 6716d. Railroad Commission empowered to regulate private sidetracks or spur tracks.**—The Railroad Commission of Texas shall prescribe reasonable rates, rules and regulations for the operation of all private sidetracks or spur tracks as may already have been or may hereafter be constructed either by the railroad companies themselves or by individuals or corporate interests, or jointly by such railroads and individuals or corporations, when such private sidetracks or spur tracks are operated by railroad companies or the receivers thereof; and shall have power and authority to order and compel the operation of said private sidetracks or spur tracks whenever the railway company or receiver thereof is operating other private sidetracks or spur tracks similarly situated, and to prevent discrimination therein. [Id., § 4.]

**Art. 6716e. Sidetracks or spurs to be constructed for all persons similarly situated.**—Whenever any railroad company or receiver thereof shall hereafter construct or maintain or contribute to the construction or maintenance of any private sidetrack or spur track to any private industry, the Railroad Commission shall have power to order such railway company or receiver to construct or maintain or contribute to the construction or maintenance of a sidetrack or spur track to any private industry similarly situated, on the same terms and conditions. [Id., § 5.]

**Art. 6716f. Failure to comply with orders of Commission as to sidetracks, etc.**—Failure upon the part of any railroad company or receiver thereof to observe and obey the orders of the Railway Commission issued in compliance with this Act, shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees of the Railroad Commission. [Id., § 6.]

**Art. 6716g. Action for damages.**—Any person injured by a violation of the terms of this Act shall have the right to bring suit for his actual damages and for enforcement of his rights under this Act. [Id., § 7.]

**Art. 6716h. Provision cumulative.**—This Act shall be cumulative of all other acts governing railroads or receivers thereof. [Id., § 8.]

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## CHAPTER SIXTEEN

### ISSUANCE OF STOCKS AND BONDS REGULATED

Art.	Art.
6717. State vested with regulation of issue of bonds, stocks, etc.	6724. Prerequisites to issue of bonds.
6719. Railroad commission to ascertain and report railroad values; proceeding incident thereto.	6725. Duty of secretary of state.
6722. Authority to issue bonds to be secured.	6727. Certificates, bonds, etc., void.
	6731. Suburban railroad stocks and bonds valid when.

**Article 6717. [4584a] Regulation of issue of stocks, bonds, etc., by railroads vested in state.**

Cited, *Jones v. Nix* (Civ. App.) 174 S. W. 685.

**Constitutionality.**—Arts. 6717–6732 held not violative of Const. art. 1, § 19, as denying due process of law to the payee of a note of a railroad unapproved by the railroad com-



mission, or Const. art. 12, § 6, declaring corporate stock and bonds shall issue, only for value actually received. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Operation and effect.**—Where a note of a railroad company for which stock notes were pledged as collateral was executed and transferred to plaintiff without the consent of the Railroad Commission, it was void, under arts. 6717, 6727, and hence plaintiff could not enforce the pledge. *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

**Art. 6719. [4584c] Railroad commission to ascertain and report railroad values; proceeding incident thereto.**

**Construction and effect.**—Arts. 6717–6732, held not optional as requiring the railroad commission to assume control of a road as a condition precedent to invalidity of the road's note unapproved by the commission. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Art. 6722. [4584f] Authority to issue bonds before completion of roads must be obtained, etc.**

**Construction and effect.**—See *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593; note under art. 6719.

**Art. 6724. [4584h] Prerequisites to the issue by railroad companies of bonds, etc.**

Cited, *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

**Art. 6725. [4584i] Duty of secretary of state.**

Cited, *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

**Art. 6727. [4584k] Certificates, bonds, etc., void.**

**Construction and effect.**—See *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593; note under art. 6719.

**Effect of noncompliance.**—Where a note of a railroad company for which stock notes were pledged as collateral was executed and transferred to plaintiff without the consent of the Railroad Commission, it was void, under arts. 6717, 6727, and hence plaintiff could not enforce the pledge. *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

Indorsers of notes issued by railroad, unapproved by railroad commission, as required by arts. 6717–6732, were not liable thereon as accommodation makers. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Constructive notice.**—Whoever purchases bond of railroad not certified by secretary of state as approved by the railroad commission, as required by arts. 6717–6732, has constructive notice of the invalidity of the obligation. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Waiver.**—Waiver by railroad, as to the holder of one of a series of notes, of the defense that they were invalid under arts. 6717–6732, held not a waiver of the defense as to holders of other notes. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**Art. 6731. Suburban railroad stocks and bonds valid, when.**

Cited, *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

## CHAPTER SEVENTEEN

### INTERURBAN RAILROAD COMPANIES

Art. 6733. Right of eminent domain.	Art. 6741b. Trackage or lease contracts; parallel or competing lines.
6735. May construct across streams, streets, etc.	6741c. Parallel and competing lines.
6741a. Power to acquire lease, or purchase other roads; consent of local authorities.	6741d. Not to violate anti-trust laws.

**Article 6733. Right of eminent domain.**

Cited, *North Texas Transfer & Warehouse Co. v. State* (Civ. App.) 169 S. W. 1045.

**Art. 6735. May construct across streams, streets, etc.**

**Construction of ordinance.**—A proviso in an ordinance excepting through cars or trains making through trips from the requirement that an interurban company carry local passengers within the city held to mean special cars, and not to apply to cars on the regular schedule. *Galveston-Houston Electric Ry. Co. v. Jewish Literary Society* (Civ. App.) 192 S. W. 324.

**Art. 6741a. Power to acquire, lease, or purchase other roads, consent of local authorities.**—That any corporation now or hereafter organized under the laws of the State of Texas, authorized to construct, acquire and operate electric or other interurban lines of railway in this State, commonly known as interurban railways, shall have the power to acquire, lease or purchase the physical properties, rights and franchise of any other interurban railway corporation having and possessing like power, or shall have power to acquire, lease or purchase physical properties, rights and franchise of any suburban or street railway corporation, the lines of whose railway are to be operated in connection with the lines of the interurban railway, and the right and power to sell or dispose of the physical properties, rights and franchise by such corporation or person owning the same, to such corporation, acquiring, leasing or purchasing same hereunder, is hereby given. Such acquisition or purchase may be made upon such terms as may be agreed upon by the respective boards of directors and authorized or approved by a majority of the stockholders of such corporations, respectively. Provided further, that corporations owning and operating said street car railways before making sale of its properties hereunder, shall obtain the consent of the city council, board of commissioners or other governing power, as the case may be, of the city where such street car line may be located; and, in cities and towns operating under any charter which provides for the right of qualified voters to vote on the granting or amending of franchise to street railways or interurban railways, this right shall still exist. [Act June 3, 1915, 1st C. S., ch. 14, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Art. 6741b. Trackage or lease contracts; parallel or competing lines.**—Any corporation authorized to construct, acquire and operate electric or other interurban lines of railway in this State, commonly known as interurban railways, shall also have the power to make and enter into trackage or lease contract with any corporation owning and operating street railways, so as to procure continuous passage into or through such city or town; provided, the city council, board of commissioners, or other governing board, shall consent thereto; and, in such case, the owner of such street railways is also authorized to enter into such trackage or lease contract; provided, that no such corporation shall ever be permitted to acquire, own, control or operate any parallel or competing interurban line. [Id., § 2.]

**Art. 6741c. Parallel and competing lines.**—No corporation named in this Act shall be permitted to own, acquire or operate any parallel or competing line. [Id., § 3.]

**Art. 6741d. Not to violate anti-trust laws.**—No corporation mentioned herein shall be permitted to purchase, lease, acquire, own or control, directly or indirectly, the shares or certificates of stock or bonds, franchise or other rights or the physical properties or any part thereof, of any other corporation, if such purchase, lease, acquisition, ownership or control, will violate in any manner any of the provisions of Chapter 1, Title 130, of the Revised Civil Statutes of 1911, of the State of Texas, commonly known as the law against trusts, monopolies and conspiracies against trade. [Id., § 4.]

## CHAPTER EIGHTEEN

## STREET RAILROADS

## DECISIONS RELATING TO STREET RAILROADS IN GENERAL

See notes under arts. 862, 863, 1096d.

## II. REGULATION AND OPERATION

12. **Right to use streets.**—Street car lines, having franchises to operate their cars in the streets, have rights which pedestrians must recognize, and pedestrians cannot lie down in the street in such a manner as to interfere with the regular running of cars. *Scates v. Rapid Transit Ry. Co.* (Civ. App.) 171 S. W. 503.

13. **Defects in tracks or equipment and obstructions in streets.**—Galveston ordinance, making it unlawful to operate street cars without fender on the front end, merely requires an effective contrivance to prevent persons from being run over, and it need not project in front of the car. *Galveston Electric Co. v. Swank* (Civ. App.) 188 S. W. 704.

16. **Collisions with animals or vehicles.**—In an action for injuries to plaintiff's wife in a collision between a vehicle in which she was riding and a street car, the court properly charged that if the car was stopped until the vehicle was in the clear, and the vehicle struck the side of the car, and the accident could not have been avoided by the exercise of ordinary care on the part of the motorman, plaintiff could not recover. *Kelly v. Dallas Consol. Electric St. Ry. Co.* (Civ. App.) 158 S. W. 221.

Situation as to width of street where defendant street railroad's car struck plaintiff's buggy held such as to put motorman on notice that dangerous collision might occur. *Marshall Traction Co. v. Harrington* (Civ. App.) 194 S. W. 1156.

17. **Injuries to persons on or near tracks**—In general.—The violation by motorman of a railway company's rule to run slowly at a certain point does not of itself give an injured person a right of action. *Southern Traction Co. v. Wilson* (Civ. App.) 187 S. W. 536.

18. — **Signals and lookouts.**—Street car company's liability for injury at street crossing, for failure to give warning of approach of car, depends upon whether or not such omission is sole proximate cause of injury. *Southwestern Gas & Electric Co. v. Duke* (Civ. App.) 194 S. W. 1010.

19. — **Duty on seeing person on or approaching track.**—If the motorman discovered decedent's peril on the track in time to have avoided a collision by the use of the means at hand to stop or slow the car, his failure to do so was negligence. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 937.

22. **Contributory negligence**—In general.—Where one run down by a street car received his injuries because of his intoxication, he is as a matter of law guilty of contributory negligence, defeating recovery. *Scates v. Rapid Transit Ry. Co.* (Civ. App.) 171 S. W. 503.

Where an intoxicated man negligently stepped in front of an approaching street car, his would-be rescuer stands in the same position as the intoxicated man, and the negligence of the latter is attributed to the rescuer, so that no recovery can be had, though the street car company's servants were also negligent. *Id.*

23. — **Drivers of vehicles and persons therein.**—A street railway motorman, who operated his car at a speed forbidden by the rules, and also ran across an intersecting street in violation of the rules of his company, held guilty of contributory negligence barring recovery for injuries in a collision with a car of another company. *Bogue v. Texas Traction Co.* (Sup.) 173 S. W. 875, affirming judgment *Texas Traction Co. v. Bogue* (Civ. App.) 139 S. W. 1042, and rehearing denied (Sup.) 177 S. W. 954.

25. **Proximate cause of injury.**—It was not necessary that motorman should have been able to anticipate particular result that followed when he drove car in such a situation as to plaintiff's team that he was charged with notice that dangerous collision might occur. *Marshall Traction Co. v. Harrington* (Civ. App.) 194 S. W. 1156.

26. **Injury avoidable notwithstanding contributory negligence.**—To apply the doctrine of discovered peril, the party injured must be actually discovered in a position of danger by those operating the train or cars, and the fact that the operatives did not keep the required lookout furnishes no basis for an application of the doctrine. *Scates v. Rapid Transit Ry. Co.* (Civ. App.) 171 S. W. 503.

A street railway company is not liable to an injured pedestrian, who has negligently placed himself in danger, if the peril could have been discovered by ordinary care, but only if, after actually discovering it, the operatives failed to use all means at their command to prevent injury. *Galveston Electric Co. v. Swank* (Civ. App.) 188 S. W. 704.

27. **Sufficiency of evidence.**—In an action for an injury to a pedestrian caused by stepping into a hole in the floor of a bridge which had been torn up in laying street railway tracks, evidence held to sustain a finding of the jury that plaintiff was not guilty of contributory negligence. *Cleburne St. Ry. Co. v. Dickey* (Civ. App.) 168 S. W. 475.

Evidence in an action for injury by a street car colliding with plaintiff's horse while uncontrollable, which he was riding, held to warrant the conclusion of negligence of the motorman after seeing the situation. *Marshall Traction Co. v. Young* (Civ. App.) 175 S. W. 727.

## CHAPTER EIGHTEEN A

## STATE RAILROAD

Art. 6745a-6745f. Superseded.	Art. 6745k. Mortgage of road; disposition of proceeds; credit of state not pledged; accounting between railroad and prison.
6745g. Control of road conferred on Prison Commission; sale, lease, mortgage or extension of road.	6745l. Donations.
6745h. Extension of road; operation; telephone and telegraph line.	6745m. Convict labor may be employed in construction work.
6745i. Eminent domain.	6745n. Repeal.
6745j. Condemnation proceedings; duties and compensation of county attorney.	6745o. Powers of railroad commission.

**Articles 6745a-6745f.**

Superseded by Act April 2, 1917, ch. 180, post, arts. 6745g-6745o.

**Art. 6745g. Control of road conferred on Prison Commission; sale, lease, mortgage or extension of road.**—That the Prison Commission be and they are hereby authorized, together with the consent and approval of the Governor, to exercise full and plenary control of said State Railroad, and that they be given full authority to sell said railroad to another railroad corporation now in existence or hereafter to be formed, and to receive in payment therefor for the benefit and use of the State, cash or stocks of said railroad corporation or the bonds of said railroad corporation or both, or to charter the State railroad into a separate corporation and said railroad corporation shall have power to issue bonds, debentures and mortgages to secure same and drawing any rate of interest which to said Prison Commission shall seem best, and to give generally and specially to said Prison Commission, acting with and by the consent and approval of the Governor, authority to sell, lease or extend said railroad, and to do any and all things in the disposition, sale, lease, mortgage, extension or otherwise which an individual might do if he owned said Texas State Railroad; provided, especially, that the credit of the State shall not be given impliedly or expressly, and all persons dealing with the Prison Commission and the Governor with reference to the management or disposition of said railroad be and are hereby put on notice that the credit of the State is not bound morally or expressly. Provided that in no event shall said railroad be sold unless a cash payment be made at the time of such sale, equal to the face value and accrued interest of bonds owned by the school funds of Texas against said State railroad, and provided further, that the proceeds derived from such sale shall be applied to the payment of the bonds so held by the school fund of Texas. [Act April 2, 1917, ch. 180, § 1.]

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

**Art. 6745h. Extension of road; operation; telephone and telegraph line.**—Should an extension of the road be deemed by the Prison Commission and the Governor advisable it shall be their duty to extend, build and construct said railroad to Waco, Texas, or to Dallas, Texas, or to Shreveport, Louisiana, or to Alexandria, Louisiana, or to any two of said places or any other commercial center within reasonable distance, as said Prison Commission may determine by and with the consent and approval of the Governor, after taking into the most careful consideration the advantages offered by the section to be traversed by the proposed line of extension, the needs of such section for new or additional railroad facilities, the probable development that may be the result in such sec-

tion of the said extension, the inducements that may be offered by the cities, towns and villages and the country through or near which such extended line of railroad might run, and the probable returns in freight and passenger traffic to the road, having a view to the present and the future. And the Prison Commission is hereby authorized to maintain, equip and operate said State railroad, and any and all such extensions thereof, to purchase therefor such equipment, rolling stock, engines and other equipment as said Prison Commission may deem necessary or expedient. Said Prison Commission shall also be and they are hereby authorized to build, construct, maintain, operate in connection with and along said State railroad over the right of way thereof an electric telephone or telegraph line. [Id., § 2.]

**Art. 6745i. Eminent domain.**—Whenever it shall be or become necessary to take, occupy, or use any land or material for the purpose of constructing, building, draining or maintaining the said extension or extensions of said railroad, or for the purpose of draining or maintaining any portion of said State railroad, including any and all extensions thereof, or for the purpose of constructing and maintaining turnouts, sidings and switches therefor, or for the purpose of erecting and maintaining depots thereon, or for the purpose of forming and maintaining any connection with any other railroad or railroads, said Prison Commission shall have full power and authority to enter upon, take, occupy and use such land, first paying therefor, however, the value and price thereof, if the owner thereof and said Prison Commission can agree on the value of the land so taken and the amount of damages, if any, to be paid by said commission; but if such owner of such land and said Prison Commission cannot agree thereon, said commission may proceed to condemn any and all such land in the same manner, so far as applicable, that a railroad corporation, under the laws now existing, or to be hereafter passed, may condemn the land for right of way, and in so far as such proceedings may be applicable, the same proceedings may be had, and as to each party the same rights shall exist as would exist if such proceedings in condemnation were by or on behalf of a railroad corporation, except that in no case shall said Prison Commission or the State of Texas be required to give bond. [Id., § 3.]

**Art. 6745j. Condemnation proceedings; duties and compensation of county attorney.**—Any and all proceedings in condemnation provided for by this Act shall be instituted and prosecuted in the name of the State of Texas, for the use of said Prison Commission and their successors in office, and any and all judgments and decrees or condemnation in such proceedings, and any and all deeds for any and all such lands which may be acquired by said commission for any of the purposes mentioned in this Act shall run accordingly.

Any and all such condemnation proceedings shall be instituted and prosecuted by the county attorney of the county in which such land or material may be situated, and as compensation for such services such county attorney shall be entitled to receive and shall be paid by said commission, out of current revenues, reasonable fees not exceeding in any instance more than ten per cent of the price which said commission shall pay for such condemned land or material. [Id., § 4.]

**Art. 6745k. Mortgage of road; disposition of proceeds; credit of state not pledged; accounting between railroad and prison.**—In order to obtain and secure repayment of the necessary money with which to carry into effect the provisions of this Act, said Prison Commission shall be,

and they are hereby authorized to have printed and execute, as herein provided, mortgage in such form and such amount or amounts as said Prison Commission may determine, bearing interest from date, at the rate not exceeding six per cent per annum, payable as said Prison Commission may determine and as indicated upon the coupons thereof, which shall be attached to such bonds, said bonds maturing twenty years from the date of their issuance, with an option of redemption after ten years. Each and all of said bonds may be secured by a mortgage lien upon said line of railroad and all extensions thereof authorized by this Act, and embracing its entire right of way, franchise, depot buildings, and grounds, equipment, rolling stock, engines and cars.

The form of such bonds and coupons shall be approved by the Attorney General and all such bonds and coupons shall be signed by the chairman and secretary of the Prison Commission, and such bonds shall be countersigned by the Governor; provided especially that the credit of the state shall not be given impliedly or expressly, and all persons dealing with the Prison Commission or the Governor on any matter pertaining to the management or disposition of said railroad are hereby put on notice that the credit of the state is not bound morally or expressly. All expenses connected with the expenses connected with the extension, equipment and operation of said railroad and telegraph and telephone lines shall be paid only from proceeds of sale of such bonds or debentures from donations made to such railroad and from net income from operation thereof. No part of any other money belonging to the state or the Prison Commission shall be expended in connection with such construction, extension, equipment or operation nor with the purchase of right of way, depot grounds and buildings or other appurtenance of such railroad. If any convicts are worked thereon, the same sums shall be paid to the Prison Commission for their labor as is paid for their labor by counties working convicts on the public roads. The Prison Commission shall pay into the treasury of such railroad for freight carried over said road for it the same sums as are charged other persons for like service. All moneys belonging to such railroad shall be kept separate from moneys of the Prison Commission and separate account thereof shall be kept. [Id., § 5.]

**Art. 6745l. Donations.**—The Prison Commission are hereby authorized to accept donations and gifts, either in money or lands, or other necessities to be used in the extension of said road. [Id., § 6.]

**Art. 6745m. Convict labor may be employed in construction work.**—The Prison Commission are hereby authorized to employ the state convicts in the construction of extension of said railroad and to enter said convicts into the service of any corporation that may have in hand the building of said railroad, said convicts, however, to be worked under the direct supervision and control of the Prison Commission, but in no event shall such convicts be employed or used in the operation of handling of any train or car upon said railroad which may be used or operated thereupon in transportation for hire either passenger or freight. [Id., § 7.]

**Art. 6745n. Repeal.**—All laws and parts of laws in conflict herewith are hereby repealed. [Id., § 8.]

**Art. 6745o. Powers of Railroad Commission.**—The Railroad Commission of Texas shall have the same jurisdiction and power over the traffic carried on and over said railroad and with respect to divisions of

traffic charges between said railroad and connecting lines of railroad as said Commission has, or may hereafter have by law, in the matter of compelling lines of railway corporations in this state, and it shall be and is hereby made the duty of the Prison Commission of this state to obey and enforce all rules, regulations, rates and divisions relating to such traffic charges as are made and fixed by the Railroad Commission of Texas. [Id., § 9.]

## CHAPTER NINETEEN

### GENERAL PROVISIONS

Art.	Art.
6746. Separate coaches for white and negro passengers.	6750. Exceptions and limitations as to provisions.
6748. Separate coaches, how defined and marked.	6753. Conductor to exclude passengers from wrong car.
6749. Penalty.	

#### Article 6746. Separate coaches for white and negro passengers.

**Interstate commerce.**—Neither the railroad nor the conductor has, under articles 6746, 6748–6750, and 6753, the right to compel an interstate negro passenger to leave the coach in which he was riding and go into another, though equal in point of comfort and convenience. *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227.

**Equal accommodations.**—A passenger cannot recover even nominal damages against a carrier for an infraction of the separate coach law without showing that he was injured. *Weller v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 374; *Connally v. Same* (Civ. App.) 187 S. W. 376.

#### Art. 6748. Separate coaches, how defined and marked.

**Interstate commerce.**—See *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227; note under art. 6746.

#### Art. 6749. Penalty.

**Interstate commerce.**—See *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227; note under art. 6746.

**Burden of proof.**—In an action to recover the penalty under articles 6746, 6748–6750, and 6753, the burden is on the state to show that the required accommodations were not provided. *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227.

If it be conceded that the act applies to Pullman coaches, in an action against a railroad for penalty for allowing white and colored passengers to occupy a Pullman coach, the burden is on the state to show that no other Pullman coaches in the train were equipped as prescribed. *Id.*

The fact that the railroad proved proper accommodations in day coaches and made no proof as to accommodations in Pullmans is insufficient to shift to it the burden of proving compliance as to Pullman coaches. *Id.*

**Passenger in wrong car.**—Under articles 6746, 6748–6750, and 6753, a railroad is not liable where it provides the required accommodations if the conductor permits a passenger to ride in the wrong car, although the conductor and the passenger may be liable. *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227.

Evidence that white and negro passengers occupied together a particular Pullman coach is insufficient to show that other coaches properly marked, as required by articles 6746, 6748, and 6750, and properly fitted, were not provided. *Id.*

#### Art. 6750. Exceptions and limitations as to provisions.

**Interstate commerce.**—See *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227; notes under art. 6746.

#### Art. 6753. Conductors to exclude passengers from wrong car.

**Interstate commerce.**—See *State v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 184 S. W. 227; note under art. 6746.

**Whites in negro coaches.**—The mere unauthorized presence of a white person in a negro coach is not a violation of any right of negro passengers, and gives them no cause of action against the carrier. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 158 S. W. 259.

Under articles 6746–6753, a conductor had power to determine whether a negro in charge of a white sheriff should ride in the white or colored coach, and the company would not be liable where he compelled the sheriff to ride with the negro in the colored coach. *Gulf, C. & S. F. Ry. Co. v. Sharman* (Civ. App.) 153 S. W. 1045.

**Injuries from failure to separate.**—The failure of a passenger conductor to prevent a white city marshal from entering a negro coach does not render the carrier liable for the death of a negro in the coach, killed by the marshal, unless the conductor could have reasonably anticipated that as a result of his failure decedent or some passenger in the coach, would likely be killed or suffer injury. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 158 S. W. 259.

A railroad whose servants knew, or by the exercise of due care might have known, that a white person was in a coach for blacks, in violation of the separate coach law, and did not remove him, was liable for injuries to plaintiff's wife, a negress, inflicted by such white person, and where plaintiff's wife was assaulted by such white man, the court should have charged that if by a high degree of care the conductor should have known of the white man's presence in the car, they should find for plaintiff, unless plaintiff's wife provoked the assault. *Baker v. Texas & P. Ry. Co.* (Civ. App.) 158 S. W. 263; *Texas & P. Ry. Co. v. Baker* (Civ. App.) 184 S. W. 664.

The carrier's wrongful act in permitting the white man to ride in the car held the proximate cause of her injury, unless she provoked the assault by her own misconduct. *Baker v. Texas & P. Ry. Co.* (Civ. App.) 158 S. W. 263.

The railroad was not liable, aside from the separate coach law, unless the road should have reasonably foreseen, in time to have prevented the assault, that the white person would commit it. *Texas & P. Ry. Co. v. Baker* (Civ. App.) 184 S. W. 664.



## TITLE 116

## RANGERS—STATE

<p>Art. 6756. Compensation.</p> <p>RANGER HOME GUARD</p> <p>6766a. Governor authorized to organize force.</p> <p>6766b. Of what force shall consist; appoint-</p>	<p>Art.</p> <p>6766c. Equipment; funeral expenses; members furnishing their own equipment.</p> <p>6766d. Rations and forage.</p> <p>6766e. Act how construed.</p>	<p>ment and removal of officers; period of service.</p>
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**Article 6756. Compensation.**—The pay of officers and men in said force be as follows; Captain One Hundred and Twenty-Five Dollars (\$125.00) per month, Sergeants Sixty Dollars (\$60.00) per month, privates Fifty Dollars (\$50.00) per month. The payment shall be made at such times and in such manner as the Adjutant General of the State or the Governor may prescribe, and it is further provided that the Governor may appoint captains and other officers who may serve without pay, and also privates for said force who may serve without pay or cost to the State, except their immediate traveling expenses and feed for themselves and horses when transferred from their home to some other part of the State, under orders from competent authority. [Acts 1901, p. 41, § 3; Act May 25, 1917, 1st C. S., ch. 36, § 3.]

See art. 6766e, post.

## RANGER HOME GUARD

**Art. 6766a. Governor authorized to organize force.**—That the Governor be and he is hereby authorized to organize a force to be known as the Ranger Home Guard for the purpose of protecting the frontier against marauding and thieving parties, and other lawlessness or any invasion by any foreign foe or alien enemy. [Act May 25, 1917, 1st C. S., ch. 36, § 1.]

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

**Art. 6766b. Of what force shall consist; appointment and removal of officers; period of service.**—The Ranger Home Guard of this State shall consist of not to exceed one thousand men, to be selected and appointed by the Governor, or under his direction, and all officers of said force necessary for the commanding, equipping and regulating of said force shall be appointed by the Governor; and any officer or member of said force shall be removed at the pleasure of the Governor and shall serve for a period of three years, unless sooner removed by the Governor. [Id., § 2.]

Note.—Sec. 3 is amendatory of Act 1901, p. 41, § 3, Rev. Civ. St. art. 6756, and is set forth ante as art. 6756.

**Art. 6766c. Equipment; funeral expenses; members furnishing their own equipment.**—The State shall furnish each member of said force with one carbine and pistol at cost, the price of which shall be deducted from the first money due such officer per man, and shall furnish said force with rations of subsistence, medicines and medical attendance, camp equipment and a munition for the officers and men, and also forage for the horses. The State shall pay funeral expenses of members of the Ranger Home Guard dying in the service, and it is further provided that any person who may desire to join said force and who shall be

appointed by the Governor and who shall stipulate that they are serving without pay, except as herein provided, may furnish his own carbine and pistol and shall be permitted to furnish his own horse or other means of transportation which may be acceptable to the captain of any company in which he desire to enlist. [Id., § 4.]

**Art. 6766d. Rations and forage.**—The amount of rations and forage shall be that now or hereafter prescribed in the United States army regulations to be furnished by the State of Texas, provided that when it is impracticable to furnish rations in kind they may be commuted at not to exceed the rate of two dollars per man per day for such period. [Id., § 5.]

**Art. 6766e. Act how construed.**—It is hereby agreed and understood that this is a separate and distinct act passed at this time to cover a period of such time as the Governor of this State may deem necessary not to exceed three years from the taking effect of this Act, and that it is cumulative of an act passed by the Twenty-seventh Legislature providing for the organization of the Ranger Home Guard, and does not in any wise repeal said act passed by the Twenty-seventh Legislature except as to Section 3 of said Act relative to pay, rations and forage of officers and privates of the present Ranger Home Guard, and in that respect it is amandatory of said section providing for the payment of the salaries, rations and forage of said officers, and all officers and privates of the present Ranger Home Guard are hereby from and after the taking effect of this Act placed on the same salaries, rations and forage as provided for in this Act, and in other respect this Act is cumulative of the present law governing the Ranger Home Guard in this State. [Id., § 6.]

## TITLE 117

## RECORDS

Chap.

1. Transcribing old records.

Chap.

2. Supplying lost records, etc.

## CHAPTER ONE

## TRANSCRIBING OLD RECORDS

**Article 6775. [4593] Compensation for making transcript; how paid.**—The County Clerk or person making such transcript shall be entitled to a reasonable compensation for transcribing, comparing and verifying said records of not to exceed fifteen (15c) cents for each one hundred words, the amount of such compensation to be fixed by the Commissioners' Court in the order authorizing and empowering the Clerk to transcribe, compare and verify such records; said compensation to be paid out of the county treasury upon warrant issued under the orders of the Commissioners' Court of the newly created county. [Acts 1879, p. 105, § 4; Act March 1, 1917, ch. 50, § 1.]

**Explanatory.**—The act amends art. 6775 of ch. 1, title 117, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER TWO

## SUPPLYING LOST RECORDS, ETC.

## ABSTRACTS OF TITLE

**Nature; definition.**—An "abstract" is a statement in substance of what appears in public records affecting the title of property agreed to be conveyed, and also a statement in substance of such facts as do not appear upon the public records which are necessary to perfect title. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

## TITLE 118

## REGISTRATION

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| Chap.<br>1. Recorders and their duties.<br>2. Acknowledgment and proof of deeds,<br>etc., for record. | Chap.<br>3. Instruments authorized to be recorded,<br>and the effect of recording.<br>5. General provisions. |
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## CHAPTER ONE

## RECORDERS AND THEIR DUTIES

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| Art.<br>6786. County clerks shall be recorders.<br>6789. Shall keep memorandum and give re-<br>ceipt. | Art.<br>6790. Shall record without delay in the or-<br>der presented.<br>6791. Record shall take effect, when.<br>6792. Shall keep alphabetical indexes, etc. |
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**Article 6786. [4602] County clerks shall be recorders.**

**Right of public.**—In absence of statute, the right of citizens to inspect county records is governed by the common law. *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

A citizen of a county held entitled to compel the proper officers to permit him to inspect county records to discover a misapplication of funds. *Id.*

**Presumption.**—Under this article and arts. 6789, 6790, 6791, a deed, duly deposited with the clerk for record, must be considered as recorded within article 5674, fixing a five-year limitation for recovery of land. *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

**Art. 6789. [4605] Shall keep a memorandum and give receipts, etc.**

**Filing for record.**—See *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373, note under art. 6786.

Under this article and arts. 3862, 6792, if the clerk fails to demand fees immediately and retains an instrument in his custody pending notification of necessity of paying fees, the instrument is filed for record, and operates to give notice to all persons of its existence. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

**Art. 6790. [4606] Shall record without delay in the order presented.**

**Recordation.**—See *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373, note under art. 6786.

**Art. 6791. [4607] Record shall take effect from date of deposit.**

**Recordation.**—See *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373, note under art. 6786.

**Filing with clerk.**—Under this article and arts. 6824, 6828, an instrument is "filed with the clerk" to be recorded as required by law when it is delivered to the clerk and by him received in his official custody, regardless of whether it is then entered in the record books. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

**Art. 6792. [4608] Shall keep alphabetical indexes.**

**Filing for record.**—Under this article and arts. 3862, 6789, if the clerk fails to demand fees immediately and retains an instrument in his custody pending notification of necessity of paying fees, the instrument is filed for record, and operates to give notice to all persons of its existence. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

## CHAPTER TWO

## ACKNOWLEDGMENT AND PROOF OF DEEDS, ETC., FOR RECORD

Art. 6797. Before whom acknowledgment may be made in this state.	Art. 6804. Form of certificate of acknowledgment.
6800. Acknowledgment, how made.	6805. Form of acknowledgment by a married woman.
6801. Party must be known or proven.	6806. Proof of instrument by witness.
6802. Acknowledgment of married woman, when and how taken.	6808. Form of certificate of proof by witness.
6803. Certificate of officer.	

**Article 6797. [4613] Before whom acknowledgments may be made in this state.**

Cited, *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

**Art. 6800. [4616] Acknowledgment, how made.**

Cited, *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**Art. 6801. [4617] Party must be known or proven.**

Cited, *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**Art. 6802. [4618] Acknowledgment of married woman, when and how taken.**

Cited, *Blakely v. Kanaman* (Civ. App.) 168 S. W. 447; *Blakely v. Kanaman* (Sup.) 175 S. W. 674; *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**Historical.**—Though the statutes, prior to 1879, did not require that a married woman's conveyance of her personal property should be in writing, yet, if such conveyance was in writing, it was required to be properly acknowledged, and otherwise was void. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

**In general.**—Where a deed executed by husband and wife was acknowledged in proper form, and the notary who took the wife's acknowledgment testified that he acquainted her with the contents of the deed, evidence that the wife, who was Polish, could not talk much English, and that the notary could not talk Polish, did not justify setting aside the deed. *Ryman v. Petruka* (Civ. App.) 166 S. W. 711.

Under this article, a certificate of acknowledgment of a married woman to a deed which failed to show that she did not wish to retract it was fatally defective. *Vanderwolk v. Matthaai* (Civ. App.) 167 S. W. 304.

Where a certificate to a married woman's deed failed to state that she did not wish to retract it, it could not be contended, in the absence of evidence to the contrary, that the acknowledgment was, in fact, properly taken, but merely defectively certified. *Id.*

**Rights of married women where acknowledgment is defective or procured by fraud.**—For a married woman to defeat the recitations of her privy acknowledgment, she must show that she never appeared before the notary and signed and acknowledged the deed, or that the person whose rights depend upon sustaining the acknowledgment had actual or constructive knowledge of the falsity of the certificate, and was not an innocent purchaser for value. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

**Conclusiveness of certificate.**—In the absence of fraud, where it appeared that a wife separately acknowledged a deed of trust, the certificate of separate acknowledgment, stating that it was explained to her, is conclusive, and she cannot, as a defense to the instrument, set up that she did not understand it. *Tinkham v. Wright* (Civ. App.) 163 S. W. 615.

**Evidence.**—Evidence held to show that an agent was aware that the officer who took a married woman's acknowledgment to a deed of trust was financially interested in the transaction. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

Where evidence of lost deed by man and wife showed that after execution and acknowledgment before notary they lived near tract for many years without claim by them or their heirs, held sufficient to establish taking of wife's acknowledgment with separate examination as required by statute. *Baldwin v. Smith* (Civ. App.) 181 S. W. 785.

**Art. 6803. [4619] Certificate of officer.**

Cited, *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**Art. 6804. [4620] Form of certificate of acknowledgment.**

**Certificate—Requisites and sufficiency.**—**In general.**—A certificate of acknowledgment held sufficient, except as to a married woman who was a party. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

An acknowledgment to an officer is sufficiently shown when the certificate shows that the person signing, "acknowledged" the instrument, though the words "to me" are omitted. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

The acknowledgment to a power of attorney to receive a land certificate and to transfer an interest therein, failing to recite that the maker "willingly" signed it, if the acknowledgment of a single woman, was sufficient. *Id.*

Where the notary who took acknowledgments to trust deed testified that he read over and explained to signers the instrument and the acknowledgment, the court is not justified in holding that a signer did not understand it or that undue influence or fraud induced the signatures. *Calvin v. Neel (Civ. App.) 191 S. W. 791.*

Certificate of acknowledgment before notary public showing substantial compliance with law under which it is made is sufficient. *Kenley v. Robb (Civ. App.) 193 S. W. 375.*

Certificate of acknowledgment by notary public held insufficient under law requiring subscriber to be known to notary or proof of his identity to be established. *Id.*

**Art. 6805. [4621] Form of acknowledgment by a married woman.**

Cited, *Vanderwolk v. Matthaai (Civ. App.) 167 S. W. 304; Blakely v. Kanaman (Civ. App.) 168 S. W. 447; Blakely v. Kanaman (Sup.) 175 S. W. 674.*

**Certificates held insufficient.**—A certificate of acknowledgment held sufficient, except as to a married woman who was a party. *Sullivan v. Fant (Civ. App.) 160 S. W. 612.*

**Art. 6806. [4622] Proof of instrument by witness.**

Cited, *Kenley v. Robb (Civ. App.) 193 S. W. 375.*

**Art. 6808. [4624] Form of certificate or proof by witness.**

Cited, *Kenley v. Robb (Civ. App.) 193 S. W. 375.*

**Certificate—Requisites and sufficiency—In general.**—Certificate of an officer to a deed proved by a subscribing witness held to sufficiently show that the witness signed the instrument as a witness at the grantor's request. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co. (Civ. App.) 171 S. W. 537.*

**CHAPTER THREE**

**INSTRUMENTS AUTHORIZED TO BE RECORDED, AND THE EFFECT OF RECORDING**

Art.	Art.
6821. Patents and grants may be recorded without proof.	6833. Transfer of judgments to be recorded.
6823. What may be recorded.	6835. Partition to be recorded.
6824. All sales to be void as to creditors and purchasers unless registered.	6837. Suit for land, notice to be filed.
6827. Deeds to be recorded where.	6838. Record of, how made.
6828. Deeds valid, etc., against subsequent creditors from, etc.	6839. Transfers without notice valid.
6831. Copies from land office to be recorded.	6840. Effect of notice.
	6841. Titles to chattels, where recorded.
	6842. Record of any grant, etc., when notice.

**Article 6821. [4637] Patents and grants may be recorded without proof.**

**Bill of sale of land certificate.**—A bill of sale transferring a duplicate land certificate is properly recorded as a chattel real, where the land had been located and the field notes returned to the Land Office at the time of registration, though at the time of the execution of the bill of sale there had been no location under the certificate. *Magee v. Paul (Civ. App.) 159 S. W. 325.*

**Land certificate.**—An unlocated land certificate is personal property, and is not entitled to record under Rev. St. 1879, art. 4331. *Magee v. Paul (Civ. App.) 159 S. W. 325.*

**Art. 6823. [4639] What may be recorded.**

Cited, *Kenley v. Robb (Civ. App.) 193 S. W. 375.*

**What may be recorded—Assignment of vendor's lien notes.**—Written assignment and conveyance of vendor's lien notes against plaintiff and a defendant jointly and of the superior title retained to secure them held an instrument entitled to record under this article, and, after record, constructive notice to one purchasing defendant's undivided half interest of plaintiff's right to enforce payment of defendant's part of the joint indebtedness. *Holloman v. Oxford (Civ. App.) 168 S. W. 437.*

The assignment of a vendor's lien is within the registration statutes. *Biswell v. Gladney (Civ. App.) 182 S. W. 1168.*

**Art. 6824. [4640] All sales, etc., to be void as to creditors and purchasers, unless registered.**

Cited, *Neville v. Miller (Civ. App.) 171 S. W. 1109; Kenley v. Robb (Civ. App.) 193 S. W. 375.*

1½. **Filing for record.**—Under this article and arts. 6791, 6828, an instrument is “filed with the clerk” to be recorded as required by law when it is delivered to the clerk and by him received in his official custody, regardless of whether it is then entered in the record books. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

4. **“Creditors and purchasers for a valuable consideration without notice.”**—Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), provides that a bankrupt’s trustee, as to all property in the custody or coming into the custody of a bankruptcy court, shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and section 67a declares that claims which, for want of record or any other reason, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate. Held in view of this article, that, since a bankrupt’s trustee does not take as an ordinary voluntary purchaser, but as the representative of the rights of creditors with a lien acquired by legal or equitable proceedings, and subject only to such liens and rights as would be valid against such creditors, a deed of trust executed by a bankrupt on certain of his assets, but neither filed nor recorded, did not create a lien enforceable against the bankrupt’s trustee, though disclosed in the bankrupt’s voluntary petition. *Cooper Grocery Co. v. Park*, 218 Fed. 42, 134 C. C. A. 64.

A purchaser at an execution sale has a superior title to the heirs of a grantee who claim under a prior unrecorded deed. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

Under this article a lien fixed by judicial process upon land without notice of an unrecorded deed is superior to such deed. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

This article does not apply to an equitable title, for that is not subject to registration. Hence where the grantor of land conveyed his entire interest instead of the portion which was intended, and conveyed to a second grantee the land reserved, the second grantee took only an equitable title, and his rights are not affected by the registration statute. *Id.*

Payment of a debt secured by mortgage discharges the mortgage, and it cannot be continued as against a subsequent judgment creditor of the mortgagor by a new mortgage after the judgment. *First State Bank of Amarillo v. Jones* (Civ. App.) 171 S. W. 1057, judgment reversed (Sup.) 183 S. W. 874.

A broker who had a contract for the sale of land on commission, cannot attack, as void, under this article, a previous conveyance to the wife of defendant, the apparent record owner, since he had no lien. *Gossett v. Vaughan* (Civ. App.) 173 S. W. 933.

Judgment creditor may, notwithstanding unrecorded deed, acquire a lien by complying with arts. 5614–5616, or by levy of execution without notice under articles 6827, 6828, of a third person’s ownership, and under this article, subject the land to his judgment. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

A judgment creditor is not a bona fide purchaser, and stands only in the shoes of his debtor, and hence his lien is inferior to a prior deed of trust, though through mutual mistake a release of trust deed purporting to release the lands and reciting payment of the whole debt was given. *First State Bank of Amarillo v. Jones* (Sup.) 183 S. W. 874.

Under this article and art. 5616, creditor who fixed lien on land of judgment debtor without notice of unrecorded conveyance had a superior right to that claimant under such conveyance. *Hirt v. Werneburg* (Civ. App.) 191 S. W. 711.

5. **Bona fide purchasers**—In general.—There can be no innocent purchaser for value under a judgment which shows on its face that it is void. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

One cannot be an innocent purchaser as against a devisee under a valid outstanding will. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

An innocent purchaser from heirs of a deceased owner may, where he pays full value, hold the land against an unrecorded deed executed by decedent. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

Attorneys employed by a grantor to recover land by setting aside an earlier conveyance, who as compensation received a conveyance of part of the land in controversy, are not bona fide purchasers. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

A purchaser under a judgment foreclosing a vendor’s lien on a homestead, held not a purchaser in good faith, and he could not claim under the judgment, which was void. *Davis v. Cox* (Civ. App.) 176 S. W. 931.

Where grantee in conveyance of land made in consideration of boarding and caring for grantor performed her part of contract after grantor’s previous conveyance to defendant, which had been withheld from record until after her own deed was recorded, defendant had no equity against her title. *City of Houston v. Ritchie* (Civ. App.) 191 S. W. 362.

6. **Mode and form of conveyance**—In general.—Where a deed was accepted by the grantee under the impression that it contained a covenant of warranty, the omission from the deed of such a covenant was only a circumstance on the issue of the grantee’s claim of innocent purchaser. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

To enable one to claim as a “bona fide purchaser” without notice, the title purchased must be apparently perfect, legal, and regularly conveyed, and where the deed is void, one who purchases from the grantee gets no title. *King v. Diffey* (Civ. App.) 192 S. W. 262.

As a general rule a bona fide purchaser without notice from a grantee who has received no valid delivery of his deed acquires no title as against the grantor, unless by estoppel. *Id.*

While absence of warranty covenants in a deed does not charge the purchaser with notice of outstanding equities, a deed warranting grantor’s title to two-thirds of a tract and

to the remainder during his natural life charged the grantees, and persons claiming under them, with notice of the grantor's wife's outstanding equity in one-third of the property. *Padgitt v. Still* (Civ. App.) 192 S. W. 1110.

7. — **Quitclaim.**—An administrator's deed only purporting to convey the interest of the estate in the property is prima facie a quitclaim only and insufficient to support a plea of innocent purchaser. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

Where a grantee in a quitclaim deed conveyed to a third person by warranty deed, the third person was not an innocent purchaser, the record showing prior conveyance by grantor in quitclaim deed. *Cook v. Smith* (Sup.) 174 S. W. 1094, reversing judgment *Smith v. Cook* (Civ. App.) 142 S. W. 26.

That a person's deed to land is a warranty deed does not constitute him a bona fide purchaser, where the deed to his grantor from which he derives title is a quitclaim deed. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

A quitclaim deed will not ordinarily sustain the defense of an innocent purchaser. *Barksdale v. Benskin* (Civ. App.) 194 S. W. 402.

8. **Notice—In general.**—Where plaintiff's grantor never had title nor apparent title to the land in controversy, he could acquire no rights as an innocent purchaser for value, because he had no notice of a parol partition between such prior grantor and his sister. *Smith v. Huff* (Civ. App.) 164 S. W. 429.

Where purchasers of land paid the purchase price to a bank, to be paid over to the vendor, and the conveyance was deposited with the bank before the purchasers had notice of plaintiff's equitable interest, the fact that the bank retained the funds and the deed until after the purchasers acquired notice of plaintiff's claim does not deprive them of the defense of bona fide purchase. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

Purchaser of land from patentee is not required to go behind patent, there being nothing in it to put one on notice of the claims of others than the patentee in and to the land. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

One who bought in school lands on foreclosure of a mortgage given by purchaser held, in view of the forfeiture and reawarding of the lands, to purchaser not charged with notice of vendor's lien notes given by mortgagor, the purchaser, in payment. *Anderson v. Farmer* (Civ. App.) 189 S. W. 508.

9. — **Actual notice.**—That a certificate of acknowledgment of a power of attorney to convey lands described the grantee as "Mrs." held not to afford actual notice that the land belonged to the community estate. *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

10. — **Effect of notice.**—Where a purchaser of a lot has full knowledge at the time of the purchase that a house located thereon belongs to a third person, and is not intended to be conveyed by the deed, he acquires no greater rights or interest in the house than his grantor possessed. *Clayton v. Phillipp* (Civ. App.) 159 S. W. 117.

One who purchased land from a traction company with notice of contracts between it and plaintiff from whom it purchased the land, and who knew that a suit was pending by plaintiff alleging forfeiture for nonperformance, would not take a better title than the traction company had. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

A vendee who purchases land with notice that a lease exists and that his vendor is holding as a tenant under a third party is in no better attitude in respect to such lessor than his vendor. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

Where defendant purchased land with notice that a recorded deed of release of lien had been executed by mistake, such deed could work no estoppel as against the lien claimant. *Smiddy v. Chapman* (Civ. App.) 174 S. W. 615.

Under art. 5616, a purchaser at an execution sale with notice that the execution debtor did not own the land held not entitled to protection under this article. *Hooker v. Eakin* (Civ. App.) 176 S. W. 80.

One obtaining a conveyance from a grantee in a deed, absolute in form, but in fact a mortgage, acquires no title unless he is a purchaser for value and without notice that the deed was a mortgage. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

A person who purchases realty with notice of the existence of an implied vendor's lien is not protected as an innocent purchaser. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

A purchaser of land, with notice that his vendor's lessee put improvements thereon under oral agreement that he might remove them, preventing him from doing so, is liable to him for their value. *Bean v. Cook* (Civ. App.) 182 S. W. 1166.

Against mortgagor and subsequent mortgagee and purchaser with knowledge, description in mortgage, followed in foreclosure judgment and sheriff's deed of mortgaged chattels and land, is sufficient; the property being capable of identification by aid of extrinsic evidence. *Walter Connally & Co. v. Continental State Bank of Big Sandy* (Civ. App.) 189 S. W. 311.

Where a grantee, after having received a conveyance of land, learning, on applying to his grantor's grantor for a correction of original conveyance, of vendor's lien on property, such notice cannot relate back so as to defeat grantee's rights as bona fide purchaser without notice. *Knox v. Gruhlkey* (Civ. App.) 192 S. W. 334.

11. **Constructive notice and facts putting on inquiry.**—Where a purchaser was affected with notice that his grantor acquired title during the life of his wife, he was charged with notice that the property was community. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.



Where a purchaser knew that his grantor had been married, as several of his children joined in the deed, he was bound to take notice that other children of the grantor's wife were entitled to an interest in their mother's half of community land. *Id.*

One who purchased a lot which was a part of a tract attempted to be dedicated by his grantor as an addition to a city is chargeable with notice that his grantor did not comply with the statutory requirements in platting the addition and dedicating the streets therein. *Poindexter v. Schaffner* (Civ. App.) 162 S. W. 22.

Since the act which provides for the recording of a foreign will does not include the registration of the schedule of property, the failure to file the schedule does not put a purchaser from the devisees on inquiry, and where he purchases without notice of a prior unrecorded deed executed by testator and pays full value, he is a bona fide purchaser. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

A statement by one engaged in the land and abstract business to a purchaser of land that he thought the sale would not be good unless the vendor's wife joined was not sufficient to apprise the purchaser of an equitable interest in the vendor's wife. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

One claiming title to land is charged with notice of every matter affecting the estate, which appears on the face of any deed forming an essential link in the chain of his title, and also with notice of whatever he would have learned by any inquiry which the recitals therein required him to make. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

A purchaser of land held not to have had constructive notice of a deed of trust on a portion of it which wholly misdescribed the property. *Wiseman v. Watters* (Sup.) 174 S. W. 815, reversing judgment (Civ. App.) 142 S. W. 134.

A judgment creditor has constructive notice of whatever rights prior purchasers from the debtor have, where the property is in possession of tenants who attorn to such purchasers. *Cox v. Kearby* (Civ. App.) 175 S. W. 731.

Where a prospective purchaser has notice of facts putting him on inquiry, he is bound to make inquiries of his vendor. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

Where inquiry would not have shown defects, or the inquiry showed facts which would satisfy a reasonably prudent man that there were no defects, a purchaser may be a bona fide purchaser. *Id.*

Notice sufficient to deprive a purchaser of the defense of bona fides must be of such a nature as to have reasonably excited the suspicions of a reasonably cautious man. *Houston Oil Co. of Texas v. Griggs* (Civ. App.) 181 S. W. 833.

What is notice, or constructive notice, sufficient to deprive a purchaser of the defense of bona fides, depends upon the particular circumstances of the case. *Id.*

That a certificate of acknowledgment of a power of attorney to convey lands described the grantee as "Mrs." held not to afford constructive notice that the lands belonged to the community estate. *Id.*

The recitals in a deed only charge a party with notice of such facts as the words or condition import. *Id.*

Buyer of a vendor's lien note held advised of facts that would cause a prudent person to prosecute inquiry which would have disclosed that the vendor's wife, who conveyed away her homestead, considered it as a mortgage. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

Where owner of building with outside stairway conveyed adjoining lot to bank of which he was president and principal stockholder, there was nothing in bank's use of wall as partition wall to cause inquiry as to what consideration was being paid therefor. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

Purchaser of property subject to easement of alleyway which was openly used was charged with knowledge of existence of alley and its use. *Miles v. Bodenheim* (Civ. App.) 193 S. W. 693.

A special warranty deed does not charge the grantee with notice of an outstanding equitable title. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**12. — Recitals in conveyance.**—Where a purchaser knew before the purchase that a third person claimed to own the land, and the purchaser and his attorney examining the title had an abstract of title containing a deed reciting facts of conveyances and contracts supporting the claim of the third person, the purchaser was put on notice and he was not a purchaser in good faith. *Freund v. Sabin* (Civ. App.) 159 S. W. 168.

A purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise on the face of any deed which forms an essential link in his chain of title. *Loomis v. Cobb* (Civ. App.) 159 S. W. 305.

Where a deed in defendants' chain of title showed that the land in question was conveyed to G. by a town pursuant to a city ordinance limiting conveyances of whole surveys to married men, defendants were charged with notice of the ordinance and of the fact that the land when conveyed became the community property of the grantee and his then living wife. *Id.*

Where a city ordinance was referred to in a deed in a purchaser's chain of title as the source of authority for the original conveyance, the purchaser was not relieved from constructive notice of the contents of the ordinance because on inquiry it appeared to have been lost or destroyed. *Id.*

The rule that a purchaser of land conveyed pursuant to a city ordinance referred to in a deed is chargeable with constructive notice of the ordinance is rebuttable and not conclusive. *Id.*

A recital in a deed conveying lands to a traction company that it was subject to the terms of a contract binding the grantee to maintain certain traction lines was notice of such covenant to a subsequent mortgagee. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Although a number of deeds in a chain of title were not recorded, nevertheless one claiming title through such unrecorded deeds is chargeable in law with notice of a vendor's lien shown in them. *Thompson v. Keys* (Civ. App.) 162 S. W. 1196.

Where a deed of trust was expressly made a part of a deed and the deed of trust expressly recited that plaintiffs claimed a portion of the land conveyed, the grantee in the deed was put upon notice of the claims of plaintiff as to the land. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

Recital in recorded deed held to put subsequent purchasers on inquiry as to retention of vendor's lien in purchase-money notes. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

Recitals in mortgage as to vendor's lien held not admissible against persons claiming under sale under execution against the mortgagor. *Id.*

Where plaintiff's life interest was recognized in a deed which was part of defendants' chain of title, defendants are charged with knowledge of such interest. *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181.

A grantee is not an innocent purchaser for value where previous deeds to him of other nearby land described tract in question as belonging to another than his grantor. *Rogers v. White* (Civ. App.) 194 S. W. 1001.

13. — **Records and facts of which record is notice.**—Public records are only constructive notice of what one would discover by examining the recorded instruments, and not of what he might ascertain by following an inquiry suggested by inspecting them. *Adams v. West Lumber Co.* (Civ. App.) 162 S. W. 974.

Where one who had a contract for the purchase of land was not in possession at the time the owner mortgaged it, the registration of the contract as a chattel mortgage only to give the owner a lien upon crops which might be raised by the purchaser was not constructive notice to the mortgagee. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

Where the seller and buyer of land released the purchase-money note of record, though the seller had previously transferred it to a third party, one buying the land from the record without actual knowledge of the existence of the note or an equitable vendor's lien did not hold the land subject to any lien in favor of the transferee of the note from the original seller. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

To put a purchaser of land on notice, an excerpt from judgment recorded in land titles must be indexed as required by Paschal's Dig. arts. 5015, 5016. *Leonard v. Benford Lumber Co.* (Civ. App.) 181 S. W. 797.

A purchaser of land held not required to go behind a patent, unless recital or fact put him on inquiry. *Id.*

Purchasers of land from the record owner without notice of the claim of a corporation or stockholders, paying full value, could hold against the stockholders, claiming equitably in their own right under contract with a defendant, another stockholder, or as successors to the assets of the corporation, to which defendant had agreed to convey. *Deweese v. Nicholson* (Civ. App.) 182 S. W. 396.

Under arts. 6831, 6842, record of an assigned land certificate, being a copy of recorded certificate, with proper acknowledgment of one of the assignors, held constructive notice to subsequent purchasers of divestiture of such assignor's interest. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

Where a deed was written on the back of the original patent to the land, and its record immediately followed a registration of the patent, the registration of the deed could not be excluded on account of its alleged insufficiency of description. *Id.*

A purchaser is required only to look for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derived his title. *Id.*

Where owner of land subject to a vendor's lien conveys a part of the land by quitclaim deed, agreeing that the land conveyed shall be discharged from the vendor's lien, and the original vendor releases another part of the land, of greater value than the amount due on the lien notes, the land so conveyed is discharged as against a subsequent purchaser of the lien notes, with notice of the record of the quitclaim deed. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

A subsequent purchaser of land subject to a vendor's lien is not required to go further than the record in searching the vendor's lien note, if he does not know it has been assigned. *Id.*

Reconveyance, by deed describing land according to unrecorded map of "addition," made by grantee to grantor, did not impute notice to adverse parties of the grantor's new title. *King v. Lane* (Civ. App.) 186 S. W. 392.

A purchaser need not examine the records for previous conveyances executed by his grantor prior to the time the title held by such grantor originated, nor is he charged with notice of prior deeds or mortgages given by the grantor previous to the origin of title. *Anderson v. Farmer* (Civ. App.) 189 S. W. 508.

Record of the suit between her husband and his creditor was not notice to the wife to whom the husband had conveyed his land. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

14. — **Possession.**—The location of land acquired by adverse possession within art. 5676, is fixed to a certain extent, and a purchaser from the possessor must take notice of that fact and of the fact that he acquires no title unless he purchases the land whose location is so fixed. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

That the opposing claimants are innocent purchasers without notice for a valuable consideration will not defeat a title acquired under the three years' statute of limitations. *Williams v. McComb* (Civ. App.) 163 S. W. 654.

Possession under contract held constructive notice of claim. *Wilson v. Clemmons* (Civ. App.) 170 S. W. 855.

Where, when a tram company purchased certain land, L. had possession of 86 acres under an unrecorded deed, his possession was not constructive notice to the tram compa-

ny of a prior unrecorded deed to the balance of the tract. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520.

Purchaser of leased land held not chargeable with notice of an unrecorded deed from his grantor to the lessee. *Kelly v. Blakeney* (Civ. App.) 172 S. W. 770.

A conveyance by a mortgagee out of possession passes no title. *McLemore v. Bickstaff* (Civ. App.) 179 S. W. 536.

Where a prescriptive way across land had been acquired, held, that a purchaser could not defeat the holder's rights on the ground of being an innocent purchaser because the easement had not been recorded. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

If another's possession of land is consistent with the record title, purchaser is not bound to inquire concerning title indicated by possession, and purchaser from vendee whose vendor remains in possession is not bound to inquire further when he finds on record a deed from such vendor conveying title. *King v. Lane* (Civ. App.) 186 S. W. 392.

Possession of land by original grantor after reconveyance to him by grantee was not notice to adverse parties of his title, unless they knew of his deed. *Id.*

Possession of a tenant, though under a lease for the year, is notice to a purchaser, putting him on inquiry as to his having an oral lease for the next year. *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

**15. Consideration—In general.**—Unless one has paid a valuable consideration, he cannot question an unrecorded conveyance, under this article, as a bona fide purchaser. *Gossett v. Vaughan* (Civ. App.) 173 S. W. 933.

The assumption of a vendor's lien note on land conveyed constitutes a sufficient consideration to entitle the innocent purchaser without notice to protection to the extent to which he obligates himself. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

The judgment in a wife's suit for cancellation of her deed for fraud in procuring it, which canceled the deed and her vendor's lien note, relieved her grantee's vendee, who had assumed such note, from his liability under the assumption, so that he could not rely on it to render him an innocent purchaser for value. *Id.*

**16. — Payment of value.**—The giving of negotiable notes as a consideration for a conveyance of real estate is such payment as supports a title of one claiming to be a bona fide purchaser. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

The assumption of debts owing the judgment creditors of a vendor of land in such a manner that they thereupon release the vendor is a payment rendering the person making it a bona fide purchaser for value. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

**17. — Pre-existing debt.**—A judgment creditor who buys land apparently owned by his judgment debtor, giving only a credit on the judgment, is not a bona fide purchaser for value and acquires title only to the portion actually owned by the debtor. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

In trespass to try title to property claimed by the plaintiff wife as her separate property and claimed by the defendant under an execution sale as the property of the husband or of the community, the defendant was not an innocent purchaser where it was alleged and proven that he credited the amount of his bid on his judgment. *Martinez v. De Barroso* (Civ. App.) 189 S. W. 740.

Bank depositor who accepted conveyance of land in compromise of action for amount of his deposit in bank which was guaranteed under state laws, held bona fide purchaser for value as against the equitable lien of his grantor's vendor. *Knox v. Gruhlkey* (Civ. App.) 192 S. W. 334.

While cancellation of pre-existing debt is not alone sufficient consideration to protect purchaser or mortgagee against prior title of which he had no notice, if, in addition, some other consideration of value is given for execution of deed or mortgage, person claiming under instrument is protected as innocent purchaser. *Johnson v. Master-son* (Civ. App.) 193 S. W. 201.

**18. Purchases from bona fide purchasers.**—One purchasing from the purchaser of a homestead for value, with notice of a recited cash consideration and actual notice that notes had been substituted for part thereof, held justified in assuming that the substitution of the notes was authorized or ratified by the vendor, and not bound to inquire as to the substitution. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

Where a tram company from which plaintiff acquired title was an innocent purchaser without notice of any superior outstanding title, it was immaterial that plaintiff, when it purchased, had knowledge of facts which would have charged the tram company with knowledge of a prior conveyance. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520.

Neither its representative nor the corporation, who was the ultimate beneficiary of a conveyance of a homestead, held innocent purchaser. *Gill v. Flynn* (Civ. App.) 175 S. W. 853.

Where an innocent purchaser places his deed on record first, a purchaser from him would acquire title, though he was not an innocent purchaser. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

Where title to real estate vests in a purchaser for value without notice of an outstanding equitable title, persons claiming under him acquire a valid title, although they had actual notice of the outstanding equity. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**19. Title and rights acquired by bona fide purchasers and equities and defenses against them.**—Where the deed reserving a vendor's lien did not show that the lien notes stipulated for an attorney's fee, a subsequent purchaser having no actual knowl-

edge of such stipulation could redeem from a sale at foreclosure without paying the stipulated fees. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

The legal title of the purchaser for value not shown to have notice of an outstanding equitable title held superior to the equity. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

A deed coming into grantee's possession without grantor's assent, given with the intention that it shall operate as a conveyance, will not pass title, even as against an innocent purchaser for value from the grantee, and without notice. *Tyler Building & Loan Ass'n v. Baird & Scales* (Civ. App.) 165 S. W. 542.

That one grantor was induced to execute a deed by representations of the other grantor, to whom he intrusted the transaction, that he had a verbal understanding that the deed was intended as a mortgage, was not ground for avoiding the deed as against one who purchased from the grantee without knowledge of such representations. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

The equity of an innocent purchaser cannot be asserted without the ownership of the legal title, but a bona fide purchaser may defend against an equitable interest. *Hennessy v. Blair* (Sup.) 173 S. W. 871, affirming judgment *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

A purchaser for value, who has no knowledge of the existence of a resulting trust in favor of the children of the holder of the legal title, acquires the property free from such trust. *Armstrong v. Hix* (Sup.) 175 S. W. 430.

One purchasing from a purchaser in an executory contract of sale, duly recorded, takes subject to a vendor's lien, and, where he abandons the contract, his heirs cannot recover. *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

Where the question was solely one of boundary, and plaintiff was not in possession of the land which it claimed, the bona fides of plaintiff's purchase or want of notice does not give him additional rights. *Lockwood Inv. Co. v. Geiselman* (Civ. App.) 179 S. W. 549.

Where corporate stockholders assumed payment of the price of land bought for the corporation, such assumption inured to the benefit of purchasers of a part of the land, which, by agreement with the corporation and stockholders, the selling stockholder, in whose name title to the land had been taken for the benefit of the corporation, was to own individually. *Deweese v. Nicholson* (Civ. App.) 182 S. W. 396.

Where, with the assent of stockholders in a land company, title to land purchased for it was taken in the name of one, the other stockholders assuming payment of the price, such others could not recover the price per acre, the payment of which they had assumed, from innocent purchasers for value from the stockholder holding the legal title. *Id.*

Where the entire consideration of a deed was paid to the vendor by an innocent purchaser before she was apprised of defendant's claim under a previously executed, but unrecorded, deed, the question of pro tanto protection was not in the case. *City of Houston v. Ritchie* (Civ. App.) 191 S. W. 362.

Rights of bona fide purchasers to land who made part payment to proportional part of land as against true owner, her husband having taken title in his own name and sold land, must be measured according to contract price. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

The law does not require any one to do a useless thing, and therefore bona fide purchasers from plaintiff's husband, who took in his own name title to land purchased with her funds, need not tender plaintiff any balance due. *Id.*

**20. Evidence.**—Evidence, in a suit to foreclose a vendor's lien on property in the hands of a purchaser from the vendee, held to sustain a finding that there were sufficient facts known to the purchaser at the time of the purchase which, if pursued with reasonable diligence, would have given him notice that the note sued on had not been paid, and that the vendor's lien by which it was secured had not been extinguished, and that the deed of release on record, purporting to release them, was a mistake. *Hunker v. Estes* (Civ. App.) 159 S. W. 470.

Evidence in trespass to try title to land claimed by defendants to have been wrongfully purchased by plaintiff for S., who was trustee of the land for defendants' predecessors in interest, held not to show that the legal title ever passed from S. to a bona fide purchaser. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Evidence held to justify a finding that a conveyance from complainant in exchange for certain worthless corporate stock was obtained by the fraud of all the defendants except E., who received a deed with notice of the fraud, and was therefore not a bona fide purchaser. *Payne v. Snyder* (Civ. App.) 160 S. W. 1153.

In an action by one who asserted an equitable interest in land the legal title to which defendants had acquired evidence held insufficient to show that defendants were not bona fide purchasers without notice. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

Evidence in trespass to try title held sufficient to authorize a finding that a conveyance from the common grantor to defendant's predecessors was in pursuance of a contract by such grantor prior to his conveyance to plaintiff's grantors, and that plaintiff's grantor when he purchased had knowledge of such contract of sale. *Hermann v. Thomas* (Civ. App.) 168 S. W. 1037.

In an action to cancel vendors' lien notes, with intervention by defendant's wife for cancellation of her deed, etc., evidence held to support finding that plaintiffs were not purchasers without notice of defendant's pretended sale. *Bludworth v. Dudley* (Civ. App.) 173 S. W. 561.

Grantees in a deed held under the evidence to have notice that the grantor had title under a deed from a husband and wife absolute in form, but intended as a mortgage. *Cox v. Kearby* (Civ. App.) 175 S. W. 731.

Evidence held insufficient to show that plaintiffs were bona fide purchasers without notice of defendants' claims. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

In an action to recover land which a husband had conveyed without the consent of his wife, evidence held not to show that defendant had notice of any fraud. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 178 S. W. 785.

In partition by the illegitimate son of a married woman against a purchaser from her husband, evidence that the purchaser had actual notice that plaintiff was the surviving child of the married woman and had an interest in the property in controversy held sufficient to support judgment for plaintiff. *Lee v. Frater* (Civ. App.) 185 S. W. 325.

Where a grantee took land with knowledge that the cash consideration mentioned in his grantor's deed had not been paid, and that the deed was not recorded, evidence held sufficient to sustain a verdict that he took with notice that the deed to his grantor was intended as a mortgage. *Harris v. Hamilton* (Civ. App.) 185 S. W. 409.

In action of trespass to try title, evidence held to warrant finding that purchaser was innocent purchaser for value, without notice of transfer of certificate under which plaintiff claimed. *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**29. Mortgagees as bona fide purchasers—In general—Sufficiency of evidence.**—Evidence held to sustain a finding that mortgage bonds were purchased without notice of unrecorded mechanic's lien claims, where the bonds recited they were issued to repay loan. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

**31. Color of title.**—Under this article, making unrecorded deeds void against subsequent purchasers, an unrecorded deed held color of title within the three-year limitation law (articles 5672, 5673). *Phelps v. Pecos Valley Southern Ry. Co.* (Civ. App.) 182 S. W. 1156.

**Art. 6827. [4641] Deeds, etc., to be recorded in county where land is situated.**

Acquisition of lien by levy of execution.—See *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

**Art. 6828. [4642] Deed, etc., valid, against subsequent creditors from, etc.**

**In general.**—Judgment creditor may, notwithstanding unrecorded deed, acquire a lien by complying with arts. 5614–5616, or by levy of execution without notice under this article and art. 6827, of a third person's ownership, and, under article 6824, subject the land to his judgment. *Whitaker v. Hill* (Civ. App.) 179 S. W. 539.

Under this article and arts. 6824, 6791, an instrument is "filed with the clerk" to be recorded as required by law when it is delivered to the clerk and by him received in his official custody, regardless of whether it is then entered in the record books. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

Under express provisions of this article, the record of a deed reserving a vendor's lien put subsequent creditors on notice of the existence of the lien. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**Art. 6831. [4645] Copies from land office to be recorded.**

**Copy of recorded land certificate.**—Under this article and art. 6842, record of an assigned land certificate, being a copy of recorded certificate, with proper acknowledgment of one of the assignors, held constructive notice to subsequent purchasers of divestiture of such assignor's interest. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

**Art. 6833. [4647] Transfers of judgment to be recorded, etc.**

Cited, *Marschall v. Smith* (Civ. App.) 158 S. W. 1047; *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

**Does not apply to transfer before suit.**—This article does not apply to an assignment to attorneys by plaintiff having a cause of action in tort of a one-half interest therein, executed prior to the institution of the suit, and defendant, having judgment against plaintiff, could not require that the judgments should be set off against each other to the detriment of the attorneys. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

**Art. 6835. [4649] Partition to be recorded.**

**Decree competent evidence, though not recorded, when.**—In suit to foreclose a vendor's lien, where the only objection to the original judgment of partition, admitted in evidence to show that title to the purchase notes was vested in plaintiff's wards, was that such judgment affected title to land and had never been recorded, its admission was proper. *Stewart v. Thomas* (Civ. App.) 179 S. W. 886.

**Art. 6837. Suit for land; notice to be filed.**

Cited, *Teel v. Brown* (Civ. App.) 185 S. W. 319.

**Lis pendens—In general.**—Under this article and arts. 6838 and 6839, judgment cancelling vendor's lien notes is not binding on a transferee not a party, where plaintiff did not file lis pendens. *Burke-Simmons Co. v. Konz* (Civ. App.) 178 S. W. 587.

Sheriff's return on a prior execution sale of house held not notice to one foreclosing mortgage on fixtures therein, and removing them. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

Where one who had bought a note and vendor's lien therefor from one who had brought suit on the note, in which suit defendant had filed answer setting up defenses, thereafter intervened in such suit as plaintiff, the question of his notice of defenses to the note was for the jury, even if he were not chargeable with such notice under this article. *Miller v. Poulter* (Civ. App.) 189 S. W. 105.

— **Service of summons or appearance.**—The doctrine of *lis pendens* only applies to one who purchased from defendant after service of citation. *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

Until service of citation upon the defendant husband, the commencement of an action for divorce, in which the wife prayed for an adjudication of their property rights, was not notice to purchasers of land from the husband of her interest therein. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

— **Operation and effect.**—A *lis pendens* operates only during pendency of the suit and only as to matters involved therein, and terminates with the judgment in the absence of appeal. *Rosborough v. Cook* (Sup.) 194 S. W. 131.

— **Rights and liabilities of purchasers.**—The rule of *lis pendens* does not apply to negotiable instruments purchased in good faith for value before maturity. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

The purchaser of a cause of action pending suit has a right to have the cause proceed in the name of his assignor; the judgment rendered inuring to the benefit of the purchaser. *Duke v. Trabue* (Civ. App.) 180 S. W. 910.

*Lis pendens* purchaser is entitled to intervene in suit by his grantor to set aside deed claimed to have been procured by grantee's fraud. *Gabb v. Boston* (Sup.) 193 S. W. 137.

— **Limitations.**—Where during partition suit two persons in interest conveyed a specific tract after *lis pendens* notice was filed, their interest passed subject to the termination of the suit, and the deed was valid, so as to stay the running of limitations in favor of the grantee. *Rosborough v. Cook* (Sup.) 194 S. W. 131.

#### Art. 6838. Record of, how made.

Cited, *Teel v. Brown* (Civ. App.) 185 S. W. 319.

#### Art. 6839. Transfers without notice, valid.

Cited, *Teel v. Brown* (Civ. App.) 185 S. W. 319.

**Failure to file *lis pendens*.**—Under this article and arts. 6837, 6838, judgment canceling vendor's lien notes is not binding on a transferee not a party, where plaintiff did not file *lis pendens*. *Burke-Simmons Co. v. Konz* (Civ. App.) 178 S. W. 587.

#### Art. 6840. Effect of notice.

Cited, *Teel v. Brown* (Civ. App.) 185 S. W. 319.

#### Art. 6841. [4651] Titles to chattels, where recorded.

Cited, *Farmer v. Evans* (Civ. App.) 192 S. W. 342 (in dissenting opinion).

**"Valuable consideration without notice."**—The term "valuable consideration without notice," in this article, qualifies not only "purchasers" but "creditors." *Biggerstaff v. McGill* (Civ. App.) 175 S. W. 711.

#### Art. 6842. [4652] Record of any grant, etc., when notice.

Cited, *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

**Record as notice—In general.**—Where a trust deed was executed as further security for a vendor's lien note, and, on default, the property was sold and the trustee's deed placed on record, a subsequent purchaser from the vendee took with notice of the foreclosure deed and was not an innocent purchaser for value. *Wood v. Smith* (Civ. App.) 165 S. W. 471.

Purchaser of land located under certificate from heir of certificate holder's devisee held not entitled to protection as an innocent purchaser, as against those claiming under a transfer of the certificate; the records of the county having been destroyed by fire so that they disclosed nothing as to the title. *Temple Lumber Co. v. Brooks* (Civ. App.) 165 S. W. 507.

Subsequent purchasers of land could not claim as innocent purchasers for value, where, at the time of the conveyance to them, there was then recorded a prior deed covering the same land, executed by their grantors. *Green v. Eddins* (Civ. App.) 167 S. W. 196.

A recorded deed is constructive notice only of the facts which it recites, but a party is chargeable with notice of what a reasonably prudent person, with knowledge of the facts, would have ascertained by inquiry, where he has actual knowledge of a deed or its record. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

The assignment of a vendor's lien is within the registration statutes. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

When a conveyance has been promptly recorded, creditors whose claims arise thereafter cannot attack it as fraudulent. *Martin v. Jourdanton Mercantile Co.* (Civ. App.) 185 S. W. 583.

The registration of defendants' conveyances and payment of taxes, as shown on the tax rolls, together with their use of the land, conclusively charged plaintiffs with notice of their adverse holding. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

— **Facts of which record is notice.**—Subsequent purchasers of parts of a tract of mortgaged property are charged with constructive notice of the rights of previous purchasers, whose conveyances are of record, to have the lands alienated last first sold for the satisfaction of the vendor's mortgage. *Powell v. Stephens* (Civ. App.) 163 S. W. 672, judgment modified on rehearing 164 S. W. 1058.

Where land passes to one member of a community by deed or judgment, the legal title is vested in that one, and such deed or judgment is not notice to bona fide purchasers for value of the community interest of the other. *Mitchell v. Schofield*, 171 S. W. 1121, 106 Tex. 512, affirming judgment (Civ. App.) 140 S. W. 254.

Under this article and art. 6831, record of an assigned land certificate, being a copy of recorded certificate, with proper acknowledgment of one of the assignors, held constructive notice to subsequent purchasers of divestiture of such assignor's interest. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

A subsequent purchaser of part of land subject to a common charge has constructive notice of the equities of a prior grantee of another part of the same land, whose deed is on record. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

Where the father died, and the mother then conveyed half of the land to each of two sons, if she in fact held the land in trust for all the children, the record of her conveyance to the other children and heirs was notice of adverse ownership and possession by the grantees. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

— **Persons affected with notice and notice of instruments not in chain of title.**—A purchaser of land is chargeable with notice of a prior deed of his vendor to another person which has been duly recorded. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

Purchaser of land from heir of devisee of certificate holder held put upon inquiry and charged with notice of the transfer of the certificate on file in the general land office. *Temple Lumber Co. v. Broocks* (Civ. App.) 165 S. W. 507.

Written assignment and conveyance of vendor's lien notes against plaintiff and a defendant jointly and of the superior title retained to secure them held an instrument entitled to record under art. 6823, permitting the recording of deeds, mortgages, etc., and, after record, constructive notice to one purchasing defendant's undivided half interest of plaintiff's right to enforce payment of defendant's part of the joint indebtedness. *Holman v. Oxford* (Civ. App.) 168 S. W. 437.

Where a grantor, who owned only an undivided one-half interest in a section, conveyed through mistake his entire interest to another instead of a one-fourth interest, as was intended, the record of a subsequent deed by the grantor to a second grantee of the remaining one-fourth interest is not constructive notice to creditors of the first grantee. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

A purchaser of real estate is unaffected by a recorded chattel mortgage on a fixture becoming a part of the realty. *Murray Co. v. Randolph* (Civ. App.) 174 S. W. 825.

A subsequent deed of record does not afford constructive notice to an anterior holder of an interest in the land. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

The record of a quitclaim deed, not on its face showing that the grantor and grantee contracted in regard to the grantor's debt for purchase money of a larger tract, as a part of the real consideration, affords notice of the equities to a subsequent assignee of the vendor's lien notes. *Id.*

A purchaser from M. held put on inquiry as to outstanding vendor's lien notes, assigned as collateral, by recorded deed of M. to S. retaining a vendor's lien and deeds reconveying to M., reciting that he assumed payment of the notes. *Henningsmeyer v. First State Bank of Conroe* (Civ. App.) 192 S. W. 286.

Grantee held not charged with notice of existing vendor's lien note, though deed to his grantor contained an added initial. *Knox v. Gruhlkey* (Civ. App.) 192 S. W. 334.

— **Defective records.**—A record of a deed of trust held not constructive notice to a subsequent purchaser because of the inaccuracy of the description if intended to apply to the land bought by the subsequent purchaser. *Higginbotham Bros. & Co. v. Breed* (Civ. App.) 160 S. W. 117.

— **Particular instruments.**—As a single man could acquire land under the Pre-emption Act of January 22, 1845, and Paschal's Dig. art. 4341, patent to R. as assignee of rights of S. so acquired, was not notice to R.'s vendee of community interest of S.'s wife. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

Against mortgagor and subsequent mortgagee and purchaser with knowledge, description in mortgage, followed in foreclosure judgment and sheriff's deed of mortgaged chattels and land, is sufficient; the property being capable of identification by aid of extrinsic evidence. *Walter Connally & Co. v. Continental State Bank of Big Sandy* (Civ. App.) 189 S. W. 311.

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## CHAPTER FIVE

### GENERAL PROVISIONS

#### Article 6858. [4669] Attachments to be recorded, when.

**Notice of prior conveyance.**—Plaintiff, in action for sheriff's failure to record an attachment lien, held not entitled to damages if when he obtained the attachment he had actual notice of a prior conveyance by the attachment defendant. *Neville v. Miller*, 171 S. W. 1109.

## TITLE 119

## ROADS, BRIDGES AND FERRIES

[See Appendix for list of local road laws.]

Chap.	Chap.
1. Establishment of public roads.	6. Road superintendents.
1a. State highway department.	7. Road law for counties having forty thousand inhabitants or over.
4. Powers and duties of overseers.	8a. Motor and other vehicles.
5. Road commissioners.	

## CHAPTER ONE

## ESTABLISHMENT OF PUBLIC ROADS

Art.	Art.
6859. What roads declared public.	6880. Notice to owner, etc.
6860. Commissioners' courts to open.	6882. If report approved, to be paid, etc.
6861. Not to be changed unless, etc.	6883. May order opening, but damages to be paid first, etc.
6863. First class roads from county seat to county seat, etc.	6889. Roads on line between different owners, etc.
6866. When damage excessive, etc.	6894. May open on line, when.
6870. Such roads to be changed, when.	6899. Right to erect gates.
6871. General classification of roads.	6901. Commissioners as supervisors.
6877. How laid out, etc.	
6879. Duty of jury, etc.	

**Article 6859. [4670] What roads are declared to be public.**

**Constitution.**—Const. art. 3, § 56, forbidding the Legislature to pass any local or special law in reference to certain matters, was annulled, in so far as it related to the maintenance of public highways and roads, by the amendment to article 8, § 9. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

Under authority of the Legislature, under the amendment to Const. art. 8, § 9, to pass local laws relating to highways, such a law is not objectionable, notwithstanding it incidentally regulates county affairs. *Id.*

**Prescription.**—In a prosecution for obstructing a public road, where the road did not coincide with the road as laid out, certain evidence held sufficient to support a finding that the state had acquired title by limitation. *Rust v. State*, 71 Cr. R. 283, 158 S. W. 519.

Where at time a highway was laid out the owner of land, across which was an old road, told the jury of view that the public might continue to use such road until he fenced the land, the subsequent public use of the road was not adverse to his title. *Id.*

Where the public use of premises is merely permissive, there is no basis for a claim of a right of way by prescription. *West v. City of Houston* (Civ. App.) 163 S. W. 679.

Where the public used a way over the land of defendant's predecessors in title for more than 30 years, the public acquired a highway by prescription. *Wheeler v. McVey* (Civ. App.) 164 S. W. 1100.

Where a use by the public of uninclosed land of a tract, not platted into lots or streets, was permissive only, an easement of a public way by prescription could not be acquired. *Bryson v. Abney* (Civ. App.) 171 S. W. 508.

In a suit to remove a cloud from title to a strip of land, evidence held to warrant a finding that the land had become a public alley by prescription. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 181 S. W. 496.

Use by the public as a passage of a railroad right of way for the period of three years is not sufficient to constitute a dedication of the highway by prescription. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

**Dedication.**—Proof that a road was indicated and named as a public road on a plat filed before the controversy arose, and that it was referred to several times in the testimony, is not sufficient to establish, as a matter of law, that it was a public road. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

**Art. 6860. [4671] Commissioners' courts to open, etc.**

Cited, *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Jurisdiction and powers of commissioners' court.**—Under this article and arts. 6861, 6871, 6883, 6889, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.



**Art. 6861. [4672] Shall not be changed, except, etc.**

**Changing location of road.**—Where no road has been opened, order of commissioners' court setting aside order that road be opened and ordering it laid out in a different location, is not within this article. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

**Authority of commissioners' court to lay out highways.**—Under this article and arts. 6860, 6871, 6883, 6889, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

**Art. 6863. [4674] First class roads from county seat to county seat, etc.**

Cited, *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Compliance with article.**—A substantial compliance with this article, as to laying out roads over direct route to the county seat of adjoining county, is sufficient, and that a road veered a few miles from the most direct route is no ground for complaint. *Currie v. Glasscock County* (Civ. App.) 183 S. W. 1193.

**Injunction.**—Petition for injunction alleging the commissioners' court fraudulently laid out a first-class 60-foot road several miles to the side of the route required by this article, so as to pass through plaintiff's lands, states ground for relief. *Currie v. Glasscock County* (Civ. App.) 179 S. W. 1095.

The commissioners' court can be enjoined, if, in laying out a 60-foot road under this article, it has transcended its authority or grossly abused its discretion. *Id.*

If the commissioners' court in laying out a first-class 60-foot road is acting in substantial compliance with this article, it cannot be enjoined, though the road would irreparably injure one's land. *Id.*

**Refusal to submit question.**—Where the road as laid out was in compliance with this article, and verdict might have been directed against the landowners, refusal to submit whether the road was in accordance with the statute was not error. *Currie v. Glasscock County* (Civ. App.) 183 S. W. 1193.

**Art. 6866. [4677] When damages are excessive, etc.**

Cited, *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

**Void judgment.**—Under Const. art. 5, § 8, and in view of this article, judgment of commissioners' court of San Augustine county, illegally allowing amounts to a county commissioner in connection with roadwork and ordering illegal warrants therefor, held void and subject to collateral attack. *Slaughter v. Knight* (Civ. App.) 184 S. W. 539.

**Injunction.**—Injunction is the proper remedy where the commissioners' court is proceeding without authority to open a first-class 60-foot road, this article giving appeal only as to adequacy of damages. *Currie v. Glasscock County* (Civ. App.) 179 S. W. 1095.

**Jurisdiction on appeal.**—Under this article, appeal from award of damages in proceedings to lay out a first-class road is to the district court; art. 6882 applying to other classes of roads. *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Art. 6870. [4681] Such roads to be changed, when.**

Cited, *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Art. 6871. [4682] To classify all public roads.**

**In general.**—Under this article and arts. 6860, 6861, 6883, 6889, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

**Art. 6877. [4688] How laid out.**

**Sufficiency of description in report.**—Where the jury of freeholders laid out a county road, marked it on the ground, and described it with reference to a prior road, the report containing such description, was sufficient under this article, though the location with respect to surveys crossed was not given. *Currie v. Glasscock County* (Civ. App.) 183 S. W. 1193.

**Art. 6879. [4690] Duty of jury to perform the work and report.**

**Sufficiency of report.**—Where the jury of view in highway proceedings were only authorized to lay out a third class road, their report was not fatally defective in reciting the laying out of a "road" instead of a "third class road." *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

**Term for passing on report.**—It was not necessary that the commissioners' court should pass on the report of the jury of view at the first term or at a regular term of such court. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

**Art. 6880. [4691] Notice to owner.**

**Recording character of notice.**—It is not essential to the legality of proceedings to establish a highway that the character of the notice given be made a matter of record. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

**Notice of date of passing on report.**—The law does not require notice to the landowner of the date when the commissioners' court will pass on the report of the jury of view. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

**Notice of intention to pass new order to cure defect.**—An order having been held defective in certain particulars, an objecting landowner was not entitled to notice of an intention of the commissioners' court to pass a new order to cure the defect. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

**Waiver of objection to notice.**—An objection to notice of intention to lay out a highway, in that it was signed by only one member of the jury of view, was waived by the landowner's appearance pursuant to the notice. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

#### **Art. 6882. [4693] If report approved, damages to be paid, etc.**

**Appeal.**—Under art. 6866, appeal from award of damages in proceedings to lay out a first-class road is to the district court; this article applying to other classes of roads. *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Restraining opening of road.**—Recitals as to necessity in condemnation proceedings to establish a public road do not controvert positive and uncontroverted testimony, upon an injunction hearing that there was no public necessity for the road. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

#### **Art. 6883. [4694] Court may order opening of road, but damages assessed must be first paid, etc.**

**Authority of commissioners' court.**—Under this article and arts. 6860, 6861, 6871, 6889, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

Taking private property for the benefit of an individual by a municipal body is a legal fraud upon the owner's rights, although there was no fraudulent intent in doing so. *Id.*

**Sufficiency of order.**—Mere conference by county commissioners, and verbal agreement to open road, without vote being taken, does not constitute an order to open the road, and is invalid. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

#### **Art. 6889. [4700] Roads on lines.**

**Authority of commissioners' court.**—Under this article and arts. 6860, 6861, 6871, 6883, 6894, relating to the establishment of public roads, the commissioners' court cannot lay out highways unless a public necessity therefor exists. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

#### **Art. 6894. [4705] May open lines, when.**

**Authority of commissioners' court.**—See *Moseley v. Bradford* (Civ. App.) 190 S. W. 824; note under art. 6889.

#### **Art. 6899. [4710] Right to erect gates.**

**Nature of road.**—Since only a third class road can have gates erected across it an order making it optional with landowners to gate a road shows creation of a third class road. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

#### **Art. 6901. [4712] Commissioners as supervisors.**

**Constitutionality of statute fixing salary for county commissioner.**—Under Const. art. 3, § 35, and article 3, § 56, and in view of *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 2274, 2275, 3870, 6901, and *Sp. Acts* 33d Leg. c. 77, §§ 3, 6, 7, 14, and 27, held, that section 5 thereof, fixing an annual salary for a county commissioner, was not unconstitutional as embracing two subjects. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

**Liability of county commissioner and sureties.**—Under *Sp. Laws* 1903, c. 25, § 1, making county commissioners of San Augustine county ex officio road commissioners, county commissioner and sureties on bond as such are not liable for sums coming into his hands for road purposes. *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

### DECISIONS RELATING TO ESTABLISHMENT OF PUBLIC ROADS IN GENERAL

**Easement alone acquired by condemning county.**—A county, by condemning land for a public highway, only acquires an easement therein; the fee remaining in the original owner. *International & G. N. R. Co. v. Boles* (Civ. App.) 161 S. W. 914.

## CHAPTER ONE A

## STATE HIGHWAY DEPARTMENT

Art.		Art.	
6904 $\frac{1}{2}$ .	Department created.		county map by state engineer; connection of roads adjoining counties.
6904 $\frac{1}{2}$ a.	Appointment and tenure of members of commission; vacancies.	6904 $\frac{1}{2}$ j.	Plan for system of state roads; construction of such roads.
6904 $\frac{1}{2}$ b.	Chairman; duties; compensations; quorum; meetings; reports; quarterly statements.	6904 $\frac{1}{2}$ k.	Allotment of state aid; amount; maintenance of roads constructed; failure to maintain.
6904 $\frac{1}{2}$ c.	Oath and bond of members of commission.	6904 $\frac{1}{2}$ l.	Laboratories of agricultural and mechanical college and university of Texas available to commission; purchase of materials and payment for labor.
6904 $\frac{1}{2}$ d.	State highway engineer; salary and expenses; bond; duties; reports.	6904 $\frac{1}{2}$ m.	Convict labor.
6904 $\frac{1}{2}$ e.	Rules and regulations; records.	6904 $\frac{1}{2}$ n.	Expenditure of moneys contributed by United States government.
6904 $\frac{1}{2}$ f.	Statistics as to roads; investigations; advice and information to local officials.	6904 $\frac{1}{2}$ o.	Assent to act of Congress relating to aid in construction of rural post roads.
6904 $\frac{1}{2}$ g.	Rules for determination of fitness of road engineers.	6904 $\frac{1}{2}$ p.	Same; duties of state highway commission.
6904 $\frac{1}{2}$ h.	State highway engineers to make and keep state road map.		
6904 $\frac{1}{2}$ i.	County road maps; data as to road material; separation of		

**Article 6904 $\frac{1}{2}$ . Department created.**—There is hereby created a department of the public service of the State, to be known as the State Highway Department, the administrative control of which shall be vested in the members of the State Highway Commission and the State Highway Engineer hereinafter provided for in this Act. The said Department shall be furnished with adequate office room at the State Capitol, which office shall be the repository of all records of the department. [Act April 4, 1917, ch. 190, § 1.]

**Explanatory.**—Sec. 26 makes an appropriation to carry out the provisions of the act. Sec. 27 (set forth as art. 7012 $\frac{1}{2}$ i, post) repeals all laws in conflict and declares that the invalidity of a part of the act shall not affect the remaining portions.

**Art. 6904 $\frac{1}{2}$ a. Appointment and tenure of members of commission; vacancies.**—The Governor shall, within sixty days after this Act becomes effective, by and with the advice and consent of the Senate, appoint three citizens of the State as a Board of Highway Commissioners, hereinafter referred to as the State Highway Commission or the Commission. The term of office of the members of the Commission shall be for a period of two years, except that the members of the commission first appointed shall serve until February 15, 1919, or until their successors shall have been appointed and have qualified. All vacancies in the membership of the Commission shall be filled in the same manner as is prescribed for the original appointment. [Id., § 2.]

**Art. 6904 $\frac{1}{2}$ b. Chairman; duties; compensations; quorum; meetings; reports; quarterly statements.**—The Governor, in making the appointment of Highway Commissioners, shall designate one as Chairman of the Commission. The duties of the members of the Commission shall be such as the administration of the provisions of this Act require; attendance upon all regular meetings of the Commission as provided in this Act, and such special meetings as the rules that may be adopted by the Commission for its guidance may provide, or that may be called by the chairman of the Commission. The Commission shall formulate plans and policies for the location, construction and maintenance, in co-operation with the counties of the State, or under the direct supervision and control of the State Highway Department, of a comprehensive system of State Highways and public roads, and shall

perform such other duties as may be conferred upon them by law. The members of the Commission shall be allowed actual and necessary expenses incurred in the performance of the duties of their said offices, and shall each receive a per diem of ten (\$10.00) dollars for each day actually devoted to the work of the Department, the aggregate of such per diem, in no case to exceed the sum of one thousand (\$1,000.00) dollars for each member in any one calendar year; such expense and per diem to be paid from the funds provided for by this Act. Two members of the Commission shall constitute a quorum necessary to the transaction of business. Regular meetings of the Commission shall be held once each month at the State Capitol. Biennially, a report of the work of the Commission shall be submitted to the Governor and the Legislature, together with the recommendations of the Commission and the recommendations of the State Highway Engineer. Provided, that a quarterly statement shall be prepared and filed in the records of the Department, and a copy transmitted to the Governor, which shall contain an itemized statement of all monies received and from what source, together with an itemized statement of all monies paid out and for what purpose; and provided further that these reports shall be treated as public documents and open to public inspection. [Id., § 3.]

**Art. 6904 $\frac{1}{2}$ c. Oath and bond of members of commission.**—Each member of the State Highway Commission shall file his oath of office with the Secretary of State and execute a bond payable to the State of Texas, to be approved by the Governor, conditioned upon the faithful discharge of duty in office, in the sum of five thousand (\$5,000.00) dollars each, the premium for which bonds shall be paid out of the funds in this Act provided for. [Id., § 4.]

**Art. 6904 $\frac{1}{2}$ d. State Highway Engineer; salary and expenses; bond; duties; reports.**—As soon as practicable after their qualification for office the State Highway Commission shall elect a State Highway Engineer who shall be a competent civil engineer and graduate of some first class school of civil engineering, experienced and skilled in highway construction and maintenance, and who shall receive an adequate salary in the discretion of the Commission, and shall be allowed actual traveling and other expenses while absent from the State Capitol in the performance of duty under the direction of the Commission; and who shall hold his position until removed by the Commission. Before entering upon his duties, the State Highway Engineer shall execute a bond payable to the State of Texas in such sum as in the judgment of the Commission may be necessary, conditioned upon the faithful performance of his duties, such bond to be approved by the Commission and filed with the Secretary of State. The Highway Engineer shall act with the Highway Commission in an advisory capacity, without vote, and he shall submit reports to the Commission quarterly, annually and biennially, setting forth in detail the progress of public roads construction, and a statement detailing the expenditures therefor, under the direction of the Department as provided in this Act. [Id., § 5.]

**Art. 6904 $\frac{1}{2}$ e. Rules and regulations; records.**—The State Highway Commission shall establish and make public proclamation of all rules and regulations for the conduct of the work of the Department as may be deemed necessary, not inconsistent with the provisions of this Act; and the Department shall maintain a record of all proceedings and official orders and keep on file copies of all road plans, specifications and estimates, prepared by the Department or under its direction. [Id., § 6.]

**Art. 6904½f. Statistics as to roads; investigations; advice and information to local officials.**—The State Highway Department shall collect information and compile statistics relative to the mileage, character and condition of the public roads in the different counties of the State, and the cost of construction of the different classes of roads in the various counties. It shall investigate and determine the methods of road construction best adapted to the different sections of the State, and shall establish standards for the construction and maintenance of highways, bridges and ferries, giving due regard to all natural, conditions, and to the character and adaptability of road building material in the different counties. The Department may, at all reasonable times, be consulted by county and city officials for any information or assistance it can render with reference to the highways within such counties or cities, and it shall be the duty of the State Highway Department to supply such information when called for by city or county officials; and it may call upon all such officials for any information necessary to the performance of its duties under this Act. Upon request of the Commissioners' Court of any county, the State Highway Department shall consider and advise concerning general plans and specifications for all road construction to be undertaken from the proceeds of the sale of bonds or other legal obligations issued by a county, or by any sub-division or defined district of any county; and it shall be the duty of the Commissioners' Court, county road superintendent, or official acting under the authority of the commissioners' court, to obtain all the available information and advice from the office of the State Highway Department relative to road construction and maintenance suitable to the county, political sub-division or defined district in which such roads are to be constructed before any of the proceeds from such bond issues are expended by, or under the direction of the commissioners' court. [Id., § 7.]

**Art. 6904½g. Rules for determination of fitness of road engineers.**—The State Highway Department shall adopt such rules as are found necessary to determine the fitness of engineers making application for highway construction work and upon the formal application of any county or organized road district thereof, or of any municipality, the Commission may recommend for appointment a competent civil engineer, and graduate of some first class school of civil engineering, skilled in the knowledge of highway construction and maintenance. [Id., § 8.]

**Art. 6904½h. State Highway Engineer to make and keep state road map.**—The State Highway Engineer shall, as soon as practicable after qualification for duty, cause to be made and kept in form convenient for examination in the office of the Department, a complete road map of the State as represented in the road construction of the various counties, and such map shall be regularly revised as construction proceeds in the different counties. [Id., § 9.]

**Art. 6904½i. County road maps; data as to road material; preparation of county map by state engineer; connection of roads of adjoining counties.**—The commissioners' court of each county in the State, within twelve months after this Act becomes effective, shall have prepared county road maps in duplicate, showing the approximate location of all public roads within the county. Such county maps shall further show the location at the county lines of connecting roads, of all adjoining counties, or in the absence of such connecting roads, the commissioners' court shall submit a statement setting forth the public importance of such connecting roads in such adjoining county or counties.

The commissioners' court of each such county also shall designate such of the roads in the said county as would, in the judgment of the court, represent part of an adequate system of State highways to the various market and business centers of the State, and connect such principal traffic centers. One of the said county maps shall be filed in the office of the county clerk of each county, and the other map, duly certified by the commissioners' court, shall be filed with the State Highway Department. The county commissioners' court shall, at the time of filing such county map, furnish the State Highway Department, a statement of the location in such county, estimated extent and availability of all material deemed suitable for the building of roads. Should the commissioners' court of any county for any reason fail to provide such maps and information to the State Highway Department within the time specified, the State Highway Engineer shall have such maps and information of such county prepared under his supervision, and the committee shall be empowered to deduct the expenses thereof from the first allotment of funds to such county to accrue from registration fees of motor vehicles under the provisions of this Act. Should the public roads of any two adjoining counties representing a necessary part of the system of State highways, as designated by the State Highway Department in accordance with the provisions of this Act, fail to connect; the State Highway Engineer shall make or cause to be made, an investigation in the respective counties and report to the Commission, which shall notify the commissioners' court of such county or counties of what is necessary to complete the connection of such State highways, and if such county or counties shall fail to make or complete such connections on roads, which constitute a part of the system of State highways within six months after notice has been given by the State Highway Department, the commission shall be empowered to direct the State Highway Engineer to complete such connection, and the commission shall be empowered to deduct the expense thereof from the allotment of funds to such county or counties to accrue from registration fees of motor vehicles and motorcycles as hereinafter provided for in Section 23 of this Act [Art. 7012½g]; the expense of maintenance thereafter to devolve upon such county or counties. [Id., § 10.]

**Art. 6904½j. Plan for system of state roads; construction of such roads.**—The State Highway Engineer shall prepare, under the direction and with the approval of the commission, a comprehensive plan providing a system of State highways, and it shall be the duty of the commission to advance the construction of such State highways in co-operation with the counties of the State, or under the direction, supervision and control of the State Highway Department, as the necessary funds for construction may be available. A copy of such plans of State highways shall be furnished by the Department to each county commissioners' court in the State, to be dispalyed in the office in which the road records of the county are kept. [Id., § 11.]

**Art. 6904½k. Allotment of state aid; amount; maintenance of roads constructed; failure to maintain.**—Whenever the commissioners' court of any county shall desire, and is prepared, to construct one or more miles of public roads constituting a part of the system of State highways as designated by the Department, such court may make application for an allotment of State aid from the State highway fund, and if such application is accompanied by plans, profiles and estimates prepared in accordance with the requirements of the State Highway Engineer, the commission shall file such application in the order in which

it is received; and when such roads shall be constructed according to specifications and under the supervision of the highway engineer, the commission shall make an allotment of aid from any monies available in the State highway fund, not to exceed one-fourth of the cost of construction; provided, such State aid may not be expended to aid in constructing more than ten miles of road in any county during any one year. In counties in which the assessed valuation of property, in the judgment of the commission, does warrant the construction of sections of the system of State highways necessary to provide the State with trunk roads, or to connect market centers of the State as provided in this Act, the commission may, in its discretion, increase such allotment of State aid not to exceed one-half of the cost of constructing not more than ten miles of such part of the system of State highways in each of such counties in one year. All parts of the system of the State highways that may be constructed with State aid, as provided in this Section, shall be maintained at the expense of the county in which such part of the highway is located, in accordance with plans approved by the State Highway Department, and failure to maintain such Sections of State highway, shall forfeit any further State aid until such maintenance work shall have been done. [Id., § 12.]

**Art. 6904 $\frac{1}{2}$ l. Laboratories of Agricultural and Mechanical College and University of Texas available to commission; purchase of materials and payment for labor.**—The laboratories maintained at the Agricultural and Mechanical College of Texas and at the University of Texas shall be at the disposal and direction of the State Highway Engineer for the purpose of testing and analyzing road and bridge material, and it shall be the duty of those in charge of said laboratories to co-operate with and assist the State Highway Engineer, to the end that the best interests of the State, may be advanced in this connection. The commission shall purchase all necessary supplies and materials required in the administration of this Act, and shall have authority to employ all clerical and other assistance necessary to carry out the provisions of this Act, and it shall pay such labor the reasonable and customary price per day, month or year for the class of work performed. [Id., § 13.]

**Art. 6904 $\frac{1}{2}$ m. Convict labor.**—The labor of State prisoners may be utilized in construction or maintenance work on any road designated by the State Highway Department as forming a part of the system of State highways, upon such terms as may be agreed upon by the State Highway Commission and the State Prison Commission and approved by the Governor of Texas. [Id., § 14.]

**Art. 6904 $\frac{1}{2}$ n. Expenditure of moneys contributed by United States government.**—Any funds for public road construction in the State of Texas appropriated by the United States Government, shall be expended by and under the supervision of the State Highway Department only upon a part of the system of State Highways. [Id., § 15.]

**Note.**—Sections 16 to 27 of this act relate to the registration and regulation of motor vehicles, and are set forth as articles 7012 $\frac{1}{2}$  to 7012 $\frac{1}{2}$ l, inclusive, of the Civil Statutes and art. 820a of the Penal Code.

**Art. 6904 $\frac{1}{2}$ o. Assent to Act of Congress relating to aid in construction of rural post roads.**—That the assent of the State is hereby expressed to the provisions of an Act of the Sixty-fourth Congress of the United States, approved July 11, 1916, being "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." [Act March 2, 1917, ch. 54, § 1.]

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

**Art. 6904 $\frac{1}{2}$ p.** Same; duties of State Highway Commission.—The State Highway Commission of Texas is authorized to co-operate with the United States Government, through the Federal Department of Agriculture, and to enter into all necessary agreements with the United States Government relating to the construction and maintenance of rural post roads covering each of the five years for which Federal funds are appropriated in the said Act of Congress, and to submit such plans for construction and maintenance as may be required in carrying out the provisions of the said Act of Congress in its application to this State; and all Federal funds appropriated to this State under the said Act of Congress shall be expended upon the highways comprising a system of State highways, as may be determined by the State Highway Commission. [Id., § 2.]

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## CHAPTER FOUR

### POWERS AND DUTIES OF OVERSEERS

Art. 6934. Timber for causeways and bridges.	Art. 6935. Construction of causeways.
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**Article 6934. [4744] Timber for causeways and bridges.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Art. 6935. [4745] Construction of causeways; ditches may be cut on land of adjacent owners, when.**

**Liability of county.**—Under this article, a county was liable for damages to adjacent landowners for the overflow of their lands incident to the construction of a road, though there was no technical taking of the property. *Palo Pinto County v. Gaines* (Civ. App.) 168 S. W. 391.

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## CHAPTER FIVE

### ROAD COMMISSIONERS

**Article 6947. [4757] Powers and duties.**

**Power to open road of second class.**—Under Acts 27th Leg. c. 49, road law of Fayette, Frio, and Uvalde counties, where commissioners' court of Frio county never ordered road commissioner of precinct to open road of second class, such commissioner had no power to do so. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

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## CHAPTER SIX

### ROAD SUPERINTENDENTS

Art. 6959. Other duties of road superintendent.	Art. 6966. Commissioners' court may let contract for work; advertisement for bids; bond of contractor; appropriation.
6960. Superintendent to divide county into road districts; keep record, etc.	
6965. Superintendent to make the best contract, etc.	6968. Donations for road purposes; drains.

**Article 6959. [4769] Roads and bridges to be kept in repair; his duty, etc.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Art. 6960. [4770] County shall be divided into precincts or districts.**

**Discretion of commissioners' court.**—The determination of the area of a proposed road district, the sufficiency of the petition, and other prerequisites to its establishment are



within the discretion of the commissioners' court, and the motives of the petitioners cannot be considered in determining the validity of establishment. *League v. Brazoria County Road Dist. No. 13* (Civ. App.) 187 S. W. 1012.

**Art. 6965. [4775] Shall make the best contracts, etc.**

**Liability of members of permanent road board.**—The members of a permanent road board are individually liable under Sp. Acts 31st Leg. c. 72, for damages resulting from the withholding of a warrant from the persons entitled thereto. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

**Consent of road board as waiver.**—Where a road contractor asked and was given permission by the board to have the work completed by his surety, there was no default by him in the performance of the contract. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

The consent by a road board to the completion of the work by the contractor's surety is a waiver of damages occasioned by the default of the principal. *Id.*

**Art. 6966. [4776] May improve roads and bridges by contract.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Transportation of road materials.**—Before the passage of the road act of March 31, 1913, giving the highway commissioners of L. county power to contract as to highways, the commissioners' court of that county could contract for the transportation of road materials, and the county should pay the contractor one-half the amounts it saved under a special agreement with a railroad company for the transportation of the material. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

**Statute as affecting prior contracts.**—The passage of Act March 31, 1913, giving power to make road contracts to highway commissioners, did not affect lawful contracts made by the commissioners' court prior to that date. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

**Art. 6968. [4778] May accept donations, etc.**

**Liability of county under contract to expend amount of donation.**—Under section 4 of the special road law of 1903 for Nacogdoches county, where private parties donated \$1,200, to be expended on a road, and the commissioners' court appropriated only \$800, it could authorize the commissioner to contract for services in a sum not exceeding the balance of the \$1,200 not appropriated, and the county would be liable therefor. *Millard v. Nacogdoches County* (Civ. App.) 170 S. W. 828.

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## CHAPTER SEVEN

### ROAD LAW FOR COUNTIES HAVING FORTY THOUSAND INHABITANTS OR OVER

[For list of local road laws, see Appendix.]

**Article 6977. Members of commissioners' courts to be ex officio  
road commissioners; their duties; bond.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

CHAPTER EIGHT A

MOTOR AND OTHER VEHICLES

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| <p>Art.<br/>7012½. Registration of motor vehicles; application; fees; definition of terms; rules; license for two or more counties.</p> <p>7012½a. Entry in register; certificate; carrying certificate on vehicle; seal; not to apply to motor vehicles owned by state, municipality, etc.</p> <p>7012½b. Registration number to be attached to motor vehicles; display of seal.</p> <p>7012½c. Time for registration; duration; apportionment of fee.</p> <p>7012½d. Transfer of certificate.</p> <p>7012½e. Manufacturers and dealers; fees.</p> <p>7012½f. Motor vehicles owned by nonresidents; authority to chairman of commission to accept service of process; to procure seal after 30 days.</p> <p>7012½g. State highway fund; disbursement; distribution among counties; how expended by counties.</p> | <p>Art.<br/>7012½h. Municipal registration abolished; exception of vehicles for hire.</p> <p>7012½i. Repeal; partial invalidity.</p> <p>7012½j. Register and index of motor vehicles; public inspection; mailing lists to counties.</p> <p>7012½k. Seals and number plates.</p> <p>7012½l. Unsafe vehicles; revocation of registration.</p> <p>7012½m. Delinquency in payment of fee; penalty; lien; foreclosure.</p> <p>7012½n. License to chauffeur; application; badge; record; report to county clerks, etc.</p> <p>7012½o. Revocation of chauffeur's license for drunkenness.</p> <p>7012½p. Badge of chauffeur, good only during term of license; loss of badge.</p> <p>7012½q. Record of license of chauffeurs.</p> <p>7012½r. Definition of terms.</p> <p>7012½s. Partial invalidity.</p> <p>7012½t. Printed pamphlet of laws to be furnished to motor vehicle owners.</p> |
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**Article 7012½. Registration of motor vehicles; application; fees; definition of terms; rules; license for two or more counties.**—In order to provide funds to effectuate the provisions of this Act [Arts. 6904½–6904½n, ante], on and after the first day of July, 1917, and annually thereafter on and after the first day of January, every owner of one or more motorcycles or motor vehicles in this State, shall file in the office of the State Highway Department, on a blank provided by the Department, application for registration for each motorcycle or motor vehicle owned or controlled by him. Such application for registration shall state the name of the owner and his address and such brief description of such motorcycle or motor vehicle to be registered by him as may be prescribed by the State Highway Department. Each application shall be accompanied by the requisite fee for semi-annual or annual registration as provided for in this Act, which registration fee shall be for each motorcycle three (\$3.00) dollars, and for each motor vehicle, other than motor vehicles intended for commercial uses, and carrying or intended to carry a total gross load of more than one thousand (1000) pounds per wheel, the registration fee shall be thirty-five cents per horsepower as determined by the standard gauging power employed by the Association of Licensed Automobile Manufacturers, but no such motor vehicle shall be registered for a less sum than seven (\$7.50) dollars and fifty cents. The term “motorcycle” shall include only those motor vehicles with or without pedals and saddles and with the driver sitting astride. The term “motor vehicle” shall include all vehicles propelled by mechanical power. For each commercial vehicle the annual license fee shall be based upon the carrying capacity per wheel, as follows:

Weight in Pounds Per Wheel	Fee
1001 to 2,000	\$ 20.00
2001 to 4,000	40.00
4001 to 6,000	60.00
6001 to 8,000	150.00
8001 to 10,000	300.00

For loads greater than 10,000 pounds per wheel, license fees shall be charged for each vehicle at the additional rate of five hundred (\$500.00) dollars for each one thousand (1000) pounds increase in weight, or fraction thereof; provided, however, that no load greater than eight hundred (800) pounds per inch width of tire per wheel shall in any case be permitted; and provided further, that no vehicle of a total gross weight of more than fourteen tons shall be licensed by the Highway Commission.

The State Highway Department shall formulate rules for the determination of weights governing license fees established herein for commercial vehicles; these rules and the rates fixed by this Section for commercial vehicles may be changed by the State Highway Department; provided, that applications for license of commercial vehicles under the provisions of this Section shall state whether for operation in one or more counties, naming them, and if more than one, the Department shall distribute one-half the license fee from such vehicle among the counties in which such vehicle is operated, on a mileage basis. A commercial vehicle within the terms of this Act, shall be one carrying passengers or freight for hire. Such motor vehicles as run upon rails or tracks, shall not subject to the provisions of this Act. [Act April 4, 1917, ch. 190, § 16.]

**Explanatory.**—Sec. 26 makes an appropriation to carry out the act. Sec. 28 declares an emergency. Other provisions of this act are set forth ante as arts. 6904 $\frac{1}{2}$  to 6904 $\frac{1}{2}$ n of the Civil Statutes and post as art. 820a of the Penal Code. Sec. 43 of the act provides that the act shall become effective July 1, 1917.

**Art. 7012 $\frac{1}{2}$ a. Entry in register; certificate; carrying certificate on vehicle; seal; not to apply to motor vehicles owned by state, municipality, etc.**—Upon the receipt of an application for registration of a motor vehicle or motorcycle, accompanied by the proper fee, as hereinbefore provided for, the State Highway Department shall cause such motor vehicle or motorcycle to be registered in a registration book or card index kept for the purpose, and without additional charge shall cause to be furnished the owner of each motor vehicle or motorcycle so registered, a certificate of registration, which certificate shall be in the form of a card, which may be carried in the pocket, and which certificate shall contain the descriptive number so assigned to the owner of each motor vehicle or motorcycle so registered, stating the name and address of the owner, and a brief description of such motor vehicle or motorcycle, together with the name of the manufacturer and the horsepower motorpower, and such certificate shall at all times be carried upon such motor vehicle or motorcycle and subject to examination on demand of the proper officer; and the department, without additional charge, shall also cause to be issued to the owner of such motor vehicle or motorcycle, a distinguishing seal of aluminum or other suitable material, of such size and form as the commission shall determine, having stamped thereon the words "Registered Motor Vehicle, Texas," with the year of issue inserted therein, which seal shall be of a distinctly different color for each calendar year, and shall be conspicuously displayed on the radiator of such motor vehicle, or on the front of such motorcycle, and there shall be at all times a marked contrast between the color of the letters and figures and the background of the seal; provided, however, the same combination of colors may be repeated after five years. Provided, further, that road rollers and other road building equipment owned and operated by municipalities, counties or subdivisions of counties, street sprinklers, fire engines or apparatus, patrol wagons, ambulances owned by municipalities or counties, motor vehicles owned and operated under

the direction and exclusively in the official service of the United States Government, State of Texas, or any county or city thereof, shall not be required to pay the fees herein stipulated for motor vehicles, but application shall be made for and a registration number secured for such motor vehicles, and each year application for the distinguishing seal provided by the department for that year, shall be made. [Id., § 17.]

See arts. 7012½j, 7012½k, post.

**Art. 7012½b. Registration number to be attached to motor vehicles; display of seal.**—On and after July 1, 1917, every motor vehicle except motorcycles, shall at all times, while being used or operated upon the public highways of this State, have displayed in a conspicuous place and manner, both upon the front and rear of such motor vehicle, a plate or marker bearing the registration number assigned such motor vehicle by the State Highway Department, and each operator of a motorcycle shall in like manner have displayed upon his machine, one plate marker bearing the registration number of such motorcycle; and the State Highway Commission shall furnish such number plates without charge for the first registration, and plates that may have to be replaced, shall be at the expense of the owner of such motor vehicle or motorcycle. Such motor vehicles and motorcycles shall at all times display the distinguishing seal to be provided by the Department for each year, and the said number plates and the seal shall conform to such requirements as may be prescribed by the Department. [Id., § 18.]

**Note.**—Sec. 24 of this act makes it an offense to operate a motor vehicle on the public highways without a registration number and seal, and is set forth herein as art. 820a of the Penal Code.

**Art. 7012½c. Time for registration; duration; apportionment of fee.**—The first registration of motor vehicles and motorcycles herein provided for shall become effective on the first day of July 1917, and shall be for the one-half year ending December 31, 1917. Each and every person owning a motor vehicle or motorcycle in this State on July 1, 1917, or who shall purchase or assume control of a motor vehicle or motorcycle in this State subsequent to July 1, 1917, and before December 31, 1917, shall immediately file an application for registration with the State Highway Department, and such registration shall be effective from the day of the filing of such application and shall expire the following 31st day of December 1917; and all such applications for registration made prior to the 31st day of December 1917, shall be required to pay one-half the annual fees required by the provisions of this Act. Thereafter, registrations shall begin with the first day of January of each year and end with the 31st day of December, and all applications for registration of motorcycles or motor vehicles filed on and after January 1, and before June 30th of any year, shall be required to pay the annual fee, and all applications for registration filed on and after July 1, and before December 31st of any year, shall pay one-half of the annual registration fee. [Id., § 19.]

**Art. 7012½d. Transfer of certificate.**—When any person, other than a dealer, sells a vehicle embraced in this Act, he shall endorse upon his certificate of registration, a written transfer of the same and the purchaser of such motor vehicle shall send the State Highway Department a notification of such transfer with the names and address in full of such purchaser, together with the transfer fee of one (\$1.00) dollar, and the Department shall enter upon its books, the fact of such transfer and the name and address of the purchaser, who shall be regarded as the owner thereof and amenable to the provisions of this Act. [Id., § 20.]

**Art. 7012 $\frac{1}{2}$ e. Manufacturers and dealers; fees.**—Any manufacturer of, or dealer in, motor vehicles in this State may, in lieu of registering each machine he may wish to show or demonstrate on the public highways, apply for registration and secure a general distinguishing number, which may be attached to any motor vehicle or motorcycle he sends temporarily upon the road. The annual fee for such dealers' registration of a general distinguishing number shall be fifteen (\$15.00) dollars, and additional number desired by any dealer, not exceeding five, will be assigned and registered for a fee of five (\$5.00) dollars each. All the other provisions of this Act shall apply in case of dealers' registration. [Id., § 21.]

**Art. 7012 $\frac{1}{2}$ f. Motor vehicles owned by non-residents; authority to Chairman of Commission to accept service of process; to procure seal after 30 days.**—Motor vehicles owned by citizens of other States temporarily in this State, will be exempt from the provisions of this Act for a period of ninety days, if they show the State Highway Department that they have complied with similar laws of some other State, or of a municipality of another State, providing adequate identification of such motor vehicle or motorcycle. Provided, however, that if such citizen of another State, shall remain in Texas longer than thirty days, he shall execute authority to the Chairman of the State Highway Commission to accept service in his behalf in any action that may be brought against him in the courts of this State, because of the use in this State of such motor vehicle or motorcycle. Provided, further, that if such citizen of another State, shall remain in Texas longer than thirty days, he shall be required, and it shall be his duty, to apply for and to receive from the State Highway Commission, a seal bearing such identification as the Commission may require, for which seal a fee of one (\$1.00) dollar will be required. [Id., § 22.]

**Art. 7012 $\frac{1}{2}$ g. State highway fund; disbursement; distribution among counties; how expended by counties.**—All funds coming into the hands of the Highway Commission, derived from the registration fees hereinbefore provided for, or from other sources, as collected, shall be deposited with the State Treasurer to the credit of a special fund designated as "The State Highway Fund," and shall be paid only on warrants issued by the State Comptroller upon vouchers drawn by the Chairman of the Commission and approved by one other member of the Commission, such vouchers to be accompanied by itemized sworn statements of the expenditures, except when such vouchers are for the regular salaries of the employes of the Commission. The said State Highway fund shall be expended by the State Highway Commission for furtherance of public road construction and the establishment of a system of State highways, as contemplated and set forth in this Act; provided, that semi-annually, on the first days of September and March respectively, beginning with September 1, 1917, one-half of the gross collections of registration fees from all motor vehicles and motorcycles, received from the several counties of the State by the State Highway Department, as provided in this Act, shall be remitted to the county treasurer in the counties from which such collections were respectively made; and provided further, that such allotment of registration fees to the counties, shall constitute a special fund to be expended by or under the direction of the commissioners' courts of the respective counties in the maintenance of the public roads of such counties in accordance with plans approved by the State Highway Department. [Id., § 23.]

Sec. 24 is set forth post as art. 820a of the Penal Code.

**Art. 7012½h. Municipal registration abolished; exception of vehicles for hire.**—The certificate of refistration and numbering for purposes of identification, and the fees hereinbefore provided for, shall be in lieu of all other similar registrations heretofore required by any county, municipality, or other political sub-division of the State, and no such registration fees of other like burdens, shall be required of any owner of any motor vehicle or motorcycle by any county, municipality or other sub-division of the State. But this provision shall not affect the right of incorporated cities and towns to license and regulate the use of motor vehicles for hire in such corporation; provided the nothing in this Act shall anyway authorize or empoyer any county or incorporated city or town in this State to levy and collect any occupation tax or license fees on motorcycles, automobiles or motor. [Id., § 25.]

**Explanatory.**—The printed session laws contains the notation that H. B. No. 2, as enrolled, contains duplicate pages covering section 25, and sets forth the section as it appears on the duplicate. It reads the same as the original in all respects except that the word "refistration" in the opening words is correctly spelled "registration," and the closing words are "fees on motorcycles, motor vehicles or motor trucks," instead of "fees on motorcycles, automobiles or motor," as set forth above.

See arts. 819, 820, Vernon's Pen. Code 1911, imposing a criminal penalty for act similar to those denounced by this section.

**Art. 7012½i. Repeal; partial invalidity.**—All laws and parts of laws in conflict with the provisions of this Act are hereby repealed; and if any Section, sub-division or clause of this Act, shall be held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. [Id., § 27.]

**Art. 7012½j. Register and index of motor vehicles; public inspection; mailing lists to counties.**—Upon the receipt by the Highway Department of an application for registration of a motor vehicle accompanied by the fee required by law to entitle such motor vehicle to registration, the Department shall file such application and shall alphabetically and also numerically, register and correctly index such motor vehicles with the name, residence and business address of the owner, together with the facts stated in such application in a book to be kept for the purpose, under the distinctive number assigned to such motor vehicle by the said department, which book shall be kept open to the inspection of the public during reasonable office hours.

The department shall on or before the first day of August, 1917, and on or before the first day of February of each succeeding year thereafter, make out and mail to the clerk of each county court in this state, and to the chiefs of police of every incorporated city in this state, a full and accurate list made up in alphabetical and numerical order of all motor vehicles so registered, stating the distinctive numbers so assigned to them, the name, residence and business address of the owner, manufacturer or dealer, as the case may be; and at the expiration of every sixty days thereafter a similar list of the additional registrations or changes in registration, such list to be kept on file by said county court clerks and by the said chiefs of police in a conspicuous place in their respective offices, and to be open to the inspection of the public during reasonable hours. [Act April 9, 1917, ch. 207, § 1.]

**Note.**—See art. 7012½a, ante. Criminal provisions of this act are set forth post as arts. 820aa-820z, 826a, 1022a, 1259aa, 1259bb, 1259cc, 1621a of the Penal Code.

**Art. 7012½k. Seals and number plates.**—The Department shall furnish without charge with transportation prepaid, to every person whose motor vehicle is registered as required by law, one seal of such size, color, description, shape and material as may be adopted by the said

department for any year, and bearing such insignia, words or figures thereon as may be determined by the said department, which shall be attached and conspicuously displayed at all times upon the front end of such motor vehicle, other than a motorcycle, and said seal to be placed conspicuously on the rear of each motorcycle.

The department shall furnish free of cost, with each first seal a number plate, but if same shall be destroyed or lost it shall be replaced at the expense of the owner by another substantially sufficient to meet the requirements of this law. [Id., § 2.]

See art. 7012 $\frac{1}{2}$ a, ante.

**Art. 7012 $\frac{1}{2}$ l. Unsafe vehicles; revocation of registration.**—If the said department shall determine at any time that a motor vehicle is unsafe or improperly equipped, or otherwise unfit to be operated upon the public highways, it may refuse to register such vehicle, and said department may for a like reason revoke any registration already required. [Id., § 3.]

**Art. 7012 $\frac{1}{2}$ m. Delinquency in payment of fee; penalty; lien; foreclosure.**—The registration fee required to be paid upon a motor vehicle shall become delinquent in case of any such vehicle forthwith upon the operation of the vehicle upon the public highways without the registration fee required by law first having been paid to the Department, accompanied by the application for registration provided by said Department.

It is hereby provided, in addition to any and all other penalties, that if at the expiration of thirty (30) days after any registration fee becomes delinquent such fee has not been paid and registration applied for, a penalty shall be added to the amount of such fee in an amount equal to twenty-five per cent of the fee required, and such fee, together with the amount of said penalty, shall be a lien upon the motor vehicle upon which said registration is delinquent, and the department shall have power, and it is hereby made its duty to collect the said registration fee, together with the penalty by foreclosure upon and by sale of such motor vehicle. The sale herein authorized shall be conducted and carried out by the Department in the same manner as is provided by law for the sale of personal property by the county tax collector for collection of taxes due on personal property. [Id., § 6.]

**Art. 7012 $\frac{1}{2}$ n. License to chauffeur; application; badge; record; report to county clerks, etc.**—An application for a license to operate a motor vehicle as a chauffeur, (and by "chauffeur" is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire), shall be made by mail or otherwise to the Department upon blanks prepared for such purpose, and shall be accompanied by an annual fee of \$3.00, provided that the first fee payable under this act shall be \$2.00 for the period of time expiring December 31, 1917, and said fee shall be payable on July 1, 1917, and thereafter on the first of January of each year there shall be paid by each chauffeur to the Department a fee of \$3.00, accompanied by the application, as herein provided for; provided, that any person wishing to engage in the business of a chauffeur at any time after January 1, 1918, shall pay \$3.00 when making his application which shall pay his license fee till the 31st of December following the date of such application. The application for license to be issued to a chauffeur shall be in conformity with the requirements prescribed by the Department, and shall be sworn to by the applicant, and shall also, after being sworn to, be endorsed and vouched

for by two reputable citizens of the place where the said applicant lives or resides at the time of making such application, setting forth that they have known or been acquainted with the applicant for a period of not less than sixty days prior thereto, and that the said applicant is trustworthy, sober and competent to operate motor vehicles upon the highways of this State. Upon the receipt of such application, and provided the Department is satisfied that the applicant is a proper party to whom a chauffeur's license should be issued, and is over eighteen years of age, they shall issue to him a distinguishing number or mark, and shall also issue to him a license certificate in such form as the Department may determine.

At the time of issuing said certificate to the chauffeur the Department shall also mail or deliver to him, free of charge, a metal badge to be at all times prominently displayed on his clothing when engaged in the operation of motor vehicles on the public highways or in prosecuting his said business.

Upon the receipt of such applications to be licensed as a chauffeur the Department shall record the same in the office in a book kept for that purpose in the manner designated for recording the registrations of the owners of motor vehicles, and when the Department has issued license certificate and assigned to him a badge number, such applicants' names shall be noted in said records; and the names of the licensed chauffeurs shall be furnished to the county clerks and chiefs of police of the cities of this State in the same manner as is provided with respect to the owners of motor vehicles. [Id., § 25.]

**Competency of driver of automobile.**—A mistake of judgment as to the competency of the driver of an automobile, however honestly made, is not a defense to a suit for injury caused by his negligence. *Prince v. Taylor* (Civ. App.) 171 S. W. 826.

An automobile is not a dangerous instrument per se when operated by a careful and competent driver, but a powerful heavy machine operated by an 85-pound boy 11 years of age along the streets of a populous town may become a menace to other persons on the streets. *Allen v. Bland* (Civ. App.) 168 S. W. 35.

**Art. 7012½o. Revocation of chauffeur's license for drunkenness.**—Provided that if it shall be made to appear to the satisfaction of the Department that any chauffeur shall have driven or operated a motor vehicle within this State while under the influence of intoxicating liquor during the period of such license, the Department shall thereupon immediately cancel the license of said chauffeur and shall not renew the same until after the expiration of six months from and after the date of such cancellation. [Id., § 26.]

The above is a proviso to sec. 26 of the act. The rest of the section is set forth post as art. 820t of the Penal Code.

**Art. 7012½p. Badge of chauffeur good only during term of license; loss of badge.**—The badge issued to the chauffeur by the Department shall be valid only during the term of the license of the chauffeur to whom it is issued. Upon filing in the office of the Department an affidavit to the effect that the original badge is lost, stolen or destroyed, and upon the payment of the fee of one (\$1.00) dollar, a duplicate badge will be furnished. [Id., § 27.]

**Art. 7012½q. Record of license of chauffeurs.**—Upon the receipt of an application for a chauffeur's license the Department shall thereupon file the same and register the application in a book or on index card which shall be kept in the same manner subject to public inspection as the books or index cards for the registration of motor vehicles. [Id., § 28.]



**Art. 7012½r. Definition of terms.**—Wherever the word “Department” is used in this Act, is meant the Highway Department of this State. “Motor Vehicle” wherever used in this Act shall include all vehicles propelled otherwise than by muscular power, except such vehicles that run upon rails or tracks. “Automobile” as used includes all motor vehicles excepting motorcycles. “Motorcycle” as used in this Act shall include all motorcycles designed to travel on not more than three wheels in contact with the ground. [Id., § 41.]

**Art. 7012½s. Partial invalidity.**—If any section, sub-section or clause of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of any of the remaining portions of this Act. [Id., § 42.]

**Art. 7012½t. Printed pamphlet of laws to be furnished to motor vehicle owners.**—The Highway Department of this State shall, as soon as practicable after the passage of this Act, cause to be printed in pamphlet form one hundred and fifty thousand copies of this Act, including therein all the other laws of this State regulating the use of public highways in this State by motor vehicles and other vehicles, together with all the laws fixing penalties regarding the same, which shall be distributed on demand without charge. When such supply is exhausted the Department shall cause such additional copies thereof to be printed from time to time as may be found necessary. The Department shall mail a copy of such pamphlet to each motor vehicle owner and chauffeur at the time it mails out to him this certificate of registration or license provided for in this Act. [Id., § 43.]

## TITLE 120

## SALARIES

Chap.  
1. Executive officers.

Chap.  
4. Miscellaneous officers.

## CHAPTER ONE

## EXECUTIVE OFFICERS

Art.  
7047. Salary of governor.  
7050. [Superseded.]  
7051. Commissioner of agriculture.

Art.  
7052. Commissioner of insurance and banking.  
7054. [Superseded.]

**Article 7047. [4818] Governor.**

Appropriation for Governor's mansion.—A bill appropriating money for water, fuel, lights, etc., for the Governor's mansion, containing items for food, liquors, groceries, and automobile repairs for the Governor's private use, is violative of Const. art. 3, § 50, providing that the Legislature shall have no power to authorize the giving or lending of the credit of the state. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

**Art. 7050. [4827].**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the superintendent at \$4,000.

**Art. 7051. Commissioner of agriculture.**

By Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, the salary of the Commissioner is fixed at \$3,600.

**Art. 7052. Commissioner of insurance and banking.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b.

**Art. 7054. [4834].**

Superseded. See arts. 7085a-7085e, post.  
See art. 5767a.

## CHAPTER FOUR

## MISCELLANEOUS OFFICERS

Art.  
7068, 7069. [Superseded.]  
7074, 7075. [Superseded.]  
7076. Commissioner of pensions.  
7077. [Superseded.]  
7079. [Superseded.]  
7080. State mining inspector.  
7081, 7082. [Superseded.]  
7083. Game, fish and oyster commissioner.  
7084. [Superseded.]  
7085. State insurance board.

Art.  
7085a. Salaries of certain officers, assistants, deputies and employés.  
7085b. Enumeration.  
7085c. Those not enumerated to receive compensation fixed by appropriation bills.  
7085d. Traveling and other expenses to be fixed by appropriation acts.  
7085e. Repeal.

**Article 7068.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the purchasing agent at \$3,000.

**Art. 7069.**

Superseded as to superintendent of orphans' home by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b.

**Art. 7074. [4830].**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the revenue agent at \$2,100.

**Art. 7075. [4833].**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing salary of superintendent at \$1,500, and \$250 additional for looking after buildings outside of Austin.

**Art. 7076. Commissioner of pensions.**

See, also, art. 7085b, fixing salary of commissioner at \$2,000

**Art. 7077.**

Superseded by art. 7085b, fixing salary at \$2,400.

**Art. 7079.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the "Pure Food and Dairy Commissioner" at \$3,000.

**Art. 7080. State mining inspector.**

Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixes the salary of the inspector at \$2,000.

**Art. 7081.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the librarian at \$2,000.

**Art. 7082.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the two members of the board of pardon advisers at \$2,500.

**Art. 7083. Game, fish and oyster commissioner.**

Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixes the salary of the commissioner at \$2,500.

**Art. 7084.**

Superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the tax commissioner at \$2,500.

**Art. 7085. State insurance board.**

See art. 7085b, post, fixing salary of Commissioner of Insurance and Banking.

**Art. 7085a. Salaries of certain officers, assistants, deputies and employés.**—That from and after the passage of this Act the following named officers, assistants, deputies, clerks and employés in the employ of the State Government of the State of Texas, shall receive for their services as such officers, assistants, deputies, clerks and employés, the following annual salaries which are hereby fixed and established at the respective amounts herein set out. [Act June 5, 1917, 1st C. S., ch. 48, § 1.]

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

**Art. 7085b. Enumeration.**—The Adjutant General shall receive an annual salary of three thousand dollars.

The assistant Adjutant General and Chief Clerk shall receive an annual salary of Two Thousand Dollars.

The Quartermaster shall receive an annual salary of Two Thousand Dollars.

The Commissioner of Agriculture shall receive an annual salary of Thirty Six Hundred Dollars.

The Chief of the department of plant, pathology of said department of Agriculture shall receive an annual salary of Twenty One Hundred Dollars.

The Chief Clerk in the Department of Agriculture shall receive an annual salary of Two Thousand Dollars.

The Chief Inspector of Nurseries in said department of Agriculture shall receive an annual salary of Two Thousand Dollars.

The two members of the Board of Pardon Advisors shall receive an annual salary of Twenty Five Hundred Dollars.

The State Superintendent of Public Instruction shall receive an annual salary of Four Thousand Dollars.

The State Revenue Agent shall receive an annual salary of Twenty One Hundred Dollars.

The Chairman of the Industrial Accident Board shall receive an annual salary of Four Thousand Dollars.

Each of the other two members of the Industrial Accident Board shall receive an annual salary of Three Thousand Dollars.

The Superintendent of the Tuberculosis Sanitorium at Carlsbad, shall receive an annual salary of Twenty Five Hundred dollars.

The Secretary of the Industrial Accident Board shall receive an annual salary of Twenty-five hundred dollars.

The State Tax Commissioner shall receive an annual salary of Twenty-five hundred dollars.

The State Purchasing Agent shall receive an annual salary of three thousand dollars.

The Chief Clerk in the office of State Purchasing Agent shall receive an annual salary of two thousand follars.

The State Librarian shall receive an annual salary of two thousand dollars.

The inspector of Masonry, Public Buildings and Grounds shall receive an annual salary of two thousand dollars.

The State Inspector of Mines shall receive an annual salary of two thousand dollars.

The Game, Fish and Oyster Commissioner shall receive an annual salary of twenty-five hundred dollars.

The Chief Deputy in the office of the Game, Fish and Oyster Commissioner shall receive an annual salary of two thousand dollars.

The Commissioner of Pensions shall receive an annual salary of two thousand dollars.

The Superintendent of Buildings and grounds shall receive an annual salary of one thousand and five hundred dollars, and shall receive in addition thereto, as long as he shall be required to look after the State's property outside of Austin, the sum of two hundred and fifty dollars annually.

The Superintendent of the State Orphans' Home shall receive an annual salary of two thousand dollars together with provisions for himself and family not to exceed five hundred dollars per annum, with fuel, lights, laundry, water and housing.

The President of the State Board of Health shall receive an annual salary of three thousand dollars.

The Assistant Health Officer shall receive an annual salary of twenty four hundred dollars.

The Registrar of Vital Statistics shall receive an annual salary twenty four hundred dollars.

The Chemist and Bacteriologist in the Health Department shall receive an annual salary of twenty one hundred dollars.

The Commissioner of Labor shall receive an annual salary of twenty four hundred dollars.

The Inspectors in the Bureau of Labor Statistics shall receive an annual salary of eighteen hundred dollars.

The Chairman of the Live Stock and Sanitary Commission shall receive an annual salary of twenty five hundred dollars.

Each of the other two members of the Live Stock and Sanitary Commission shall receive an annual salary of one thousand two hundred and fifty dollars.

The Pure Food and Dairy Commissioner shall receive an annual salary of three thousand dollars.

The Chemist in the Pure Food and Dairy Department shall receive an annual salary of twenty four hundred dollars each.

The Inspectors in the Pure Food and Dairy Department shall each receive an annual salary of fifteen hundred dollars.

The Manager of the Warehouse and Marketing Department shall receive an annual salary of three thousand and six hundred dollars.

The Chief Clerk in the Ware House and Marketing Department shall receive an annual salary of two thousand dollars.

The State Expert Printer and Secretary of the State Printing Board shall receive an annual salary of Two Thousand Dollars.

The Commissioner of Insurance and Banking shall receive an annual salary of Four Thousand and he shall also receive, as long as he shall exercise the functions fixed by statute, the sum of one thousand (\$1,000.00) dollars, salary as Ex-Officio Superintendent of Banking, and a like sum of Five Hundred dollars annually as Chairman of the State Fire Insurance Commission.

The store keepers and accountants of the various eleemosynary institutions shall receive an annual salary to be fixed in the General Appropriation bills from year to year, not to exceed Twelve Hundred (\$1,200.00) dollars. [Id., § 2.]

**Explanatory.**—The title of the act attempts to enumerate the various officers listed in this article. In such enumeration the Chief Clerk in the Department of Agriculture, the Superintendent of the Tuberculosis Sanitorium at Carlsbad, and the storekeepers and accountants of the various eleemosynary institutions are omitted. After the enumeration the words "and other assistants, deputies, clerks and employes, providing for the necessary traveling and other expenses incurred," etc., appear, but this would seem to have reference to sections 3 and 4 of the act, post, arts. 7085c, 7085d.

**Art. 7085c. Those not enumerated to receive compensation fixed by appropriation bills.**—Other assistants, deputies, clerks, and employes in the various departments of the State Government, other than those specifically provided for herein, shall receive such compensation as shall be fixed and provided for in the General Appropriation Bills for the support of the State Government by the Legislature of the State. [Id., § 3.]

**Art. 7085d. Traveling and other expenses to be fixed by appropriation acts.**—The traveling and other necessary expenses incurred by the various officers, assistants, deputies, clerks and other employes in the various departments of the State Government, in the active discharge of their duties, shall be such as are specifically fixed and appropriated for by the Legislature in the General Appropriation Bills providing for the expenses of the State Government from year to year. [Id., § 4.]

**Art. 7085e. Repeal.**—The terms hereof fixing and establishing the salaries and allowances of expenses and the other provisions of this Act shall be superior to those in any other Act or Statute of the State conflicting herewith and as to the specific provisions of this Act, such conflicting sections, provisions and terms of other and prior Acts and Statutes are hereby repealed. [Id., § 5.]

## TITLE 121

## SEALS AND SCROLLS

Art. 7092. Private seals and scrolls dispensed with.	Art. 7093. Unsealed instruments held to import consideration.
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**Article 7092. [4862] Private seals and scrolls dispensed with.**

**Contracts and conveyances by corporations.**—This article does not make all contracts by corporations void unless under seal, but merely leaves the law as it was before, under which a seal was required to a deed of land by a corporation, but not to a contract to convey land. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

In a suit to adjust the equities, the holder of a prior vendor's lien could not question the sufficiency of a deed by a corporation to the person who erected the improvements upon which a mechanic's lien was claimed, because its corporate seal was not attached, where the corporation was not objecting to the mechanic's lien, nor seeking to repudiate its deed. *Id.*

**Art. 7093. [4863] Unsealed instruments held to import consideration, etc.**

**Written contracts import consideration.**—The grantor of plaintiff having only a bond for deed, not reciting payment, though it is under seal, plaintiff must show payment of consideration, against defendant in possession not shown to be without title. *Randell v. Robinson* (Civ. App.) 172 S. W. 735.

A written contract, by statute, imports a consideration. *Crawford v. Woods* (Civ. App.) 185 S. W. 667.

Under this, and article 1906, concerning the impeachment of the consideration of a written instrument, in an action on a written policy, it was not necessary for the plaintiffs to allege in their pleadings that the written contract sued upon was based upon a sufficient consideration. *Royal Neighbors of America v. Heard* (Civ. App.) 185 S. W. 882.

By direct provision of this article, a written contract imports consideration in the same manner and as fully as sealed instruments. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Under this article, in an action against a carrier for delay in furnishing cars pursuant to alleged oral agreement, where defendant pleaded a subsequent written contract for transportation, held, that it was incumbent upon plaintiff to allege and prove want of consideration for written contract. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

**Admissibility in evidence.**—Where a written contract does not show upon its face a want of consideration, it is admissible in evidence, without proof aliunde of a consideration. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

## TITLE 122

## SEQUESTRATION

Art.	Art.
7094. In what cases to be issued.	7107. How judgment may be discharged.
7095. Affidavit, and what it shall state.	7108. When the property has been injured.
7097. Bond for the writ.	7109. Execution shall issue when.
7099. Writ of, and its requisites.	7110. Replevy by plaintiff; bond.
7103. Defendant may replevy by giving bond.	7111. Bond shall be returned, and the proceeding thereon if forfeited.
7104. Bond in case of personal property.	7112. Defendant not required to account for hire, etc., when.
7105. In case of real estate.	
7106. Return of bond and judgment thereon.	

**Article 7094. [4864] In what cases to be issued.**

**"Injury" to goods.**—Where plaintiff put a truck in defendant's hands to use, fear that such use would lessen its sale price is not fear that defendant would "injure" it, ground for sequestration under this article. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

**Immaterial questions.**—In an action by two persons to recover mules, or their value, which were claimed to have been converted by defendant, the question whether plaintiffs were partners and whether one plaintiff had paid the other for his interest therein was immaterial. *Coody v. Shawyer* (Civ. App.) 161 S. W. 935.

**Art. 7095. [4865] Affidavit, and what it shall state.**

**Sufficiency of affidavit.**—An affidavit for a writ of sequestration was not fatally defective because it did not allege that the ground stated therein was within affiant's knowledge true and correct. *Power v. First State Bank of Crowell* (Civ. App.) 162 S. W. 416.

Where an affiant for sequestration verified the matter stated in the statute as grounds for issuance of the writ, that it did not contain a statement that the facts were true within affiant's knowledge was not ground for suppression. *Id.*

A judgment in sequestration is not void because the affidavit did not allege the amount of attorney's fees. *Hawkins v. First Nat. Bank of Canyon, Tex.* (Civ. App.) 175 S. W. 163.

The affidavit for issuance of writ of sequestration, stating the total amount sued for, need not state the different items of indebtedness claimed to be due; but it is enough that they are stated in the petition. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

**Variance in amended petition.**—Where plaintiff's petition and affidavit for sequestration state the date of mortgage securing subsequent debts, the additional allegation in the amended petition, of oral agreement, when a subsequent note was given, that the mortgage should secure it, is not a variance requiring quashing of sequestration proceedings. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

**Art. 7097. [4867] Bond for the writ.**

**Disqualification as surety.**—One by making affidavit as agent for plaintiff for issuance of writ of sequestration, did not make himself a party to the suit, so as to disqualify him to be a surety on the sequestration bond. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

**Liability for wrongful sequestration.**—One having right under his chattel mortgage to take possession of the property cannot, because doing so by sequestration be liable for wrongful sequestration. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

Where a bank held a mortgage on sheep, neither the bank nor its president could be charged with actual damages on account of the president's improper affidavit to secure issuance and levy of a writ of sequestration; the bank having a right to the writ. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

Where the president of a bank holding a mortgage on sheep in pursuance of a writ of sequestration, the issuance of which was authorized by the bank, provided an inadequate pasture for the sheep, and directed the sheriff to use such pasture, the bank and the president were liable for damages to the sheep occasioned thereby. *Id.*

**Actions on bonds or for wrongful sequestration—Malice.**—The owner of premises was not liable for exemplary damages on account of malice of her agent in wrongfully suing out a writ of sequestration against her tenant, unless the evidence showed she participated in the malice, or afterwards with knowledge of the facts ratified the act. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

When a want of probable cause for the suing out of a writ of sequestration is shown, malice may be inferred therefrom. *Id.*

In suit for a wrongful sequestration, if the evidence shows honesty of purpose and not intention on the part of the suitor for the writ to injure or recklessly disregard the

rights of the person against whom it is issued, the conclusion, from the absence of probable cause, that the writ was sued out maliciously, is unwarranted. *Id.*

— **Damages in general.**—Where owner of sheep, sequestered at instance of a bank, and injured by failure to provide adequate pasturage, expended money in caring for the sheep, such money was a proper measure of damages. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

The value of lambs which would have been born but for the ill treatment of the ewes in getting insufficient pasturage was not a proper element of damages. *Id.*

A boarding house keeper against whom a writ of sequestration was wrongfully sued out, destroying her business, was under duty to use all reasonable means to secure another place in which to conduct a boarding house and thereby mitigate her loss. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

Where the business of a boarding house keeper was destroyed by a wrongful sequestration, she could recover for loss of profits. *Id.*

In a suit for a wrongful sequestration, the award, as actual damages, of \$500 for humiliation and grief, could not stand. *Id.*

Evidence held sufficient to sustain a verdict of \$1,500 for actual damages for wrongful sequestration of a motor truck during a period of ten months. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

— **Exemplary damages.**—Exemplary damages for wrongfully suing out a writ of sequestration cannot be awarded, where there was no finding of actual damages. *Hawkins v. Cook* (Civ. App.) 178 S. W. 624.

In an action for damages to sheep seized under an illegally issued writ of sequestration, an award of exemplary damages for making the affidavit for sequestration without probable cause was improper where the award of actual damages was for the owner's expenditure necessitated by the negligent handling of the sheep. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

A verdict of \$2,000 for punitive damages for sequestration of a motor truck where the actual damages were \$1,500 cannot be said to be the result of improper motive. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

#### Art. 7099. [4869] Writ and its requisites.

**Identity of property.**—Under an order for the foreclosure of a chattel mortgage on a piano, held, that a piano in possession of appellant, who was not the mortgagor, of a different number than that specified in order and writ providing a seizure and sale, could not be taken. *Lawrence v. Story & Clark Piano Co.* (Civ. App.) 183 S. W. 1187.

**Motion to quash.**—A writ of sequestration held not subject to motion to quash for variance between the sheriff's return and the mortgage under which the property was taken. *Hawkins v. First Nat. Bank of Canyon, Tex.* (Civ. App.) 175 S. W. 163.

#### Art. 7103. [4873] Defendant may replevy by giving bond.

Cited, *Adams v. Burrell* (Civ. App.) 161 S. W. 51; *Ingram v. Brown & McFarland* (Civ. App.) 173 S. W. 524; *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101.

**Persons entitled to replevy.**—Under this article, plaintiffs, in suit to enjoin seizure of property under writ of sequestration issued in trespass to try title, who were not parties to such suit, against the tenant of one of them, could not replevy the property. *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

**Recovery on replevy bond.**—Where owner brings trespass to try title against a naked trespasser having a crop growing on land, and who during pendency of suit replevies and sells crop, the owner may recover on replevy bond the value of the crop. *Finchback v. Swasey* (Civ. App.) 194 S. W. 446.

**Refusal to quash writ.**—Where a writ of sequestration was sued out on a cross-action setting up title to the entire tract and praying judgment therefor under the ordinary allegations, and to this cross-action plaintiffs pleaded not guilty, and the writ was levied on the entire tract, a refusal to quash the writ and requiring plaintiffs to replevy the entire tract was not error, though they had sued for only one-half interest. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

**Contesting title.**—That defendant in sequestration, under arts. 7094-7118, gave the statutory replevin bond and sold the property pending the suit to a third person was no defense to plaintiff contesting the title with the third person in the statutory proceeding for the trial of the right of property. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

#### Art. 7104. [4874] Bond in case of personal property.

Cited, *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

**Liability on bond.**—Where a wife, though not a party, joined with her husband in replevying property which had been sequestered, and executed with him a joint bond claiming the property as her separate estate, she became bound for rents and damages to it while in their possession under the bond. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Where one who replevied property, giving the bond required by this article, sold it, his liability and that of his sureties became then fixed, and the fact that the property had subsequently depreciated cannot be taken advantage of. *Crenshaw v. Staples* (Civ. App.) 173 S. W. 1184.



**Art. 7105. [4875] In case of real estate.**

Cited, *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443.

**Art. 7106. [4876] Return of bond and judgment thereon.**

Cited, *Coward v. Sutfin* (Civ. App.) 185 S. W. 378; *Kalmans v. Baumbush* (Civ. App.) 187 S. W. 697.

**In general.**—The court may properly adjudicate the question of rent of property or injury thereto after it has been sequestered and replevied. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

A surety on a replevin bond given in sequestration proceedings must leave the conduct of the case with his principal, and is liable only for the forthcoming of the property replevied. *Hawkins v. First Nat. Bank of Canyon, Tex.* (Civ. App.) 175 S. W. 163.

The sureties on a bond for replevin of sequestered property held, under this article, liable for its value, and not the mere amount thereof stated in plaintiff's petition and affidavit for sequestration. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

A bond for replevin of sequestered property held, as regards liability, a statutory bond, and not a common-law bond, though condition to pay "said," instead of "the," value. *Id.*

In suit to recover hides, where plaintiff issued writ of sequestration and defendants replevied, a verdict for plaintiff should have disposed of the issue of title, and, if that issue was resolved in his favor, should have found the value of each of the replevied hides. *Herrera v. Marquez* (Civ. App.) 182 S. W. 1143.

The damages should be determined by the hides' market value at the time of trial when the question arises in the original suit and under this article. *Id.*

**Collateral attack on judgment on bond.**—In a collateral attack on a judgment for the amount of a replevy bond, the question whether the judgment should have been for the amount of the bond or for the value of the property replevied cannot be considered. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

**Art. 7107. [4877] Defendant may discharge judgment by return of property, etc.**

Cited, *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

**In general.**—Under this article, authorizing obligors on a sequestration bond to return the property or any portion thereof, a verdict and judgment on the bond must find the value of the several items of property replevied. *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

A judgment against the sureties on a replevy bond should, under this article, provide that a delivery to and acceptance by the sheriff of the property replevied should, as to them, operate as a satisfaction of the judgment. *Ingram v. Brown & McFarland* (Civ. App.) 173 S. W. 524.

A verdict for plaintiff on the issue of title should have found the value of each of the replevied hides, in view of defendant's right, under this article, to return them in satisfaction of judgment. *Herrera v. Marquez* (Civ. App.) 182 S. W. 1143.

**Art. 7108. [4878] When the property has been injured, etc.**

Cited, *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80; *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

**Right to return damaged property.**—Under this article, appellant, who replevied property sequestered in divorce action, is entitled to return it, though it was damaged during the interim, upon paying amount of damage. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

**Harmless error.**—That a judgment for plaintiff in a divorce action against a claimant, who replevied sequestered property provided for return only in event the property was uninjured, held harmless, as claimant could in any event return under this article. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

**Art. 7109. [4879] Execution shall issue, when.**

Cited, *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

**Art. 7110. [4880] Plaintiff may replevy, when, and his bond.**

Cited, *Adams v. Burrell* (Civ. App.) 161 S. W. 51.

**Right to complain of failure to render judgment on sequestration bond.**—Plaintiff in an action to recover on a note and to foreclose a mortgage on mules, who took them, as authorized by this article, could not complain of the court's failure to render judgment for defendant against him on a sequestration bond, as authorized by article 7111. *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986.

**Art. 7111. [4881] Bond shall be returned, and the proceedings thereon if forfeited.**

Cited, *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

**In general.**—In trespass to try title, where plaintiffs after sequestration obtained possession by filing a replevin bond held that on judgment for defendant they were liable for unlawfully cutting and removing timber belonging to the defendants. *Adams v. Burrell* (Civ. App.) 161 S. W. 51.

Plaintiff in an action to recover on a note and to foreclose a mortgage on mules, who took them, as authorized by Vernon's Sayles' Ann. Civ. St. 1914, art. 7110, could not complain of the court's failure to render judgment for defendant against him on a sequestration bond, as authorized by article 7111. *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986.

**Dismissal by plaintiff.**—Under articles 1898-1900, 1955, relating to voluntary dismissal, and this article, as to sequestration, held that though plaintiff in sequestration dismissed suit during vacation, defendant, though he did not answer, was entitled to have all issues settled and to proceed in original suit for relief on the bond. *Hill v. Patterson* (Civ. App.) 191 S. W. 621.

**Art. 7112. [4882] Defendant not required to account for hire, etc., when.**

**Liability for rents.**—This article is intended only to protect a mortgagor, and one not in privity with him, who takes possession of the property and replevies the same when sequestered, is responsible for rents thereof. *Fawcett v. Mayfield* (Civ. App.) 183 S. W. 111.

## TITLE 123

## SHERIFFS AND CONSTABLES

Chap.  
1. Of sheriffs.

Chap.  
2. Of constables.

## CHAPTER ONE

## OF SHERIFFS

Art.

## ELECTION AND QUALIFICATION

7121. Oath and bond.

## POWERS, DUTIES AND LIABILITIES

7125. May appoint deputies, etc.

7125a. During state of war commissioners' court may authorize employment of additional deputies.

Art.

7125b. Same; application of sheriff; qualifications of deputies.

7125c. Same; hearing and determination; modification of order; number of deputies.

7127. May employ guards.

7130. Shall execute all legal process.

## ELECTION AND QUALIFICATION

## Article 7121. [4892] Oath and bond.

**Liability on bond—In general.**—Where a sheriff released attached goods upon the filing of a defective replevin bond and the goods were later destroyed by fire and defendant was otherwise insolvent, the sheriff and his bondsmen will be liable for the amount of the debt and 10 per cent. thereof as statutory damages. *Hughes v. Willis* (Civ. App.) 191 S. W. 584.

The liability of sureties on a sheriff's bond is a matter of strict law, and cannot be extended by implication or intendment. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

Under sheriff's bond conditioned that he would faithfully perform all duties required of him by law, sureties held not liable to county for moneys paid sheriff under orders of commissioners' court upon claims which under no circumstances could be lawfully collected from the county. *Id.*

In view of art. 3866, sureties on official bond of sheriff to whom a salary was allowed and paid as compensation for summoning jurors, serving election notices, etc., held not liable to county for moneys paid the sheriff on claims for attending sessions of commissioners' court and for serving notices of election. *Id.*

In view of art. 7127, and Code Cr. Proc. 1911, art. 1148, sureties on official bond of sheriff held liable to county for moneys received by sheriff on account of jail guards which he had never employed. *Id.*

## POWERS, DUTIES AND LIABILITIES

## Art. 7125. [4896] May appoint deputies, etc.

**In general.**—Under this article, where sheriff appointed two deputies in justice precinct other than that where the county site was situated, one of whom was the active deputy, appointment of the other held illegal, and to give him no right to carry a pistol under Pen. Code, art. 476. *Ransom v. State* (Cr. App.) 165 S. W. 932.

**Art. 7125a. During state of war Commissioners' Court may authorize employment of additional deputies.**—That whenever a state of war exists between the United States and other nation, and the sheriff of any county in Texas may make written application, to the commissioners court of such county, representing that the gross fees of his office are insufficient, to compensate him in the maximum amount allowed him by law and to provide proper compensation to such number of deputies as are deemed by him adequate for the preservation of peace and the protection of persons or property and service and enforcement of process, civil and criminal, in said county, then the commissioners court of such county shall have final jurisdiction to be exercised either at a regular or

special term of said court, to pass upon and determine the merits of such application, and to grant or refuse same in whole or in part, provided that any action taken or order made by the commissioners court under this Act must be by unanimous vote of said Court. [Act May 19, 1917, 1st C. S., ch. 25, § 1.]

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

**Art. 7125b. Same; application of sheriff; qualifications of deputies.**—The said application of said sheriff shall be under oath, and shall state his estimate of the probable gross revenues of his office for the ensuing year, judged by past years, and shall name each present deputy of said sheriff and state the compensation paid each. It shall also state the number of additional deputies desired to be confirmed by the commissioners court and the compensation desired, in each instance of each deputy, to be allowed by the court to supplement or fully pay the salary of each deputy indicated; and shall further state that in the judgment of applicant each deputy, named or requested in said application, is a necessary aid to applicant in the faithful discharge of the duties of his office and the preservation of peace in such county, provided that no person shall be appointed a deputy sheriff, under the provisions of this Act, who is not a bona fide citizen of the United States of America and the State of Texas. [Id., § 2.]

**Art. 7125c. Same; hearing and determination; modification of order; number of deputies.**—The commissioners court, in determining such application, shall hear evidence thereon, and shall have final jurisdiction to decide all matters presented by said application, and to determine how many of the deputies indicated in said application are necessary, and to provide in each instance where deemed necessary by the court, a sum to be paid each deputy appointed under this Act, monthly, by the county, over and above all fees and allowances of said sheriff's office, and the court, in approving deputies and providing for their compensation, shall not be limited to the stipulated number of deputies permitted to a sheriff by laws in force prior to the passage of this Act. The order of the court made in said premises may be revoked or modified at any subsequent term, regular or special, of said court, after notice given said sheriff, and said order shall automatically cease, whenever the period of said war ceases, provided that the number of deputies appointed under this Act shall never exceed one for each 3000 of the population of said county, and provided further, that the number of deputies appointed under this Act shall not exceed 25 in any county in this State. [Id., § 3.]

**Art. 7127. [4898] May employ guards.**

**Liability of sureties.**—In view of this article, and Code Cr. Proc. 1911, art. 1148, sureties on official bond of sheriff held liable to county for moneys received by sheriff on account of jail guards which he had never employed. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

**Art. 7130. [4901] Shall execute all legal process.**

**Liability for injury to sequestered property.**—The liability for injury to property sequestered while in the exclusive control and safe-keeping of the officer levying the writ is his, and not that of the person obtaining the writ. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

## CHAPTER TWO

### OF CONSTABLES

Art.	Art.
1. ELECTION, QUALIFICATION, ETC.	2. POWERS, DUTIES AND LIABILITIES
7137. Election and term of office.	7145. Duties in general.
7138. Only one deputy.	7148. Failure to pay over collections.
7141. Bond and oath.	

#### 1. ELECTION, QUALIFICATION, ETC.

##### Article 7137. [4908] Term of office.

**Authority of constable to appoint deputies.**—That defendant carried a pistol as a deputy constable under the apparent authority conferred by a constable, who, under this and art. 7138, was without authority to appoint deputies, was a mistake of law, and no defense to a prosecution for carrying a pistol. *Johnson v. State*, 73 Cr. R. 133, 164 S. W. 833.

##### Art. 7138. Only one deputy.

**Authority of constable to appoint deputies.**—That defendant carried a pistol as a deputy constable under the apparent authority conferred by a constable, who, under this and art. 7137, was without authority to appoint deputies, was a mistake of law, and no defense to a prosecution for carrying a pistol. *Johnson v. State*, 73 Cr. R. 133, 164 S. W. 833.

##### Art. 7141. [4911] Bond and oath.

**Bond—Liability on.**—Where a constable took into his actual possession part of the cotton upon which he had levied execution and sold, after he had made due return to his writ, the seizure was not in his official capacity and his sureties were not liable. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

Under art. 5475, giving a preference lien to a landlord for advances, where cotton was levied upon by a constable and sold under execution against a tenant farmer to whom his landlord had made advances, and the buyer at the sale or his agent seized part of the crop sold, there was a conversion for which the constable and his sureties were liable. *Id.*

**Liability to state.**—Where commitments were issued by a justice court to a constable, none of which were ever returned into court, the constable and his sureties were liable to the state for the amount of the fines and costs adjudged against those against whom the commitments issued. *Wynne v. State* (Civ. App.) 158 S. W. 783.

#### 2. POWERS, DUTIES AND LIABILITIES

##### Art. 7145. [4915] Duties in general.

**Liability of employer of precinct constable.**—If precinct constable employed by defendant to keep order on grounds of his medicine show was acting within general scope of his duties as defendant's employé when he arrested plaintiff and ejected him from a tent, defendant was responsible for constable's action although it was in excess of actual instructions. *Rucker v. Barker* (Sup.) 192 S. W. 528.

##### Art. 7148. [4918] Failure to pay over collections.

Cited, *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Tort of employed constable.**—Where defendant's constable unlawfully and violently arrested plaintiff and ejected him from defendant's medicine show, malice would be imputed to constable because of unlawful nature of act. *Rucker v. Barker* (Sup.) 192 S. W. 528.

If defendant, proprietor of medicine show, was party either expressly or tacitly to violent and unlawful conduct of his constable in arresting and ejecting plaintiff from show and causing his imprisonment, a verdict for exemplary damages was warranted. *Id.*

In action against proprietor of medicine show for false imprisonment of plaintiff by defendant's constable, evidence held to warrant finding that constable made arrest pursuant to his authority as peace officer of the precinct. *Id.*

In such action evidence held to justify finding of tacit participation by defendant in constable's violent and unlawful conduct in arresting plaintiff. *Id.*

## TITLE 123 B

## STATE COUNCIL OF DEFENSE

Art. 7150½. Council created; membership; ap- pointment; qualifications.	Art. 7150½c. Employment of clerks, etc.; com- pensation of members; expenses.
7150½a. Tenure of members; vacancies.	7150½d. Expenses, how paid.
7150½b. Duties.	7150½e. Appropriation.

**Article 7150½. Council created; membership; appointment; qualifications.**—There is hereby created a State Council of Defense, composed of not exceeding forty members, who shall be selected and appointed by the Governor of Texas. The members of the Council shall include those engaged in agriculture, banking, labor, manufacturing, transportation, stock-raising, and other vocations and callings. [Act May 14, 1917, 1st C. S., ch. 8, § 1.]

Became a law May 14, 1917.

**Art. 7150½a. Tenure of members; vacancies.**—The members shall hold their membership in such Council during the period of the war in which the Nation is now engaged, and all vacancies shall be filled by the Governor of Texas. [Id., § 2.]

**Art. 7150½b. Duties.**—The duties of the Council herein created are to assist the National Council of Defense in all matters requested by said Council, or by the President of the United States or under his authority, and to that end the Council herein created is authorized to call upon the various civic, educational, and commercial activities of this State to assist in organizing the economic, industrial, military and moral forces of Texas to be used in the defense of our common country. [Id., § 3.]

**Art. 7150½c. Employment of clerks, etc.; compensation of members; expenses.**—The Council herein created shall have the right to employ such assistants and clerical force as may be necessary to carry on its work, but no member of the Council shall ever be paid any salary or per diem for his services, but may be paid for reasonable and necessary traveling expenses while engaged in performing his duties. [Id., § 4.]

**Art. 7150½d. Expenses, how paid.**—All bills and expenses incurred for salaries of assistants, or clerical hire and traveling expenses, or other necessary expenses, shall be approved by the Chairman of the Council of Defense and by the Governor of Texas before any voucher is issued for the payment of the same. [Id., § 5.]

**Art. 7150½e. Appropriation.**—There is hereby appropriated, out of any funds in the State Treasury not otherwise appropriated, for the payment of clerical hire, assistants, traveling expenses and other necessary expenses incurred by said Council of Defense, for the fiscal year ending August 31st, 1917, the sum of Ten Thousand (\$10,000.00) dollars, or so much thereof as may be necessary, and for the fiscal year ending August 31st, 1918, the sum of Fifteen Thousand (\$15,000.00) Dollars, or so much thereof as may be necessary. [Id., § 6.]

## TITLE 124

## STOCK LAWS

## Chap.

1. Of marks and brands.
2. Protection of live stock.
3. Of the sale, slaughter and shipment of animals.
5. Of the mode of preventing hogs and certain other animals from running at large in counties and subdivisions.

## Chap.

6. Of the mode of preventing horses and certain other animals running at large in particular counties named.
7. Regulations for the protection of stock raisers in certain localities.
8. Live Stock Sanitary Commission.

## CHAPTER ONE

## OF MARKS AND BRANDS

**Article 7160. [4930] Unrecorded brands no evidence; proviso.**

**Unrecorded brands as evidence.**—In action to recover hides with sequestration by plaintiff and replevy by defendants, held, that plaintiff's brand, although not properly recorded, was admissible to identify animals from which hides were taken if ownership of animals with that brand was otherwise shown, and, if not recorded, was admissible to identify them. *Herrera v. Marquez* (Civ. App.) 182 S. W. 1143.

**Evidence in criminal cases.**—Under this article, as amended by Acts 33d Leg. c. 69, evidence as to unrecorded brands on animals is admissible in criminal cases to prove ownership. *Turner v. State*, 71 Cr. R. 477, 160 S. W. 357; *Sullenger v. State* (Cr. App.) 182 S. W. 1140.

On trial for cattle theft prior to amendment of this article by Acts 33d Leg. c. 69, evidence as to unrecorded cattle brands held incompetent on the question of ownership. *Turner v. State*, 71 Cr. R. 477, 160 S. W. 357.

Under this article, as amended by Acts 33d Leg. c. 69, the state, on a trial for receiving stolen cattle, may show the original brands on the cattle, and that the brands had been subsequently burned. *Mooney v. State*, 76 Cr. R. 539, 176 S. W. 52.

## CHAPTER TWO

## PROTECTION OF LIVE STOCK

## Art.

7164. Payment for animals killed, fee, etc.  
 7166. Bounties for killing certain animals; exhaustion of appropriation.  
 7167. Scalps and affidavits, etc., to be presented to commissioners' court.  
 7168. Scalp defined; powers and duties of court, etc.

## Art.

- 7168a. Court to make statement; duties of comptroller and county treasurer.  
 7168b. Laws repealed; trespass not permitted.  
 7168c. Appropriation.

**Article 7164. [4934] Payment for animals killed; fee, etc.**

**Liability of county.**—Allegations that the county judge unlawfully ordered the killing of plaintiff's mules and horse without alleging that he did so under arts. 7161-7164, stated no cause of action against the county. *Riley v. Coleman County* (Civ. App.) 181 S. W. 743.

**Liability for killing on order of county court.**—Defendant killing plaintiff's mules and horse on order of judge of county court, who believed they were affected with glanders, was not liable to plaintiff in damages, where it was not shown that arts. 7161-7164, were not followed or that defendant was not a sheriff, deputy, etc., of the county. *Riley v. Coleman County* (Civ. App.) 181 S. W. 743.

**Art. 7166. [4936] Bounties for killing certain animals; exhaustion of appropriation.**—That hereafter when any person shall kill in this State any wolf, wild cat or jack rabbit, he shall be paid the sum of \$2.00 for each wolf, and \$1.00 for each wild cat, and 5 cents for each jack rabbit so killed; provided, that the State shall not be liable for

any claim arising under the provisions of this bill after the appropriation herein provided shall have been exhausted. [Acts 1903, p. 113, § 1; Acts 1911, p. 44, § 1; Act March 12, 1915, ch. 47, § 1.]

Took effect 90 days after adjournment of the legislature on March 20, 1915.

**Art. 7167. [4937] Scalps and affidavit, etc., to be presented to commissioners' court.**—The scalps of said animals so killed shall be presented by the person or persons having killed said animals in person to the commissioners court of the county in which said animal or animals were killed, accompanied by a written affidavit before the county judge of said county, or any other officer authorized to administer oaths, stating where and when he killed said animal, and the kind of each; that affiant in person and no other killed said animal or animals. [Acts 1903, p. 113, § 2; Acts 1911, p. 44, § 2; Act March 12, 1915, ch. 47, § 2.]

**Art. 7168. [4938] Scalp defined; powers and duties of court, etc.**—Such scalp shall consist of the scalp and both ears, so that the court may sufficiently identify the class of animals so killed; the court may in all cases, when it is not satisfied as to the sufficiency of the evidence before it, under this Act, reject any and all claims; the commissioners court shall immediately take and pass upon said scalp and burn the same, but in no case shall any commissioners court in this State be authorized under this Act to issue warrant for bounty on any scalp when presented with either ear of same disfigured in the least, cut, slit or any defect whatever, except such cut, slit or defect that may have been caused in shooting, trapping or killing the animal. Both ears must be absolutely whole, and such commissioners court shall issue certificate signed by at least three members of said court, and attested by the signatures of the clerk of said court, and under the seal of said court, showing the kind of animals killed and the number of each, and the name of the party who killed same, and the amount due such party. The clerk of the county court shall issue a warrant on the county treasurer for the amount specified, and payable to the party named in such certificate. [Acts 1903, p. 113, § 3; Acts 1911, p. 44, § 3; Act March 12, 1915, ch. 47, § 3.]

**Art. 7168a. Court to make statement; duties of comptroller and county treasurer.**—It shall be the duty of the commissioners court of the several counties of this State at each regular session of each year, to make an itemized statement showing the several amounts paid, to whom, and when paid, by order of said court under the provisions of this Act; said statement shall be entered upon the minutes of said court, and a certified copy of each statement shall be entered upon the minutes of said court, and a certified copy of such statement shall be transmitted by the clerk of said court to the Comptroller of the State. Upon receipt of said certified copy by the Comptroller, it shall be his duty to draw his warrant upon the State Treasurer for one-half of the aggregate amount paid out by such county, under the provisions of this Act, as shown by said certified copy of statement, payable to the treasurer of said county, which said amount, when received by said county treasurer, shall be by him credited to the fund of the third class of said county. [Acts 1911, p. 44, § 4; Act March 12, 1915, ch. 47, § 4.]

**Art. 7168b. Laws repealed; trespass not permitted.**—All laws and parts of laws in conflict herewith are hereby repealed; provided, that nothing herein contained shall permit any person to enter on the posted lands or premises of another for the purpose of hunting or trapping, or otherwise catching or trapping wild animals for their scalps without



having first obtained the consent of the owner. [Acts 1911, p. 44, § 5; Act March 12, 1915, ch. 47, § 5.]

**Art. 7168c. Appropriation.**—And the sum of one hundred thousand (\$100,000.00) dollars is hereby appropriated out of any money in the State Treasury, not otherwise appropriated, for the payment of the above named bounties. [Acts 1911, p. 44, § 6; Act March 12, 1915, ch. 47, § 6.]

### CHAPTER THREE

#### OF THE SALE, SLAUGHTER AND SHIPMENT OF ANIMALS

<p>Art. 7170. Bill of sale to be taken. 7172. Stock animals sold by marks, etc.</p>	<p>Art. 7184. Exempted counties.</p>
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**Article 7170. [4940] Bill of sale to be always taken.**

Cited, *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

**Conversion.**—That plaintiff in conversion had a bill of sale of the cattle taken by defendant, swore they were his, and identified the hides by a fresh brand he had put on the cattle is sufficient evidence that they belonged to him. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

**Art. 7172. [4942] Stock animals sold by mark and brand, etc.**

**Application of law—Record.**—There being no intention on the part of a seller of cattle to sell or transfer his mark, where there was a bill of sale followed by actual delivery of possession upon the range, Rev. St. 1879, art. 4564, held not to require record of bill of sale in order to pass title, although it recited marks and brands. *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

**Art. 7184. [4953] Exempted counties.**—The provisions of the five preceding articles shall in nowise apply to the following counties: Anderson, Angelina, Austin, Bandera, Bastrop, Bell, Bexar, Blanco, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Chambers, Cherokee, Clay, Collin, Colorado, Comal, Comanche, Dallas, Delta, Denton, De Witt, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Galveston, Gillespie, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Hardin, Harris, Harrison, Hays, Henderson, Hill Hopkins, Houston, Hunt, Jasper, Johnson, Karnes, Kaufman, Kendall, Kerr, Kimball, Lamar, Lavaca, Lee, Leon, Liberty, Limestone, Llano, Madison, Marion, Mason, McLennan, Milam, Montgomery, Morris, Nacogdoches, Navarro, Newton, Palo Pinto, Panola, Polk, Rains, Robertson, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Sutton, Tarrant, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Walker, Waller, Washington, Williamson, Wood. [Acts 1909, p. 74; Act June 3, 1915, 1st C. S., ch. 17, § 2; Act March 30, 1917, ch. 150, § 2.]

**Explanatory.**—The act amends art. 7184, ch. 3, tit. 124, Rev. Civ. St., as amended by ch. 17, general laws First Called Session 34th Leg. Took effect 90 days after March 21, 1917, date of adjournment. The title of the act is not restrictive in respect to the counties to be added or excluded, and hence the situation presented with respect to articles 7235 and 7305, is not presented.

CHAPTER FIVE

OF THE MODE OF PREVENTING HOGS AND CERTAIN OTHER ANIMALS FROM RUNNING AT LARGE IN COUNTIES AND SUBDIVISIONS

<p>Art. 7209. Commissioners' court to order election. 7211. Requisites of petition. 7212. Election, how ordered, etc. 7221. Proclamation of result, etc.</p>	<p>Art. 7222. Stock may be impounded, when. 7230. Stock not to be injured, etc. 7234. In cases where there are less than fifty freeholders; less than twenty; where no freeholders.</p>
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**Article 7209. [4978] Commissioners' court to order election.**

**Constitutionality of statute.**—The statute authorizing stock law elections is not unconstitutional. *Ex parte Cowden*, 74 Cr. R. 449, 168 S. W. 539.

**Combination of stock law districts with other territory.**—Under Const. art. 16, § 23, relating to the regulations of live stock and authorizing elections, a town incorporated under the General Incorporation Act could be included in a district for which a stock law election was had. *Bishop v. State*, 74 Cr. R. 214, 167 S. W. 363.

Under Const. art. 16, § 23, and statutes passed thereunder, regulating live stock and authorizing elections, one or more districts, where the stock law has been put in force, can be combined with territory where no election has been held, and thereby embrace an entirely new and complete district. *Id.*

**Art. 7211. [4980] Requisites of petition.**

**Amendment of petition.**—Where a petition to the commissioners' court for a stock law election was permitted to be amended so as to include three other surveys, and change the number of the district, the amendments did not render the petition a new one, so that the court could not act thereon at that term. *Bishop v. State*, 74 Cr. R. 214, 167 S. W. 363.

**Art. 7212. [4981] Election, how ordered and conducted.**

**Construction of order for election and proclamation.**—The order of the commissioners' court for a stock law election, and the proclamation of the county judge issued in conformity therewith, are to be construed as a whole. *Ex parte Cowden*, 74 Cr. R. 449, 168 S. W. 539.

**Art. 7221. [4990] Proclamation of the result, and its effect.**

**Construction of order for election and proclamation.**—The order of the commissioners' court for a stock law election, and the proclamation of the county judge issued in conformity therewith, are to be construed as a whole. *Ex parte Cowden*, 74 Cr. R. 449, 168 S. W. 539.

**Record of returns.**—Under art. 2276, the fact that the tabulated returns of a stock law election were recorded in a book in which the result of all elections were recorded, and not in the minutes of the court, did not invalidate the election, since the minutes of the court need not necessarily be kept in one book. *Bishop v. State*, 74 Cr. R. 214, 167 S. W. 363.

Though the clerk of the commissioners' court should fail to record the tabulated returns of a stock law election in the proper book, it would not invalidate the whole election, where every other essential was complied with, and there was no doubt that the election was carried. *Id.*

**Art. 7222. [4991] Stock may be impounded, when.**

**In general.**—Where cattle escaped from the owner's inclosure through no fault of his, he was not guilty of a violation of the stock law, prohibiting the running at large of animals. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

**Art. 7230. [4999] Stock not to be injured, etc.**

**Negligence; poison.**—One placing poison on his premises is not liable for the death of another's cattle trespassing thereon unless he failed to exercise reasonable care. *Ft. Worth & R. G. Ry. Co. v. Brown* (Civ. App.) 173 S. W. 943.

Failure of a railroad to notify an owner of cattle that it was going to place poison on its right of way held not negligence, where cattle entered because a third person opened a gate. *Id.*

In action for death of horse by falling into defendant's cistern, ordinance prohibiting the running at large of live stock held complete defense, unless defendant was guilty of gross negligence in permitting the cistern to remain open. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**Art. 7234. [5001c] In cases where there are less than fifty freeholders; less than twenty; where no freeholders.**—Whenever there is territory between two subdivisions of a county which have adopted a stock law, or when there is territory adjoining a subdivision which has adopted a stock law, and in such territory there are less than fifty freeholders, an election shall be ordered on a petition of a majority of the freeholders residing in such territory; and the election shall be held as provided by law in other cases relating to the adoption of the stock law. And, if there be less than twenty freeholders in such intervening or adjoining territory, then on the petition of a majority of the owners of the land to the Commissioners Court, the said Commissioners Court shall issue an order extending the stock law to said territory and the same shall be included in the territory of such adjoining subdivision, and, in cases where there are no freeholders on such intervening or adjoining territory, then, on the petition of the owner, or owners, of the land to the Commissioners Court, the said Commissioners Court shall issue an order extending the stock law to said territory, and the same shall be included in the territory of such adjoining subdivision; and any person or persons who own lands adjoining any other lands which have been added to territory in which a stock law prevails, shall have the same right, and, on petition of the owner or owners of such lands to the Commissioners Court, the said Commissioners Court shall issue an order extending the stock law to said territory, and the same shall be included in the territory of such adjoining subdivision. [Acts 1899, p. 80; Acts 1907, p. 150; Act March 30, 1915, ch. 133, § 1.]

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

## CHAPTER SIX

### OF THE MODE OF PREVENTING HORSES AND CERTAIN OTHER ANIMALS RUNNING AT LARGE IN PAR- TICULAR COUNTIES NAMED

<p>Art. 7235. Election to put law into operation. 7238. Petition shall state what. 7248. Proclamation and time law goes into effect. 7248a. Duty of sheriff or constable to seize and impound stock running at large; impounding fees.</p>	<p>Art. 7249. Impounding stock. 7250. Animals impounded when; notice; payment of fees and damages. 7252a. Sale on failure to redeem stock impounded; fees. 7253. Unknown owner; sale; proceeds, how disposed of.</p>
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**Article 7235. Election to put law in operation; proviso.**—Upon the written petition of one hundred freeholders of any of the following counties; Anderson, Atascosa, Austin, Bastrop, Baylor, Bandera, Bee, Bell, Bexar, Blanco, Borden, Bosque, Brazos, Brewster, Brown, Burnet, Caldwell, Calhoun, Callahan, Cameron, Camp, Cass, Castro, Clay, Cherokee, Childress, Collingsworth, Coleman, Collin, Colorado, Cooke, [Comal, †] Comanche, Concho, Crockett, Coryell, Cottle, Crosby, Cochran, Crane, Dallas, Dallam, Dawson, Deaf Smith, Delta, Denton, De Witt, Dimmit, Donley, Eastland, Ector, Edwards, Ellis, Erath, El Paso, Falls, Fannin, Fayette, Floyd, Foard, Franklin, [Frio, †] Fisher, Freestone, Gaines, Gregg, Guadalupe, Garza, Glasscock, Gillespie, Gonzales, Grimes, Grayson, Hale,\* Hamilton, Hansford, Harrison, Hays, Haskell, Hall, Hardeman, Hartley, Henderson, Hidalgo, Hill, Hood, Hopkins, Howard, Hockley, Hunt, Jack, Jackson, Jones, Jefferson, Johnson, Kaufman, Kimble, Knox, Kerr, Kendall, Kleberg, Lamar, Lampasas,\* Lavaca, Lamb,

Art. 7235  
V. S. Suppl.  
1918  
Amended  
Third C. S.  
36 L. P. 91

Art. 7235  
V. S. Suppl.  
1918  
Amended  
37 L. P. 77

Lee, Limestone, Lynn, Lipscomb, Llano, Lubbock, Madison, Mason, McLennan, Matagorda, McCulloch,\* Menard, Moore, Martin, Maverick, Medina, Midland, Milam, Mills, Mitchell, Montague, Morris, Navarro, Nacogdoches, Nolan, Nueces, Ochiltree, Palo Pinto,\* Parker, Pecos, Rains, Randall, Red River, Reeves, Real, Robertson Rockwall, Rusk, Runnels, San Patricio, San Saba, Scurry, Sherman, Smith, Somervell, Sterling,\* Starr, Sutton, Swisher, Tarrant, Tom Green, Taylor, [Terry,†] Titus, Travis, Upshur, Victoria, Val Verde, Van Zandt, [Waller,†] Washington, Williamson, Wilson, Wise, Ward, Wharton, Wood, Wheeler,\* Winkler, Wichita, Wilbarger\* and Young, or upon the petition of fifty freeholders of any such subdivision of a county as may be described in the petition, and defined by the commissioners' court of any of the above named counties, the commissioners' court of said county shall order an election to be held in such county or such subdivision of a county as may be described in the petition and defined by the commissioners court on the day named in the order for the purpose of enabling the freeholders of such county or such subdivision of a county as may be described in the petition and defined by the commissioners court to determine whether horses, mules, jacks, jennets and cattle shall be permitted to run at large in such county or such subdivision of a county as may be described in the petition and defined by the commissioners court; provided that where there is an application for an election to include an entire county there shall not be less than twelve freeholders from each justice precinct of said county as signers to the petition for such election.

And provided further, that the provisions of this section shall not apply to Wharton county as a whole, but shall apply only to such subdivision thereof as may be designated in the manner herein provided; provided, however, that the provision of this Act shall not apply to Jefferson county as a whole, but shall apply only to such subdivisions thereof as may be designated in the manner herein provided. [Acts 1899, ch. 128; Acts 1901, ch. 24; Acts 1903, ch. 71; Acts 1905, chs. 23, 94; Acts 1907, chs. 11, 28, 57; Acts 1909, p. 121, § 1; Acts 1911, p. 172, § 1; Acts 1913, p. 131, § 1; Act March 1, 1915, ch. 26, § 1; Act March 22, 1915, ch. 99, § 1; Act March 29, 1917, ch. 131, § 1; Act Oct. 2, 1917, ch. 10, § 1.]

\* Improperly included in statute. See note below.

† For explanation of the bracketed matter, see note below.

**Titles and subjects of acts.**—Under original stock law, Acts 26th Leg. c. 128, as amended by several acts, including Acts 30th Leg. cc. 11, 57, and by Act 31st Leg. c. 69, to include Matagorda county, held that Acts 32d Leg. c. 94, purporting to amend Acts 30th Leg. and to exclude Matagorda county, violated Const. art. 3, § 35, relating to the title of acts, and was to that extent void. *Holman v. Cowden & Sutherland* (Civ. App.) 158 S. W. 571.

The title of the act approved March 31, 1913, entitled "An act to amend article 7235, chapter 6, title 124 of the Revised Statutes of Texas, 1911, with reference to the mode of preventing \* \* \* animals from running at large in counties named, so as to include" certain named counties, is insufficient under Const. art. 3, § 35, to cover a provision excluding, from the operation of the stock law, Matagorda county, which was previously included. *Ward Cattle & Pasture Co. v. Carpenter* (Civ. App.) 168 S. W. 408.

Matagorda county, specifically placed under the stock law by Acts 31st Leg. c. 69, is not taken from under it by Acts 32d Leg. c. 94, specifically naming the counties, not including it, in which it is proposed to repeal the law. *Ex parte Cowden*, 74 Cr. R. 449, 168 S. W. 539.

In view of the above decisions the compilers of this supplement have traced the history of the above article from the time of its original enactment in 1899 (Acts 1899, ch. 128, p. 220) to the present date, and it appears that the list of counties contained in art. 7235, Revised Civil Statutes of 1911, was in all respects correct, with the possible exception of Wilbarger county, as to which county an explanation is given below in this note.

The title of Acts 1911, p. 172, ch. 94, is as follows:

"An Act to amend sections one (1) and two (2), chapter 128 of the General Laws of the Twenty-sixth Legislature, the same being an Act providing the mode by which horses, mules, jacks, jennets and cattle may be prevented from running at large in certain counties therein named, or in any subdivision of said counties (as amended by chapter 24

of the General Laws of the Twenty-seventh Legislature, and chapter 71 of the General Laws of the Twenty-eighth Legislature, and chapters 23 and 94 of the General Laws of the Twenty-ninth Legislature, and chapters 11 and 57 of the General Laws of the Thirtieth Legislature, and chapter 69 of the General Laws of the Thirty-first Legislature) so as to exclude Wharton and Fort Bend counties, and include Brewster and Lee, Floyd, Val Verde, Randall, Deaf Smith, Castro, Runnels, Baylor and Wichita counties within the provisions of said law, and repealing all laws and parts of laws in conflict herewith, and declaring an emergency."

The title of Acts 1913, p. 131, ch. 72, is as follows: "An Act to amend article 7235, chapter 6, title 124, of the Revised Civil Statutes of Texas, 1911, with reference to the mode of preventing horses and certain other animals from running at large in counties named, so as to include Ochiltree, Moore, Sherman, Hansford, Henderson, Cameron, Hartley, Dallam, Concho, Pecos, Reeves, Wharton, Gonzales, Kerr, Kendall, Haskell, Young, Cottle, Hardeman and Hall counties, and declaring an emergency."

The title of Act March 1, 1915, ch. 26, is as follows: "An Act to amend article 7235, chapter 6, of the Revised Civil Statutes of 1911, entitled 'of the mode of preventing horses and certain other animals running at large in particular counties named, as amended by chapter 72 of the General Laws of the Regular Session of the Thirty-third Legislature of the State of Texas, so as to include Terrell, Collingsworth, Clay, Dimmit, Gregg, Lamb, Nacogdoches, Matagorda, Tom Green, Lipscomb, and Maverick Counties under the provisions of said article, and declaring an emergency."

The title of Act March 22, 1915, ch. 99, is as follows: "An Act to amend article 7235, chapter 6, title 124, of the Revised Civil Statutes of Texas, 1911, and to amend chapter 72, House Bill No. 827, General Laws of the Thirty-third Legislature, page 131, with reference to the mode of preventing horses and certain other animals from running at large in the counties named, so as to include Matagorda County, and declaring an emergency."

The title of Act March 29, 1917, ch. 131, the latest enactment on the subject, is as follows: "An Act to amend article 7235, chapter 6, title 124, Revised Civil Statutes of Texas, 1911, as amended by chapter 72, General Laws of the Thirty-third Legislature, and chapters 26 and 99, General Laws of the Thirty-fourth Legislature, with reference to the mode of preventing horses and certain other animals from running at large in the counties named so as to include Kimble, Jefferson, Kleberg, Menard, Real, Sutton, Terrell, Clay, Collingsworth, Dimmit, Gregg, Lamb, Lipscomb, Maverick, Nacogdoches, Tom Green, Bandera, Crockett, Edwards, Grimes and El Paso counties and declaring an emergency."

The title of Act Oct. 2, 1917, ch. 10, is as follows: "An Act to amend article 7235, chapter 6, title 124, Revised Civil Statutes of Texas, 1911, as amended by chapter 72, General Laws of the Thirty-Third Legislature, and chapters 26 and 99, General Laws of the Thirty-Fourth Legislature, and chapter 131, General Laws of the Thirty-Fifth Legislature, with reference to the mode of preventing horses and certain other animals from running at large in the counties named so as to include Madison County, and declaring an emergency."

An analysis of the situation, in view of the decisions above set forth, shows that the counties marked by an asterisk are not included in the provisions of the law, for the reason that such counties were not named in the title of Acts 1911, ch. 94, or any of the Acts subsequent to the revision of 1911, and the titles in each of the acts being restrictive, they were insufficient to bring such counties within the operation of the law. It thus appears that the law is not operative in the following counties: Hale, Lampasas, McCulloch, Palo Pinto, Sterling, and Wheeler. On the other hand, the Act of March 29, 1917, omits Comal, Frio, Terry, and Waller counties, which were included in the revision of 1911. An examination of the titles above set out will show that none of them are broad enough to include a provision excluding the four counties named from the operation of the law. These four counties are placed in the text above, and are inclosed in brackets.

Wilbarger county was added to the list of counties subject to the act by Acts 1907, ch. 11, approved Feb. 21, 1907. The statute was again amended at the same session, by an act approved April 3, 1907 (Acts 1907, ch. 57) and Wilbarger county was omitted in the list of counties set forth as subject to the provisions of the law. Acts 1909, ch. 69, p. 121, on which art. 7235, Revised Civil Statutes of 1911, was based, in its title, purports to add counties other than Wilbarger, and hence is insufficient, of itself, to add Wilbarger county. If the Act of April 3, 1907, superseded the Act of Feb. 21, 1907, there was no valid law adding Wilbarger county at the time the revision of 1911 was made.

The title of Act March 1, 1915, ch. 26, and that of Act March 29, 1917, ch. 131, purport to include Terrell county, but the body of neither one of the acts includes such county, and hence Terrell county is not subject to the act.

Act Oct. 2, 1917, ch. 10, amends art. 7235, ch. 6, title 124, Rev. Civ. St. 1911, as amended by ch. 72, general laws 33rd Legislature, and chs. 26 and 99 of general laws 34th Legislature, and ch. 131, general laws 35th Legislature.

### Art. 7238. Petition shall state what.

**Inaccuracy of description of subdivision.**—In a prosecution for violation of the stock law, where accused's land and the place where he allowed his animals to run at large was clearly within the limits of the subdivision which adopted the law, that the description of that subdivision was not accurate, and omitted a strip of territory, was no defense. *Neuvar v. State*, 72 Cr. R. 410, 163 S. W. 58.

**Towns.**—Under this article, incorporated towns included in a subdivision wherein the stock law is adopted are subject to its provisions. *Neuvar v. State*, 72 Cr. R. 410, 163 S. W. 58.

**Art. 7248. Proclamation and time law goes into effect.**

**Evidence in criminal prosecution.**—In a prosecution for murder, while defendant was attempting to recover mules that had strayed into deceased's inclosed field, and which deceased was attempting to impound, evidence that the stock law was in force at the time of the homicide held admissible. *Barnett v. State*, 76 Cr. R. 555, 176 S. W. 580.

**Instructions in civil action.**—In action for value of mule struck by automobile while mule was running loose on public highway in violation of stock law, instructions held improperly refused as clearly presenting the issue of gross negligence. *Dillon v. Stewart* (Civ. App.) 180 S. W. 648.

**Art. 7248a. Duty of sheriff or constable to seize and impound stock running at large; impounding fees.**—It shall be the duty of any sheriff or constable of any county, or subdivision thereof, within this State, where the provisions of this chapter are or may hereafter become operative, to seize any stock which may become known to him to be running at large on any outside premises where the provisions of the stock law are in force, and impound the same in some place provided for that purpose, and immediately notify the owner thereof, if such owner is known to such officer, who may redeem the same on the payment of an impounding fee of \$1 per head, and an additional fee of 25 cents per day per head for each day such stock is so kept. [Act March 22, 1915, ch. 92, § 1.]

**Explanatory.**—The act amends title 124, chapter 6, by adding thereto articles 7248a and 7252a, and by amending articles 7250, 7252, and 7253. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 7249. Impounding stock.**

**Effect of consent to pasture.**—Though an owner of land gave her consent to the pasturing of cattle thereon, she was not thereby necessarily precluded from recovering for an injury to the freehold done by the cattle. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

**Art. 7250. Animals impounded when; notice; payment of fees and damages.**—No animals shall be impounded except as provided in Article 7248a unless they have entered upon enclosed lands or be found roaming about the residence, lots or cultivated land of another, and, whenever any stock is impounded, notice thereof shall be given to the owner, if known, and such owner shall be entitled to their possession upon payment of fees and damages. [Acts 1899, p. 220, § 15; Act March 22, 1915, ch. 92, § 1.]

See note under art. 7248a.

**Art. 7252a. Sale on failure to redeem stock impounded; fees.**—When any stock shall have been impounded as provided in Article 7248a, and after five days' notice has been given to the owner of such stock, such officer shall sell such stock at public auction for cash, after having given notice of such sale, as in constables' sales of personal property, and apply the proceeds of such sale, after deducting the expenses thereof, to the satisfaction of said fees and damages, and shall pay the balance, if any remains, to the owner of such stock. The justices and constables shall receive for their services the same compensation as is allowed for like service in civil cases. [Act March 22, 1915, ch. 92, § 1.]

See note under art. 7248a.

**Art. 7253. Unknown owners; sale; proceeds, how disposed of.**—If no owner can be found of stock so impounded, such officer or other person taking up any such stock shall make affidavit before a justice of the peace of the county, describing the stock impounded by him, and that the owner is unknown to affiant; which affidavit shall be forthwith delivered to the county clerk by such justice to be kept in his office for inspection. After the filing of such affidavit, the constable of the precinct shall sell such stock as in case when the owner is known; and

if anything remains after satisfying the expenses of said sale and the fees and damages due to the taker-up, he shall report the same under oath to the clerk of the county court and pay the same over to the county treasurer to be received by him and placed to the credit of the road and bridge fund of the county. [Acts 1899, p. 220, § 18; Act March 22, 1915, ch. 92, § 1.]

See note under art. 7248a.

## CHAPTER SEVEN

### REGULATIONS FOR THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES

Art.		Art.	
7271.	May seize certain animals.	7287.	Hides or animals to be sold if not proven away.
7272.	Also unbranded hides, etc.	7289.	Property to be delivered to true owner, etc.
7273.	Procedure in case of seizure.	7297.	Certificates of inspection.
7282.	Hides imported from Mexico; inspector not liable for damages to hides not put in proper condition for inspection; owner to pay expenses of treatment; sale.	7305.	Exempted counties.
7283.	Horses, mules and cattle.	7305b.	Inspectors for certain counties.
7284.	Suspicious hides and animals to be seized.	7305c.	Inspectors for certain counties.
7285.	Procedure upon seizure.	7305d.	Other counties exempted.
7286.	Importer to recover on proof.	7305e.	Appointment of inspector for Nueces county; election.
		7305f.	Same; fee to be collected by inspector and paid into county treasury.

#### Article 7271. [5017] May seize certain animals, etc.

**Petition.**—Petition held to show plaintiff's cattle were not subject to the stock law (this article and art. 7272); so sequestration by inspector of cattle and hides should be enjoined, though inspector averred that he did not intend to proceed against cattle except as provided by law. *Harrell v. Holmes* (Civ. App.) 184 S. W. 285.

#### Art. 7272. [5018] Also unbranded hides and animals.

**Petition.**—See *Harrell v. Holmes* (Civ. App.) 184 S. W. 285; note under art. 7271.

#### Art. 7273. [5019] Procedure in cases of seizure.

Cited, *Harrell v. Holmes* (Civ. App.) 184 S. W. 285.

**Art. 7282. [5023e] Hides imported from Mexico; inspector not liable for damage to hides not put in proper condition for inspection; owner to pay expenses of treatment; sale.**—The hides of all cattle imported into this state from Mexico shall be inspected by the inspector of hides and animals of any county or district into which the same may be introduced or imported; and, should the importer of said hides fail or refuse to place such hides in a position where the same may be inspected by said inspector, or if said hides are found by said inspector to be folded or booked in such a manner as that the same may not be inspected without injury to said hides, then it shall be the duty of said inspector to take possession of such hides and have the same treated in such a manner as will enable him to unfold the same without injury thereto, provided however, that such inspector shall not be held liable for any damage which may accrue to such hides by reason of the treatment thereof for the purpose of enabling him to inspect the same and such treatment as may be necessary to enable the inspector to unfold and inspect such hides shall be wholly at the risk of the importer or person in whose possession such hides may be found, and in addition to the inspection fees allowed such inspector for the inspection of said hides, there shall be paid by the importer or the person in whose possession said hides may be found after importation, all expenses incurred

by said inspector in the treatment of said hides, for the purpose of enabling him to inspect the same as provided in this Article, such expenses to include drayage and freight charges and all expenses for handling and treatment of said hides, and if the importer or the person in whose possession said hides may be found after importation, shall fail or refuse to pay said expenses for treatment, or if he shall fail or refuse to pay the inspection fees as required by law, the inspector is hereby authorized to retain possession of said hides and sell a sufficient number thereof, after public notice of three days, to the highest and best bidder, to pay said inspection fees and all necessary expenses in connection therewith. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

**Explanatory.**—The act amends arts. 7282, 7283, 7284, 7285, 7286, 7287, and 7289. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 7283. [5023f] Horses, mules and cattle.**—Horses and mules and cattle imported from Mexico into this State shall be inspected in accordance with the provisions of Article 7267, and with like authority to retain and sell as provided in Article 7282 for a failure to pay the inspection fees. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7284. [5023g] Suspicious hides and animals to be seized.**—Should an inspector of hides and animals find among hides or animals imported from Mexico any hides or animals which, from the brand or from other evidence, he has reason to believe have been stolen from the lawful owner, it shall be his duty to separate said hides or animals from the others undergoing inspection and take possession of the same, and to notify any person he believes to be interested therein to come forward and institute suit for the recovery of the same. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7285. [5023h] Procedure upon seizure.**—Should no person appear to claim hides or animals, the inspector shall within twenty-four hours, make oath before the District Judge, the County Judge, or any justice of the peace of the county, according to the value of the property involved, that he has reason to believe that said hides or animals have been stolen; whereupon said judge or justice of the peace shall issue a citation, directing the importer or party claiming the same to appear before him at his office within a time specified, not to exceed twenty-four hours, to show causes why said property should not be condemned. [Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7286. [5024] Importer to recover on proof.**—Should said importer or claimant make proof that he is the lawful owner of said hides or animals by showing a bill of sale from the owner of same, or his legally authorized agent, and by showing complete chain or transfer of title from the original owner of the brand to himself, or his firm, as the case may be, such judge or justice of the peace shall direct that the same be delivered to said importer or claimant upon his paying the inspection fees. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7287. [5025] Hides or animals to be sold if not proven away.**—Should the importer or claimant of said hides or animals fail to es-



publish his claim as the lawful owner of the same, or to any number of said hides or animals so seized, it shall be the duty of the District Judge, county judge or justice of the peace to direct that said property be sold at public auction by the inspector of hides and animals or his deputy, after a notice of ten days, published in a news paper, should there be one published in said county, or if no news paper be published in the county, then by notice in writing, posted at the court house and two or more other places in said county, and the said hides shall be sold to the highest and best bidder. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7289. [5027] Property to be delivered to true owner, etc.—**Should any person appear either by himself, his agent, or attorney, and claim any hides or animals imported from Mexico at any time before the same shall have been sold as above directed, and should said claim be established before such judge or justice of the peace of said county, such property shall be delivered to the claimant, and all costs accruing therein shall be paid by the importer, provided, that at any time before proceedings shall have been commenced as above directed, the importer may be permitted to pay the lawful owner, his agent or attorney, for any hides or animals imported by him from Mexico and presented in any county of this state for inspection, and upon such payment, and the fees for inspection, such hides or animals shall be released. [Acts 1876, p. 295. Sen. Jour. 1895, p. 485; Act March 29, 1917, ch. 127, § 1.]

See note under art. 7282.

**Art. 7297. [5035] Certificate of inspection.**

Cited, *Harrell v. Holmes* (Civ. App.) 184 S. W. 285.

**Art. 7305. [5043] Counties exempted.—**The counties of Anderson, Angelina, Aransas, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee,\* Bell, Bexar, Borden, Bowie, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brown, Burleson, Burnet, Caldwell, Callahan, Calhoun, Cameron,\* Camp, Carson, Cass, Chambers, Cherokee, Childress, Clay, Cochran, Coke, Collins, Collingsworth, Colorado, Comal, Comanche, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Delta, Denton, De Witt, Dickens, Donley, Duval,\* Eastland, Ellis, El Paso,\* Erath, Falls, Fannin, Fayette, [Fisher,] Floyd, Foard, Fort Bend, Franklin, Freestone, Frio, Galveston, Gillespie, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Guadalupe, Hall, Hamilton, Hardman, Hardin, Harris, Harrison, Hartley, Hayes, Hemphill, Henderson, Hidalgo,\* Hill, Hockley, Hood, Hopkins, Houston, Hunt, Irion, Jackson, Jack, Jasper, Jeff Davis, Jefferson, Johnson, Karnes, Kaufman, [Kendall, Kent,] Knox, Kinney, Lamar, Lamb,\* Lampasas, Lavaca, Leon, Liberty, Limestone, Lipscomb, Live Oak,\* Llano, Loving, Lubbock, Lynn, Madison, Marion, Mason, Martin, Medina, Maverick,\* McLennan, Midland, Milam, Mills, Mitchell, Montague, Montgomery, Morris, Motley, Nacogdoches, Navarro, Newton, [Oldham,] Orange, Palo Pinto, Panola, Parker, Pecos, Polk, [Potter,] Presidio, Raines, Reagan, Red River, Refugio, Robertson, Rockwall, Rusk, Reeves, Sabine, San Augustine, San Jacinto San Patricio, Schleicher, Shelby, Smith, Shackelford, Somervell, Starr,\* Scurry,† Stephens, Sterling, [Stonewall,] Tarrant, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Val Verde,\* Van Zandt, Victoria, Walker, Ward, Washington, Webb Warton, Wheeler, Williamson, Wilson, Wise, Winkler, and Young are hereby exempted from the provisions of this chapter and from all laws regulating the inspection of hides and animals. [Acts

Art. 7305  
V. S. Suppl.  
1918  
Amended  
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1893, ch. 107; Acts 1895, ch. 43; Acts 1909, pp. 30, 113; Acts 1913, p. 85, § 1; Act March 28, 1917, ch. 114, § 1; Act May 18, 1917, 1st C. S., ch. 23, § 1.]

\* Removed from exempted list by other acts. See explanatory note below.

†As to title of act, see explanatory note below.

**Explanatory.**—The act amends art. 7305, Rev. Civ. St. 1911. The title of the act and the emergency clause declare the purpose of the act to be to exempt Martin county from the hide and animal inspection law. Took effect 90 days after May 17, 1917, date of adjournment.

The counties in brackets are not excepted by Act May 18, 1917, 1st C. S., ch. 23, § 1, set forth above, but all of such counties except Kendall, are specially exempted by Acts 1913, p. 85, § 1 (Vernon's Sayles' Civ. St. 1914, art. 7305a) and Act March 31, 1915, ch. 142, § 1, set forth post as art. 7305d. As the title to Act May 18, 1917, above referred to, purports to amend art. 7305, for the purpose alone of exempting Martin county, the earlier acts above referred to are still operative and the counties inclosed by brackets are on the exempted list. Kendall county was omitted from Act May 18, 1917, 1st C. S. ch. 23, § 1. But, as its omission is not warranted by the title of the act, Kendall county is still on the exempted list. See *Holman v. Cowden & Sutherland* (Civ. App.) 158 S. W. 571; *Ex parte Cowden*, 74 Cr. R. 449, 168 S. W. 539; *Ward Cattle & Pasture Co. v. Carpenter* (Civ. App.) 168 S. W. 408, and notes under art. 7235.

The counties of Cameron, El Paso, Hidalgo, Lamb, and Starr are removed from the exempted list by Act Feb. 18, 1915, ch. 13, § 1, set forth post as art. 7305b, and the counties of Bee, Duval, Live Oak, Maverick, and Val Verde are likewise removed from such list by Act March 15, 1915, ch. 57, § 1, set forth post as art. 7305c. While Act March 28, 1917, and Act May 18, 1917, are later in point of time, the titles of those acts restrict their operation to the addition of Borden, Coke, Irion, Lubbock, Lynn, Martin, Midland, Reagan, Sterling, Terry, Tom Green, and Upton counties to the exempted list. It thus appears that the acts of Feb. 18, 1915, and March 15, 1915, are still operative, and that the counties named in those acts are not on the exempted list, though included in the subsequent amendatory acts. See cases cited in next preceding note.

Scurry county was not included in the exempted list, either in the Revised Civil Statutes or in the amendatory act of March 27, 1913, ch. 43, p. 85, § 1. Its inclusion in Act March 28, 1917, ch. 114, § 1, and Act May 18, 1917, 1st C. S., ch. 23, § 1, was not warranted by the title of either of those acts. Scurry county, however, was specially excepted from the operation of the inspection law by Acts 1913, p. 87, ch. 45, § 1 (Vernon's Sayles' Civ. St. 1914, art. 7305a), and hence is properly included in the list of exempted counties.

**Art. 7305b. Inspectors for certain counties.**—That the Governor of Texas shall immediately appoint an inspector of hides and animals for each of the following counties, to wit: the counties of El Paso, Cameron, Hidalgo, Lamb, and Starr each of whom shall hold his office for a term of two years and until the election and qualification of his successor. That said counties of El Paso, Cameron, Lamb, Hidalgo and Starr shall be subject to all of the provisions of Articles 7256 to 7304, inclusive, Revised Civil Statutes of Texas, 1911 except that the inspector shall be elected in each of said counties at the first general election held after appointment herein authorized. [Act Feb. 18, 1915, ch. 13, § 1.]

**Art. 7305c. Inspectors for certain counties.**—That the Governor of Texas shall immediately appoint an inspector of hides and animals for each of the following counties, to-wit: The counties of Bee, Duval, Live Oak, Maverick and Val Verde, each of whom shall hold his office for a term of two years and until the election and qualification of his successor. All animal and hide inspectors appointed by the Governor shall be entitled to receive for their services the sum of three cents for each animal and hide personally inspected. That said counties of Bee, Duval, Live Oak, Maverick and Val Verde shall be subject to all of the provisions of Articles 7256 to 7304, inclusive, Revised Civil Statutes of Texas, 1911, except that the inspector shall be elected in each of said counties at the first general election held after the appointment herein authorized. [Act March 15, 1915, ch. 57, § 1.]

Act took effect March 15, 1915.

**Art. 7305d. Other counties exempted.**—That the counties of Oldham and Potter be and the same are hereby exempt from the provisions

and operations of Articles 7256 to 7305, inclusive, of Chapter 7, Title 124, Revised Civil Statutes of 1911, relative to the inspection of hides and animals. [Act March 31, 1915, ch. 142, § 1.]

Became a law March 31, 1915. Sec. 2 repeals all laws in conflict.

**Art. 7305e. Appointment of inspector for Nueces County; election.**—That the Governor of Texas shall immediately appoint an inspector of hides and animals for Nueces County, Texas, who shall hold his office for a term of two years and until the election and qualification of his successor. That Nueces County shall be subject to all the provisions of Article 7256 to 7304, both inclusive, Revised Civil Statutes of Texas, 1911, except that the inspector of Nueces County, Texas, shall be elected at the first general election held after the appointment herein authorized. [Act March 1, 1917, ch. 51, § 1.]

**Note.**—Sec. 1a, imposes a fine for violation of the provisions of the inspection laws, and is set forth post as art. 1415b of the Penal Code. Sec. 1c imposes a fine on the inspector for violation of such laws, and is set forth post, as art. 1415c of the Penal Code. Sec. 2 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 7305f. Same; fee to be collected by inspector and paid into county treasury.**—Said inspector shall collect the sum of ten cents for each hide and animal personally inspected by him or his deputies and in addition thereto shall collect the fees authorized to be collected under the provisions of Articles 7256 to 7304, both inclusive, Revised Civil Statutes of Texas of 1911. Said proceeds authorized to be collected by this Act by said inspector and by virtue of said Articles 7256 to 7304, both inclusive, Revised Civil Statutes of 1911, which fees by said last named articles are authorized to be collected and retained by said inspector shall be paid into the county treasury and pass into the general fund of said county, and the county commissioners' court is hereby authorized to fix the salary of said inspector, provided the same be fixed at an amount not in excess of one hundred (\$100.00) dollars per month. [Id., § 1b.]

## CHAPTER EIGHT

### LIVE STOCK SANITARY COMMISSION

Art.		Art.	
7314.	Duties of live stock sanitary commission; quarantine; transportation of animals to and from quarantined districts; rules and regulations; state veterinarians; entry upon private premises.	7314g.	Proclamations respecting quarantine in tick zones.
7314a.	[Repealed.]	7314h.	Same; movement of animals in quarantined districts.
7314b.	Control of sale of veterinary biological products; eradication of fever-carrying tick and other contagious diseases; special quarantine districts; quarantine of pastures, etc.; prescribing method of dipping.	7314i.	Inspectors in counties voting to eradicate ticks.
7314c.	[Repealed.]	7314j.	Quarantine of sheep on account of scabies.
7314d.	Duties of commissioners' court and county judge.	7314k.	Inspectors for districts quarantined for sheep scabies.
7314dd.	Duty of commission to make investigations and quarantine animals; duty of state veterinarian.	7314l.	Publication or notice of quarantine order.
7314ddd.	Appraisal of diseased animals; killing.	7314m.	Same; filing copy of notice with county clerk; evidence.
7314e.	Election in counties on question of tick eradication; quarantine.	7314n.	Seizure of animals being moved in quarantine district; dipping or treating; compensation of sheriff; lien.
7314f.	Zones or districts for tick eradication.	7314o.	County veterinarian.
		7314p.	Composition of dip and mode of dipping.
		7314q.	Construction of act; repeal.
		7314r.	Validation of elections.
		7314s.	Powers of live stock sanitary commission not abridged.
		7319.	Compensation of commissioners.
		7322.	[Repealed.]

**Article 7314. [5043c] Duties of Live Stock Sanitary Commission; quarantine; transportation of animals to and from quarantined districts; rules and regulations; state veterinarians; entry upon private premises.**—It shall be the duty of the Commission provided in Article 7312, Revised Civil Statutes, to protect the domestic animals of the State from all malignant, contagious or infectious diseases of a communicable character whether said diseases exist in Texas or elsewhere; and for the purpose it is hereby authorized and empowered to establish, maintain and enforce such protective measures and quarantine lines and sanitary rules and regulations as it may deem necessary, when it shall determine upon proper inspection that such diseases exist. It shall also be the duty of said Commission to cooperate with the Live Stock Sanitary Commission and officers of other States, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules, and regulations as shall best protect the live stock industry of this State against the fever-carrying tick (*Magararopic Annulatus*) which produces the splenic fever and other malignant, contagious, infectious or communicable diseases of live stock. It shall be the duty of said Live Stock Sanitary Commission to quarantine any district, county or part of county, or premises within this State when it shall determine upon proper inspection the fact that cattle, sheep or other live stock in such district, county, part of county or premises are affected with any malignant, contagious, infectious or communicable disease, or with the agency or transmission of such diseases, and to give written or printed notice of such quarantine to the proper officers of railroad and express companies doing business in or through such quarantine district, county, or part of a county, within this State, and to publish notice of the establishment of such quarantine in such newspaper in the quarantine district, county, or part of county as the Live Stock Sanitary Commission may select, or give notice in such other ways as it deems necessary and adequate for the purpose of establishing and maintaining a quarantine service. And no railroad or express company shall receive for transportation, or transport, from any quarantined district, county, or part of county, in this State, into any other district, county, or part of a county, within this State, any cattle sheep or other live stock except as hereinafter provided; nor shall any person, company, or corporation deliver for transportation to any railroad or express company any cattle, sheep or other live stock for or from a quarantined area except as hereinafter provided; nor shall any person, company or corporation drive on foot or cause to be driven on foot or transport in private conveyance, or cause to be transported in private conveyance, or drive or permit to drive from a quarantined district, county, or part of county or premises of this State, any cattle, sheep, or other live stock except as hereinafter provided. It shall be the duty of the Live Stock Sanitary Commission of Texas to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle and other live stock from or into a quarantined district, county, or part of a county, or premises, into any other district, county, or part of a county or premises in this State. And said Commission shall make and promulgate rules and regulations which shall permit and govern the movement and shipment of cattle and other live stock from or into a quarantined district, county or part of county, or premises into any other district, county, part of county or premises in this State where such cattle or other live stock are to be immediately slaughtered, and furnish prompt inspection

when demanded by the owner or person in charge of such cattle or other live stock so intended to be moved or shipped for immediate slaughter, and it is hereby so authorized, and directed; and the Live Stock Sanitary Commission of Texas shall give notice of such rules and regulations by proclamation issued by the Governor of Texas. The said Live Stock Sanitary Commission of Texas is hereby empowered with the authority to employ a State Veterinarian and Assistant State Veterinarians in times of emergency, and inspectors or other persons, as it may deem necessary to the performance of the duties imposed upon said Commission. The Live Stock Sanitary Commission, the State Veterinarian, Assistant State Veterinarians and inspectors acting under authority or direction of the Commission are hereby empowered and it is made their duty at their discretion to enter upon premises of any person or persons, company or corporation within this State, for the purpose of inspecting, quarantining or disinfecting premises or live stock thereon. [Acts 1893, p. 70; Acts 1913, p. 353, § 1; Act March 23, 1915, ch. 111, § 1; Act March 6, 1917, ch. 60, § 1.]

**Explanatory.**—Took effect March 6, 1917. Sec. 23, post, art. 7314q, repeals ch. 169, Acts 33rd Legislature, regular session. The Legislature, in enacting the act of 1917, overlooked the amendatory act of March 23, 1915, ch. 111. The later act, however, no doubt, works a supercession of the act of 1915.

**Constitutionality.**—Laws 1917, ch. 60, held not unconstitutional. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

**"Clean" cars.**—The term "clean," in rule 31 of the State Live Stock Sanitary Commission, does not necessarily mean that cars for transportation of hogs shall be free from dirt, but that they shall be free from infection. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

**Sufficiency of evidence to show cars infected.**—Where it was contended that because of unclean cars furnished contrary to rule 31 of State Sanitary Live Stock Commission hogs contracted cholera, evidence held insufficient to show that the cars furnished were infected. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

**Duty to comply with quarantine regulations.**—Where cattle are shipped from the quarantined area in Texas to a point outside the quarantine line, the duty of complying with quarantine regulations is primarily on the shipper. *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 165 S. W. 116.

**Fixing quarantine line.**—The Governor and the sanitary commission, which was required by art. 7322, to fix the same quarantine line against Texas fever as fixed by the federal government, might, between the time of the enactment and the going into effect of Acts 33d Leg. c. 169, authorizing the establishment of a different line, fix a new line which would be applicable when the law went into effect. *Smith v. State*, 74 Cr. R. 232, 168 S. W. 522.

Acts 33d Leg. c. 169, authorizing the Governor and sanitary commission to fix quarantine lines to prevent the spread of Texas fever, etc., held valid. *Id.*

**Interstate commerce.**—Federal government's power as to interstate commerce is paramount, and, when interstate transportation of live stock is taken under direct federal supervision, acts of Congress and regulations thereunder alone control, and any state regulations cease to have any force. *Pecos & N. T. Ry. Co. v. Hall* (Civ. App.) 189 S. W. 535.

Where federal and state governments have concurrent power, and federal government is inactive, state's power may be executed. *Id.*

#### Art. 7314a.

Repealed by Act March 6, 1917, ch. 60, § 23, post, art. 7314q.

**Art. 7314b. Control of sale of veterinary biological products; eradication of fever-carrying tick and other contagious diseases; special quarantine districts; quarantine of pastures, etc.; prescribing methods of dipping.**—It is further provided that the Live Stock Sanitary Commission shall have the power to control the sale and distribution of all veterinary biological products within this State, and it is hereby made its duty, as far as possible, to destroy and eradicate the fever-carrying tick which produces splenic fever; also to eradicate and eliminate the scabies, sheep scab, hog cholera, glanders and other malignant, infectious, contagious or communicable diseases of live stock. For this pur-

pose it is empowered and directed to establish special quarantine districts where such diseases or infection of such diseases are known to exist; and notice of the establishment of such special quarantine districts shall be given as provided for in Article 7314, Revised Civil Statutes, and in Section 1 of this Act. The Live Stock Sanitary Commission shall have the power to quarantine premises or pastures located in said special quarantine districts, and the domestic live stock thereon situated in such quarantine districts, or elsewhere, when to their knowledge such pasture or premises, or the live stock located thereon are infected with, or have been exposed to a malignant, contagious, infectious or communicable disease, or the infection thereof; and no live stock shall be moved to or from such special quarantine district; nor from or to any pastures or premises located in such special quarantine district, in a manner, method, or condition other than those prescribed by the Live Stock Sanitary Commission. It shall be the duty of the Live Stock Sanitary Commission to prescribe methods for dipping live stock or otherwise treating or disinfecting such premises and the live stock thereon, as in their opinion are necessary and adequate for the eradication of the disease or the infection of the disease for which they are quarantined. [Acts 1913, p. 353, § 3; Act March 6, 1917, ch. 60, § 2; Act May 17, 1917, 1st C. S., ch. 12, § 1.]

**Explanatory.**—The act, in its enacting part, amends sections 2, 10, 11, 12, 17, of ch. 60, general laws regular session 35th Legislature, and adding thereto, after sec. 24, a new section to be known as sec. 25. The title of the act sets forth at length the title of the act amended and then recites: "Said sections as amended not changing in any material way the provisions of the original act, but are yet the substance thereof, the changes being in substance corrective in their nature, except that section 25, added thereto, provides in substance," etc. It is thus seen that the title does not enumerate the sections of the act which are amended as is done in the enacting part. Took effect 90 days after May 17, 1917, date of adjournment.

**Constitutionality.**—Acts 33d Leg. c. 169, authorizing the Governor and sanitary commission to fix quarantine lines to prevent the spread of Texas fever, etc., is not a delegation of legislative authority which renders it invalid. *Smith v. State*, 74 Cr. R. 232, 168 S. W. 522.

#### **Art. 7314c.**

Repealed by Act March 6, 1917, ch. 60, § 23, post, art. 7314q.

**Art. 7314d. Duties of commissioners' court and county judge.**—It shall be the duty of the county commissioners courts to co-operate with and assist the Live Stock Sanitary Commission in protecting the live stock of their respective counties from all malignant, contagious, infectious or communicable diseases, whether such diseases exist within or outside the county and otherwise protect the live stock interests of their counties. It shall be the duty of said commissioners courts to co-operate with the Live Stock Sanitary Commission and the officers working under the authority or direction of said Commission, in the suppression and eradication of fever-carrying ticks, and all malignant, contagious, infectious or communicable diseases of live stock; provided, when it becomes necessary to disinfect any premises infected with anthrax, hog cholera, glanders, foot and mouth diseases, bovine-tuberculosis, or contagious abortion, under order of the Live Stock Sanitary Commission, the county judge of the county wherein such premises are located shall have such disinfecting done at done at the expense of the county, and according to the rules and regulations of the Live Stock Sanitary Commission, and the said commissioners courts are hereby authorized and empowered and directed to appropriate moneys out of the general fund of their counties for the purpose of constructing or leasing necessary public dipping vats within their counties and for the purchase of dipping material therefor. [Acts 1913, p. 353, § 5; Act March 6, 1917, ch. 60, § 3.]

**Art. 7314dd. Duty of commission to make investigations and quarantine animals; duty of state veterinarian.**—It shall be the duty of the Live Stock Sanitary Commission, whenever they have reason to believe, or shall receive notice that any malignant, contagious, infectious or communicable disease or the infection thereof exists among any domestic animals in this State, to immediately investigate, and if such disease is found to exist, or if they have reason to believe such disease exists, to immediately quarantine such animals and the premises upon which they are located. Provided, further, that if glanders or anthrax is found, the State Veterinarian, or Assistant State Veterinarians, shall make a thorough investigation and shall notify the county judge of the county wherein such animals are located of the number and description of the animals so affected. [Act March 6, 1917, ch. 60, § 4.]

**Art. 7314ddd. Appraisal of diseased animals; killing.**—It shall be the duty of the county judge of any county in this State whenever any horse, mule or asses within their counties are found infested with glanders or anthrax and have been quarantined by order of the Live Stock Sanitary Commission, to appoint three disinterested parties, who shall act as appraisers and fix the value of said animals at their actual value at the time of such appraisement, and make a sworn, written report of said appraisement to the county judge, whereupon the commissioners court shall pass upon such written report and pay to the owner of the animals their appraised value. The county judge on receipt of the report of the appraisers, as provided for in this section, shall issue an order to the sheriff, deputy sheriff, or any constable of the said county commanding him to seize said diseased animal or animals and take same to some secluded place and kill them and burn the carcass or carcasses, and said appraisers and officers shall be paid for their services as provided for in Article 7320, Revised Civil Statutes. [Id., § 5.]

**Art. 7314e. Election in counties on question of tick eradication; quarantine.**—It shall be the duty of the commissioners courts of any county within the State of Texas, whenever they deem it expedient, or when petitioned to do so by seventy-five resident land-owners to order an election called for the purpose of determining whether the county shall take up and prosecute the work of tick eradication in said county. Said election shall be ordered and held not less than sixty days after the filing of the petition. At said election the ballots shall have printed upon them "For Tick Eradication in . . . . . County" and "Against Tick Eradication in . . . . . County." The officers of said election shall hold said election and make return thereof as provided by law in case of other elections as nearly as may be. Said returns shall be made returnable to the county judge of the county. The commissioners court shall meet and canvass said returns as soon as practicable after such election, and if they find that a majority of all the votes cast were in favor of tick eradication under the direction of the Live Stock Sanitary Commission, they shall so certify and cause publication of same to be made in a newspaper published in said county, which publication shall be certified to by the county judge of said county, and said certificate shall be filed with the county clerk of said county, which said certificate shall be admissible as evidence in any of the courts of this State. The county judge shall immediately so notify the Live Stock Sanitary Commission, and upon receipt of such notice from the county judge of the county so holding the election, the Live Stock Sanitary Commission shall cause to be issued a supplemental proclamation signed by the Governor of Texas, proclaiming a quarantine around said county, and the

citizens of said county in co-operation with and under the direction of the Live Stock Sanitary Commission shall begin work of tick eradication within thirty days of the issuance of the said supplemental proclamation. Should the commissioners court find that a majority of the votes cast were against tick eradication, then the county judge shall so notify the Live Stock Sanitary Commission. [Acts 1913, p. 353, § 8; Act March 6, 1917, ch. 60, § 7.]

**Constitutionality.**—In view of Const. art. 3, § 56, regarding local and special laws, and article 16, § 23, allowing regulation of live stock, Tick Eradication Law (Acts 33d Leg. c. 169) § 8, providing for submission of tick eradication law to vote of county, etc., held constitutional. *McGee v. State* (Cr. App.) 194 S. W. 951.

**Art. 7314f. Zones or districts for tick eradication.**—The following zones or districts for the eradication of the Texas fever-carrying tick causing splenic or tick fever, are hereby established:

Zone No. 1. The Northern District, comprising the counties of Armstrong, Archer, Andrews, Anderson, Briscoe, Bailey, Baylor, Bowie, Borden, Brown, Brewster, Burnet, Bell, Bosque, Carson, Collingsworth, Castro, Childress, Cottle, Cochran, Crosby, Clay, Cooke, Collin, Comanche, Callahan, Coleman, Concho, Coke, Crockett, Crane, Culberson, Cass, Camp, Coryell, Cherokee, Dallam, Deaf Smith, Donley, Dickens, Delta, Denton, Dallas, Dawson, Erath, Eastland, Ellis, Ector, El Paso, Foard, Floyd, Fannin, Franklin, Fisher, Falls, Freestone, Gray, Grayson, Garza, Gaines, Gregg, Glasscock, Hartley, Henderson, Hansford, Hemp-hill, Hutchinson, Hall, Hardeman, Hale, Hockley, Hopkins, Hunt, Has-kell, Harrison, Hood, Howard, Mamilton, Hill, Irion, Jack, Jones, Jeff Davis, Johnson, King, Knox, Kent, Kaufman, Lipscomb, Lamb, Lub-bock, Lamar, Lynn, Loving, Llano, Lampasas, Limestone, Leon, Moore, Motley, Montague, Morris, McCulloch, Mitchell, Martin, Midland, Marion, Mills, Milam, McLennan, Nolan, Navarro, Oldham, Ochiltree, Parmer, Potter, Palo Pinto, Parker, Pecos, Presidio, Panola, Roberts, Randall, Red River, Rockwall, Runnels, Reagan, Reeves, Rains, Rusk, Robertson, Sherman, Swisher, Stonewall, Scurry, Shackelford, Stephens, Smith, Somervell, Sutton, Schleicher, Sterling, San Saba, Shelby, Titus, Throckmorton, Terry, Taylor, Tarrant, Tom Green, Terrell, Upshur, Upton, Van Zandt, Wheeler, Wood, Wichita, Wilbarger, Wise, Ward, Winkler, Young, Yoakum, Val Verde, provided that in Zone number one as above established in this bill, that all counties that have hereto-fore by majority vote, voted to eradicate ticks, in said counties, that on and after April 1st, 1917, the Live Stock Sanitary Commission of Texas, shall have the power to compel any owner of cattle, horses, mules, asses or any other animal on which ticks may be, to dip said live stock under the rules and regulations of said Live Stock Sanitary Commission as pro-vided in this Act, and that all elections held prior to the taking effect of this Act whereby any county in this State has by a majority vote, voted to eradicate ticks, is hereby in all things declared to be a valid election and is in all things ratified.

Zone No. 2. Comprising the counties of Angelina, Blanco, Bandera, Caldwell, Comal, Edwards, Guadalupe, Gillespie, Houston, Hays, Jasper, Kendall, Kimble, Kerr, Madison, Mason, Menard, Montgomery, Medina, Newton, Nacogdoches, Polk, Real, Sabine, San Jacinto, San Augustine, Travis, Tyler, Trinity, Uvalde, Kinney, Walker, Williamson, Jefferson, Liberty, and Orange.

Zone No. 3, or Southern Zone, comprising the counties of Austin, Atascosa, Aransas, Brazos, Bee, Brazoria, Bexar, Cameron, Burleson, Calhoun, Chambers, Colorado, Dimmit, Duval, DeWitt, Frio, Fayette, Fort Bend, Goliad, Galveston, Hidalgo, Harris, Hardin, Jim Hogg, Jack-



son, Brooks, Jim Wells, Kleberg, Karnes, LaSalle, Lavaca, Lee, Live Oak, Maverick, McMullen, Matagorda, Nueces, Refugio, Starr, San Patricio, Victoria, Webb, Willacy, Wilson, Wharton, Zavala, Zapata, Washington, Waller, Grimes, Gonzales, Bastrop. [Act March 6, 1917, ch. 60, § 8.]

**Art. 7314g. Proclamations respecting quarantine in tick zones.**— Provided further, that immediately after March 1, 1919, the Live Stock Sanitary Commission shall make and certify to the Governor of Texas a list of the names of the counties in Zone No. 1 that have not been freed from ticks and released from quarantine by the Live Stock Sanitary Commission; whereupon the Governor shall issue his proclamation proclaiming a quarantine in and around such counties, and thereafter all of such counties shall take up the work of tick eradication, and shall be subject to all of the provisions of this Act whether or not they shall have held an election as provided in Section 7 of this Act [Art. 7314e]. Provided further, that immediately after January 1, 1920, the Live Stock Sanitary Commission shall make and certify to the Governor a list of the names of the counties in Zone No. 2 that have not been freed from ticks and released from quarantine by the Live Stock Sanitary Commission; whereupon the Governor shall issue his proclamation proclaiming a quarantine in and around such counties, and thereafter all of such counties shall take up the work of tick eradication, and shall be subject to all of the provisions of this Act whether or not they shall have held an election as provided in Section 7 of this Act. Provided further, that immediately after January 1, 1922, the Live Stock Sanitary Commission shall make and certify to the Governor of Texas a list of the names of the counties in Zone No. 3, that have not been freed from ticks and released from quarantine by the Live Stock Sanitary Commission; whereupon the Governor shall issue his proclamation proclaiming a quarantine in and around such counties, and thereafter all of such counties shall take up the work of tick eradication, and shall be subject to all of the provisions of this Act whether or not they shall have held an election as provided in Section 7 of this Act. Provided, further, that certified copies of any proclamations by the Governor of Texas, issued under the authority of this Act, shall be admissible as evidence in the trial of any cases arising in prosecutions or other suits under this Act. [Id., § 9.]

**Art. 7314h. Same; movement of animals in quarantined districts.**— Upon the issuance of the supplemental proclamation as provided in Sections 7 [Art. 7314e] or 9 [Art. 7314g], every premise in said quarantine counties, parts of counties or districts shall at once become quarantined, and no cattle, horses, mules or asses shall be removed from any premises where located when the quarantine is proclaimed by the Governor, except in accordance with the rules and regulations of the Live Stock Sanitary Commission, or upon a written permit of an authorized inspector of the Live Stock Sanitary Commission of Texas, provided said Commission shall make and promulgate such rules and regulations as will permit the movement of work and saddle stock in any such quarantined county, part of county or district. [Act March 6, 1917, ch. 60, § 10; Act May 17, 1917, 1st C. S., ch. 12, § 1.]

See art. 1284j, Penal Code, post.  
See note under art. 7314b.

**Art. 7314i. Inspectors in counties voting to eradicate ticks.**—The Commissioners' court of any county within this State which said county has been quarantined under the provisions of Section 7 [Art. 7314e] or

9 [Art. 7314g] of this Act, shall notify the Live Stock Sanitary Commission of Texas, of the number of inspectors needed to conduct the work of tick eradication in their respective counties; whereupon the Live Stock Sanitary Commission shall appoint the number of inspectors designated, which inspectors shall be residents of the said county and shall work under the direction and orders of the Live Stock Sanitary Commission, and shall be subject to discharge by the said Commission, and shall be paid a salary out of the county treasury of that county, which compensation shall be fixed by the commissioners' court. [Act March 6, 1917, ch. 60, § 12; Act May 17, 1917, 1st C. S., ch. 12, § 1.]

See note under art. 7314b.

**Art. 7314j. Quarantine of sheep on account of scabies.**—Wherever any district, county or part of a county shall be quarantined by order of the Live Stock Sanitary Commission on account of scabies or scab in sheep, every individual premise within such quarantined area shall be quarantined separately, and no sheep shall be shipped, driven, drifted or permitted to be shipped, driven or drifted off any premises where located when such quarantine is declared, without a written permit from an authorized inspector of the Live Stock Sanitary Commission of Texas. [Act March 6, 1917, ch. 60, § 13.]

**Art. 7314k. Inspectors for districts quarantined for sheep scabies.**—The commissioners court of any county within the State of Texas, any part of which has been quarantined on account of scabies or scab in sheep, shall notify the Live Stock Sanitary Commission of Texas of the number of inspectors needed to conduct the work of sheep scab eradication in their respective counties, whereupon the Live Stock Sanitary Commission shall appoint the number of inspectors designated, which said inspectors shall be residents of the said county and shall work under the directions and orders of the Live Stock Sanitary Commission, and shall be subject to discharge by the said commission, and shall be paid a salary out of the county treasury, which compensation shall be fixed by the commissioners' court. [Id., § 14.]

**Art. 7314l. Publication or notice of quarantine order.**—Whenever the Live Stock Sanitary Commission shall have determined the fact that cattle, sheep or other live stock are infected with or have been exposed to any malignant, contagious or infectious disease, they shall designate the district, county, part of county, or premises necessary to be quarantined and notice of such quarantine shall be issued by the said commission or chairman thereof, as herein provided. Publication of such quarantine notice may be made in any newspaper within such area, or if no newspaper is published within such area, then the nearest newspaper thereto, or in the discretion of the Live Stock Sanitary Commission a written notice sent to the persons, firm or corporation owning or caring for such quarantined domestic animal or animals shall be deemed sufficient notice of such quarantine. [Act March 6, 1917, ch. 60, § 17; Act May 17, 1917, 1st C. S., ch. 12, § 1.]

See note under art. 7314b.

**Art. 7314m. Same; filing copy of notice with county clerk; evidence.**—Whenever any quarantine is declared by the Live Stock Sanitary Commission and printed or written notice thereof is given to the persons, firm or corporation owning, caring for, or in charge of such quarantined domestic animal or animals or premises, the person serving such written notice shall file a duplicate copy of such notice with the county clerk of the county wherein said quarantine is declared, which

duplicate copy shall be admissible as evidence in lieu of the original quarantine notice in any of the courts of this State. [Act March 6, 1917, ch. 60, § 18.]

**Art. 7314n. Seizure of animals being moved in quarantine district; dipping or treating; compensation of sheriff; lien.**—If any person, firm or corporation owning, controlling or caring for any domestic animal or animals within this State shall ship, drive, drift or permit to be shipped, driven or drifted any such domestic animal or animals out of any quarantined territory quarantined under the authority of this Act, the Live Stock Sanitary Commission shall have the power to call upon the sheriff, deputy sheriff, or any constable of the county in which such live stock may be found, and it shall be the duty of said sheriff, deputy sheriff or any constable of the county in which such live stock may be found, to seize said domestic animal or animals and return them to the premises from which they have been so moved, or to hold said domestic animal or animals in his custody, subject to such instructions as he may receive from the Live Stock Sanitary Commission of Texas. If any person, firm or corporation owning, controlling or caring for any domestic animal or animals located in any territory quarantined by the provisions of this Act, or by order of the Live Stock Sanitary Commission of Texas, shall fail or refuse to dip or treat such domestic animal or animals in such manner, and at such time as directed by the Live Stock Sanitary Commission, then the Live Stock Sanitary Commission, or the chairman thereof, or any inspector acting under the authority of said commission or chairman thereof, shall have the power to call upon the sheriff, deputy sheriff or any constable of the county in which such live stock are found, and it shall be the duty of said sheriff, deputy sheriff or constable, together with the said inspector, to seize and dip or otherwise treat such domestic animal or animals in a manner and at such times as the Sanitary Commission shall direct. The sheriff, deputy sheriff or constable performing such service as above set out shall receive such compensation as is provided in Article 7320, Revised Civil Statutes, and similar compensation shall be paid for any person he may have to assist him in performing such services, and the said fees, with all costs of dipping and treating of the said live stock, shall constitute a lien against such animal or animals and shall be collected by civil suit. [Act March 6, 1917, ch. 60, § 19; Act May 17, 1917, 1st C. S., ch. 12, § 1.]

See note under art. 7314b.

**Art. 7314o. County veterinarian.**—The Commissioners' court by a majority of the commissioners in each organized county, may appoint a competent person for the office of county veterinarian, who shall hold office for two years, and until his successor shall be appointed and qualify, unless sooner removed for cause. Said veterinarian shall take and subscribe to the constitutional oath of office, and shall file a copy of such oaths of office and a copy of his appointment with the Live Stock Sanitary Commission; and until such copies are so filed, said officer shall not be deemed legally qualified. Compensation of said veterinarian shall be fixed by the commissioners' court; provided, that no compensation or salary shall be allowed except for services actually rendered; said officer shall be a graduate veterinarian and shall work under the direction of the Live Stock Sanitary Commission and shall investigate and report all malignant, infectious or contagious diseases of live stock within his county to the Live Stock Sanitary Commission, and it shall be his duty to burn to ashes the carcass of any animal that may be found upon any property of the county where the ownership of such animal or animals is unknown. [Act March 6, 1917, ch. 60, § 20.]

**Art. 7314p. Composition of dip and mode of dipping.**—The dip to be used in the treatment of sheep scab under official supervision in this State is the lime and sulphur dip, made in the proportion of eight (8) pounds of unslaked lime or eleven (11) pounds of commercial hydrated lime (not air-slaked lime) and twenty-four (24) pounds of flowers of sulphur to one hundred (100) gallons of water. The dipping bath must at all times be maintained at a strength of not less than one and one-half ( $1\frac{1}{2}$ ) per cent of sulphid sulphur, or any other dip officially approved by both the Live Stock Sanitary Commission of Texas and the United States Bureau of Animal Industry. The dip to be used in the treatment of cattle for ticks shall be the arsenical dip approved by the United States Bureau of Animal Industry, or any other dip officially approved by both of said bureau and the Live Stock Sanitary Commission of Texas. [Id., § 21.]

**Art. 7314q. Construction of act; repeal.**—This Act shall be liberally construed and if any section thereof be declared invalid, the remaining parts of the law shall not be affected thereby, and it is the intent of the Legislature to preserve all, any and every portion of said Act if possible.

This Act does not repeal any law in force for the protection of domestic animals, but is cumulative thereto.

Chapter 169 of the General Laws of 1913, as passed by the Thirty-third Legislature at its Regular Session, Articles 1266, 1269, 1271, 1272, 1273, 1274, 1275, 1276, 1277, and 1278 of the Revised Criminal Statutes of 1911, are hereby expressly repealed, and all other laws and parts of laws in conflict herewith are hereby repealed. [Id., § 23.]

**Art. 7314r. Validation of elections.**—That all elections held in any county of this State for the purpose of determining whether such county should take up the work of tick eradication in said county under the provisions of Section 8, Chapter 169, Acts of the Regular Session of the 33rd Legislature, wherein the petition was filed, orders of election made by the Commissioners Court and notice thereof given prior to the taking effect of Committee Substitute Senate Bill No. 108, enacted by the 35th Legislature and approved by the Governor on March 6, 1917, which bill took effect immediately upon the approval and the election so ordered was held at a date subsequent to the taking effect of said Committee Substitute Senate Bill No. 108, are hereby in all things validated and shall be by all the courts of this State held to be valid elections just as tho the same had been ordered and held prior to the taking effect of said Committee Substitute Senate Bill No. 108. [Act May 12, 1917, 1st C. S., ch. 4, § 1.]

Became a law May 12, 1917.

**Art. 7314s. Powers of Live Stock Sanitary Commission not abridged.**—This Act shall not be construed to in any wise alter, affect, abrogate or in any wise abridge the rights, powers, and duties of the Live Stock Sanitary Commission of the State of Texas under such Committee Substitute Senate Bill No. 108. [Id., § 2.]

**Art. 7319. [5043h] Compensation of Commissioners.**

Art. 7085b, ante, fixes the salary of the chairman of the commission at \$2,500, and that of each of the other two members at \$1,250.

**Art. 7322.**

Repealed. Acts 1913, p. 353, sec. 9. See note under art. 7314, Vernon's Sayles' Civ. St. 1914.

**Fixing quarantine line.**—The Governor and the sanitary commission, which was required by this article to fix the same quarantine line against Texas fever as fixed by the federal government, might, between the time of the enactment and the going into effect of Acts 33d Leg. c. 169, authorizing the establishment of a different line, fix a new line which would be applicable when the law went into effect. *Smith v. State*, 74 Cr. R. 232, 168 S. W. 522.

## TITLE 125

## SUPPLIES FOR PUBLIC INSTITUTIONS

Chap.

1. State purchasing agent for eleemosynary institutions.

Chap.

2. Of the mode of supplying fuel to the executive and other departments.

## CHAPTER ONE

## STATE PURCHASING AGENT FOR ELEEMOSYNARY INSTITUTIONS

<p>Art. 7325. State purchasing agent; appointment; salary; personal interest in contracts; accounting as agent; rebates, etc.</p> <p>7327. Storekeepers and accountants; superintendent to act in smaller institutions; salary; bond; certain offices abolished; duties.</p> <p>7328. Manner of contracting for supplies.</p> <p>7333. Emergency purchases.</p>	<p>Art. 7335. Purchase of perishable and special supplies.</p> <p>7336. Purchasing agent's chief clerk; salary; duties; bond and oath; assistant clerk; annual report by purchasing agent.</p> <p>7337. Institutions contemplated by this chapter; approval of certain contracts.</p>
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**Article 7325. State Purchasing Agent; appointment; salary; personal interest in contracts; accounting as agent; rebates, etc.**—The State Purchasing Agent shall be appointed by the Governor, by and with the advice and consent of the Senate, every two years, and shall hold his office for a term of two years from the date of his qualification, and until his successor is appointed and qualified. Said Purchasing Agent shall receive an annual salary of three thousand (\$3,000.00) dollars, which shall not be increased or diminished during his term of office, and he shall not receive, directly or indirectly, any extra compensation in the way of commissions or otherwise. Said agent shall not be interested in, or in any manner connected with, any contract or bid for furnishing supplies or articles of any kind to any of said institutions or to any other department or institution of the State, or with any person, firm or corporation who is interested in or in any manner connected with any kind of contract with the state or any of its institutions and departments, nor shall he collect or be paid his salary, or any part thereof, while he is in any manner or degree indebted to the state or in arrears in his accounts and reports as such agent. Neither shall said agent accept or receive from any person, firm or corporation to whom any contract may be awarded, directly or indirectly, by rebate, gift or otherwise, any money or other thing of value whatever, nor shall he receive any promise, obligation or contract for future reward or compensation from any such party. [Acts 1899, p. 138, § 1; Act March 23, 1915, ch. 126, § 1.]

**Explanatory.**—The act amends articles 7325, 7327, 7328, 7333, 7335, 7336, and 7337 of ch. 1, Title 125, of Rev. St. 1911. Sec. 2 of the act expressly repeals chapter 2 of title 125 and article 6345 of ch. 1, title 110, declares that all other articles in ch. 1, title 110, are retained and not repealed, and repeals all other laws in conflict with ch. 1, title 125. The act took effect 90 days after March 20, 1915, date of adjournment. See Vernon's Pen. Code 1916, arts. 120, 121, 122a.

This article is in part superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, fixing the salary of the purchasing agent at \$3,000.

**Art. 7327. Storekeepers and accountants; superintendent to act in smaller institutions; salary; bond; certain offices abolished; duties.**—There shall be appointed by the superintendents, with the advice and consent of the board of managers of said institution, storekeepers and ac-

countants, one for each of said institutions, who shall hold their office for two years from date of qualification, or until their successors shall have qualified, unless sooner removed by the board of managers, at the suggestion of the superintendent or upon complaint of the purchasing Agent, for inefficiency, incompetency, neglect of duty or other adequate cause affecting their faithful and satisfactory performance of duty; provided, that where the magnitude of an institution is not sufficient to employ a storekeeper and accountant, that the superintendent shall perform that service. Said storekeeper or accountant shall receive a compensation of not to exceed the sum of nine hundred (\$900.00) dollars per annum, to be charged and paid as a part of the current expenses of said institution; and they shall not be entitled to charge, collect or receive any other compensation or commutation or commission, unless it be their own individual board and lodging, when they are required to reside within the institutions to which they are attached. Each of said storekeepers or accountants shall, before entering upon the performance of his duties, make and file with the Comptroller of Public Accounts a bond in the sum of ten thousand (\$10,000.00) dollars, payable to the State of Texas, to be approved by the Governor and filed with the Comptroller, which bond shall be conditioned for the full, faithful, accurate and honest performance of his duties; and it shall not be lawful for said storekeepers or accountants to sell or to in any way be concerned in the sale of any merchandise, supplies or other articles to any of the institutions herein named, or to have any interest in any bid or contract therewith, or with any other institution or department of the state government. The office or position of steward, quartermaster or other similar position heretofore existing in any and all eleemosynary institutions are abolished, and said storekeepers or accountants shall hereafter perform all of the duties, except as may be inconsistent with the provisions of this chapter heretofore imposed upon such abolished officers or employes, as well as such other duties as may be required of them by the management of said institutions. They shall also keep the Purchasing Agent constantly advised as to the amount and character of supplies on hand and the amount and character required in order to keep the institutions constantly provided for, and they shall make report on or before the tenth day of each month to the State Purchasing Agent, showing the total amount of appropriation, the total amount expended and the balance unexpended on the first of each month. They shall also furnish any other information respecting such matters as may be desired by the said Purchasing Agent. If at any time any institution accumulates an amount of supplies on hand in excess of its needs, and another institution is in need of any such supplies, the Purchasing Agent shall present such facts to a board composed of the Governor, Comptroller and Purchasing Agent, with the recommendation that such institution in need of such supplies shall be furnished from such excess of supplies, and if approved by the board, shall forthwith transfer any of such from the institution having such excess to such institution in need of such supplies, and the debit and credit shall be made on the basis that such supplies could be purchased in the open market at the time of the transfer, if such is less than the cost under the general contract for such supplies for the fiscal year, otherwise the debit and credit shall be made on the basis of the general contract price for that year, and all controversies as to such shall be determined by a board composed of the Governor, Comptroller and Purchasing Agent; provided, that any educational institution may dispense with the position of storekeeper, provided for in this Act, and select or appoint some person at such institution

whose duty it shall be to receive such supplies purchased, and such person shall make the reports to the Purchasing Agent, as is required of the storekeeper in this article. [Acts 1899, p. 138, § 3; Act March 23, 1915, ch. 126, § 1.]

**Note.**—Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, provides that storekeepers and accountants shall receive an annual salary to be fixed in the general appropriation bills not to exceed \$1,200.

See note under art. 7325.

**Art. 7328. Manner of contracting for supplies.**—When and where supplies are to be paid for by the state of Texas out of appropriations and authorized by the Legislature of Texas, it shall be the duty of the Purchasing Agent aforesaid to contract for all supplies, merchandise and articles of every description needed for the maintenance and operation of said institution, except those supplies designated by the board composed of the Governor, Comptroller and Purchasing Agent as perishable, and supplies of a special character, as books for libraries and supplies for laboratories and laboratory work and instruction, and any special supplies for instruction, demonstration and research for educational institutions, to be designated as "Special supplies for educational institutions," basing his contract or contracts upon estimates to be furnished him by the superintendents and approved by the boards of said institutions, respectively, by the first day of April of each year for an entire year, and all such contracts shall be made after full notice of advertisement of not less than four weeks in at least four of the leading papers of the state, to be selected by the said agent within the limits of appropriations made by the Legislature for such purposes, regard being had to the appropriations for each institution. Such advertisement shall call for sealed bids or proposals to furnish the aggregate of the desired articles and supplies as estimated for by such institutions, naming the articles, supplies and quantities and character required; and all such bids or proposals shall, when required by the Purchasing Agent, be accompanied by samples or designs furnished by the bidder, and shall be for the entire period of one year; such supplies, articles and merchandise to be delivered at such times, in such quantities and to such institutions as said Purchasing Agent may from time to time designate; and should the supplies, or any portion thereof, as contracted for, be not sufficient for the year for which the contract or contracts shall be made, then the contractor or contractors shall be required to furnish such additional supplies at the prices named for similar articles under the contract or contracts; provided that should said Purchasing Agent at any time discover that he could purchase the same supplies for less money than for any one year, and by buying the same for a less length of time than one year, he shall have the authority to make such purchases for a shorter length of time, but not less than three months. It being the purpose of this chapter to authorize and require said Purchasing Agent to make such contracts upon such terms as will secure the best and cheapest rates for the state in the purchase of supplies and articles of necessity for said institutions, and to that end he shall reserve the right to reject any and all bids or to accept any bid in part or to reject it in whole; and if none of the bids or proposals are deemed advantageous and satisfactory, he may buy in the open market until a proper and satisfactory bid is offered. The period for which such bids or proposals are invited shall be clearly stated in said advertisement, as well as the terms and conditions contemplated by the provisions of this chapter; when the same article is estimated for by two or more institutions, but of different brands or grades shall be purchased, so as to produce uniformity in

use by all institutions; provided, that other things being equal, supplies offered by bidders who have an established local business shall have preference, provided, that furniture or equipment for educational institutions shall be of such kind and character as specially adapted or designed for such institutions. [Acts 1899, p. 138, § 4; Act March 23, 1915, ch. 126, § 1.]

See note under art. 7325.

**Art. 7333. Emergency purchases.**—In case of emergency and where articles are deemed in need and necessary by any such institution, and are of such character as to be impracticable to be included in the annual contract, the superintendent of any such institution shall make a requisition for same to the Purchasing Agent, who, if in his judgment he considers the articles or supplies to be needed or necessary, shall forthwith purchase same in the open market, but if he does not approve the requisition he shall forthwith forward the same to the board of managers or board of control of the institution, who shall forthwith investigate the need of the articles or supplies requested, and if satisfied that the requisition is proper, shall thereupon recommend the same to the Purchasing Agent, who shall then forthwith honor the requisition and make the required purchases in the open market; provided, that furniture or equipment for educational institutions shall be of the particular kind and make as requisitioned for by such institutions when approved by the board composed of the Governor, Comptroller and Purchasing Agent. Provided, that in all bids taken by the Purchasing Agent or under his direction preference shall be given to the dealers in the cities or towns in the county in which the said institution is located, conditioned that the articles to be purchased shall be the equal in price and quality to the articles if purchased elsewhere. [Acts 1899, p. 138, § 9; Act March 23, 1915, ch. 126, § 1.]

See note under art. 7325.

**Art. 7335. Purchase of perishables and special supplies.**—The Governor, Comptroller and Purchasing Agent shall frame and transmit to each institution a system of rules and regulations for the purchase of such supplies as have been designated by them as perishable and as special supplies for educational institutions, and to which conformity by all the institutions is hereby required. [Acts 1899, p. 138, § 11; Act March 23, 1915, ch. 126, § 1.]

See note under art. 7325.

**Art. 7336. Purchasing agent's chief clerk; salary; duties; bond and oath; assistant clerk; annual report by Purchasing Agent.**—The Purchasing Agent shall have authority to appoint one chief clerk in his office, whose salary shall not be more than fifteen hundred (\$1,500.00) dollars per annum, which chief clerk shall be authorized, in the absence or inability of the Purchasing Agent, to approve accounts for supplies heretofore purchased and contracted for, and shall be responsible for supplies under his care, and shall take the constitutional oath of office and before entering upon the performance of his duties shall make and file with the Comptroller of Public Accounts a bond in the sum of ten thousand (\$10,000.00) dollars, payable to the State of Texas, to be approved by the Governor, conditioned for the full, faithful, accurate and honest performance of his duties as required by law, and one assistant clerk, who shall be a competent stenographer, at a salary not to exceed twelve hundred (\$1,200) dollars per annum, and one porter not to exceed four hundred and eighty (\$480) dollars per annum. The Purchasing



Agent shall make an annual report to the Governor at the end of each fiscal year, covering all his acts and doings, and such report shall be laid before the Legislature at its next session thereafter. [Acts 1899, p. 138, § 12; Act March 23, 1915, ch. 126, § 1.]

**Note.**—Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, fixes the salary of the chief clerk of the purchasing agent at \$2,000.

See note under art. 7325.

**Art. 7337. Institutions contemplated by chapter; approval of certain contracts.**—The institutions herein contemplated are those for the care of the insane, deaf and dumb, the blind, the orphans, the Confederate Home and all other State institutions, educational or eleemosynary, now established or that may hereafter be established anywhere in Texas, excepting the penitentiary system and its management, and also excepting the Senate and House of Representatives and all departments in the State Capitol, including General Land Office, and as to such Senate, House of Representatives, departments and General Land Office the present law or custom now in force shall continue; provided, that all contracts designated in Article 16, Section 21, of the Constitution of the State shall be approved by a board consisting of the Governor, Secretary of State and Comptroller. [Acts 1899, p. 138, § 13; Act March 23, 1915, ch. 126, § 1.]

See note under art. 7325.

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## CHAPTER TWO

### OF THE MODE OF SUPPLYING FUEL TO THE EXECUTIVE AND OTHER DEPARTMENTS

#### Articles 7339–7348.

Repealed by Act March 23, 1915, ch. 126, § 2, p. 198. See note under art. 7325.

## TITLE 126

## TAXATION

Chap.	1. Of the levy of taxes and payment of occupation taxes.	Chap.	10. Inheritance tax.
	2. Taxes based upon gross receipts.		11. Of the property subject to taxation, and the mode of rendering same.
	3. Franchise tax.		12. Of the assessment of taxes; election and qualification of assessor.
	4. State intangible tax board.		13. Of the collection of taxes; election and qualification of collector.
	5. Tax on liquor dealers.		14. Of the assessment and collection of back taxes on unrendered lands.
	6. Tax on sale of intoxicating liquors in local option territory.		15. Delinquent taxes.
	7. Tax on dealers in non-intoxicating malt liquors.		17. Assessment and collection of taxes in certain cases.
	8. Tax on persons soliciting orders or operating cold storage for intoxicating or non-intoxicating beverages in local option districts.		19. New counties.

## CHAPTER ONE

## OF THE LEVY OF TAXES AND PAYMENT OF OCCUPATION TAXES

Art.	7353. Commissioners' court to calculate county rate, when.	Art.	8. Billiard and pool tables.
	7354. Poll tax.		9. Nine and ten pin alleys.
	7355. Occupation taxes.		13. Theaters.
	Sec. 1. Itinerant merchants.		15. Menagerie, etc.; museum, etc.; carnivals.
	2. Traveling vendors of patent medicines.		23. Pawnbrokers.
	6. Itinerant physicians, etc.		36. Moving picture shows.
		7357. County ad valorem.	

**Article 7353. Commissioners' court to calculate the county rate, when.**

**Levy of tax.**—An order of the commissioners' court of a county providing that the rate of taxation for a year for the county "be and is as follows," followed by a tax rate for various purposes, does not levy a tax within the statute. *Purington v. Broughton* (Civ. App.) 158 S. W. 227.

**Art. 7354. [5048] Poll tax.**

**Tax on person.**—Assessment of poll taxes held not required by art. 7567, as a condition precedent to the right of the taxpayer to compel the collector to assess the amount levied by law as a poll tax, and to issue a receipt therefor; such tax being a tax on the person imposed by this article. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

**Art. 7355. [5049] Occupation taxes.****Sec. 1. Itinerant merchants.**

**Itinerancy as element.**—Under this section license held imposed only on merchants pursuing such occupation temporarily; and an indictment for engaging in such business without a license, not alleging that accused pursued such occupation for a limited time, was fatally defective. *Mistrot v. State*, 73 Cr. R. 172, 164 S. W. 848.

**Information.**—Information, under this section, imposing a tax or license upon itinerant merchants offering bankrupt stocks, or advertising fire sales, held not to sufficiently show what tax, if any, was due, or who was liable therefor. *Mistrot v. State*, 72 Cr. R. 408, 162 S. W. 833.

**Sec. 2. Traveling vendors of patent medicines.**—Traveling vendors of patent medicines. From every traveling person selling patent or other medicines, fifty (\$50.) dollars, and no traveling person shall so sell until said tax is so paid, provided this tax shall not apply to commercial travelers, drummers, or salesmen making sales, or soliciting trade for merchants engaged in the sale of drugs or medicines by wholesale. [Acts 1897, 1 S. S., p. 49; Act March 29, 1917, ch. 132, § 1.]

**Explanatory.**—The act amends subd. 2, art. 7355, ch. 1, Title 126, Rev. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Validity.**—Const. art. 8, §§ 1, 2, authorizes the Legislature to create classes for the imposition of occupation taxes, and this and art. 7357, imposing an occupation tax on traveling vendors of patent medicines, is not invalid because exempting merchants and druggists or because the penalty may in part be fixed by the commissioners' court, levying a tax for the county. *South v. State*, 72 Cr. R. 381, 162 S. W. 510.

**Creation of offense.**—See *South v. State*, 72 Cr. R. 381, 162 S. W. 510.

**Conviction authorized.**—Under this article, imposing occupation tax on traveling persons selling medicines, etc., and Pen. Code 1911, art. 130, making the pursuit of any occupation without paying the license tax on offense, held, on facts shown, that a conviction for selling medicines without a license was authorized. *Collins v. State* (Cr. App.) 182 S. W. 327.

**Indictment.**—Under Code Cr. Proc. 1911, arts. 453, 460, 474, relating to sufficiency of indictments, indictment under this section which exempts salesmen for merchants "engaged in the sale" of medicines, etc., alleging that defendant was not selling for merchants "selling medicines," etc., held to sufficiently negative proviso. *Collins v. State* (Cr. App.) 182 S. W. 327.

### Sec. 6. Itinerant physicians, etc.

**Who required to pay tax.**—A person who traveled over the county testing eyes, with implements for so testing, etc., and taking orders for eyeglasses, was liable for the occupation tax, under this article. *Tipton v. State*, 74 Cr. R. 225, 168 S. W. 97.

Where accused for over a year had been a resident of V., he cannot be convicted of pursuing the occupation of an "itinerant" physician without payment of the tax required. *Rutherford v. State*, 74 Cr. R. 617, 169 S. W. 1157.

**Evidence in prosecution.**—See *Tipton v. State*, 74 Cr. R. 225, 168 S. W. 97.

### Sec. 8. Billiard and pool tables.

Cited, *Roper & Gilley v. Lumpkins* (Civ. App.) 163 S. W. 110; *Ex parte Mode* (Cr. App.) 180 S. W. 708.

**Purpose and effect in general.**—This section held not in conflict with or suspended by Acts 33d Leg. c. 74 (Vernon's Sayles' Civ. St. 1914, art. 6319a), permitting counties and precincts to accept its provisions prohibiting pool halls. *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147.

This section is a purely revenue statute, and does not establish a policy to restrict the use of such tables. *State v. Country Club* (Civ. App.) 173 S. W. 570.

A license to operate a pool hall is not a property right, nor a contract, nor does it create a vested right, but it is a mere permit. *State v. Clark* (Cr. App.) 187 S. W. 760; *State v. Nabers* (Cr. App.) 187 S. W. 783, 784.

In view of Const. art. 1, § 28, and sec. 8 of this article, expressly permitting the keeping of pool rooms, etc., held, that Acts 33d Leg. c. 74 (Vernon's Sayles' Civ. St. 1914, art. 6319a et seq.), authorizing local option with regard to the keeping of pool rooms for hire, is unconstitutional. *Lyle v. State* (Cr. App.) 193 S. W. 680.

**Social club.**—This article, sec. 8, does not impose the occupation tax for keeping a billiard table for profit or in a place of business, where liquors are sold upon a bona fide social club providing such tables for the free use of its members. *State v. Country Club* (Civ. App.) 173 S. W. 570.

**Sec. 9. Nine and ten pin alleys.**—From every nine or ten pin or other alley used or operated for profits by whatever name called, constructed or operated upon the principle of a bowling alley upon which pins, pegs, balls, rings, hoops or other devices are used, without regard to the number of pegs, pins, hoops, rings or balls used and without regard to the number of tracks or alleys in the same building or place, or whether the balls or other devices are rolled or used by hand or otherwise, one hundred dollars. Any alley used in connection with any drug store, or place where intoxicating liquors or tobacco in any form are sold or given away, or upon which money or other things of value are paid or charged for the privilege of playing shall be regarded as used and operated for profit. [Acts 1897, 1 S. S., p. 49; Act April 2, 1917, ch. 173.]

**Explanatory.**—The act amends art. 7355, sec. 9, of Title 126, ch. 1, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

### Sec. 13. Theaters.

**Necessity of issuance of license.**—*Ex parte Jennings*, 76 Cr. R. 116, 172 S. W. 1143.

**Liability for breach of contract with unlicensed theater owner.**—Damages sustained from defendant's failure to furnish electric current for theater building before plaintiff commenced business held recoverable, although he did not then have license for such business. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

**Sec. 15. Menagerie, etc.; museum, etc.; carnivals.**—From every menagerie, wax works, side shows or exhibition, whether connected with a circus or not, where a separate fee for admission is demanded or received, ten dollars for every performance or exhibition, in which fees for admission are received; provided, that from any museum, menagerie or zoological exhibition, or a combination thereof, operated and maintained in any city or town and open for admission all day continuously, in which a charge for admission is demanded or received, an annual tax of fifty dollars. Provided, that where any carnival, or carnivals, shows, amusements or entertainments are held under the auspices, direction or control of any chamber of commerce of any city or other similar organization, for not longer during any one year of a period or periods aggregating thirty days, it shall not be necessary for such carnivals, shows or entertainments to pay any tax to the State, city or county during the operation of said show by said chamber of commerce or other similar organization, but there shall be assessed against said chamber of commerce a State tax of one hundred dollars. [Acts 1897, 1 S. S., p. 49; Act March 30, 1915, ch. 135, § 1.]

**Explanatory.**—The act amends subd. 24 of article 5049, ch. 1, Title 104, of Rev. Civ. St. 1895, known as sec. 15 of art. 7355, ch. 1, Title 126, Rev. Civ. St. 1911. Sec. 2 repeals all laws in conflict. Became a law March 30, 1915.

**Sec. 23. Pawnbrokers.**

**What statute governs.**—See *Schapiro v. State*, 75 Cr. R. 17, 169 S. W. 683.

**Indictment.**—See *Schapiro v. State*, 75 Cr. R. 17, 169 S. W. 683.

**Sec. 36. Moving picture shows.**

**City and state tax.**—The mere fact that an exhibitor of motion pictures has paid the state occupation tax for such exhibition does not relieve him from compliance with the city ordinance, requiring the securing of a permit as a prerequisite to the showing of pictures. *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

DECISIONS RELATING TO ARTICLE IN GENERAL

**Validity of statute in general.**—The Legislature may classify persons or subjects for taxation or regulation which right includes the right to exempt; the test being whether it operates equally and uniformly upon all persons in the class. *Booth v. City of Dallas* (Civ. App.) 179 S. W. 301.

**Art. 7357. [5050] County ad valorem, etc.**

Cited, *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

**Validity.**—Const. art. 8, §§ 1, 2, authorizes the Legislature to create classes for the imposition of occupation taxes and this article and art. 7355, imposing an occupation tax on traveling vendors of patent medicines, is not invalid because exempting merchants and druggists. *South v. State*, 72 Cr. R. 381, 162 S. W. 510.

**Excessive levy.**—An excessive levy for taxes is absolutely void, whether the excess is caused by including unlawful expenses, such as officers' fees, with lawful taxes, or otherwise. *Bonougli v. Brown* (Civ. App.) 185 S. W. 47.

**Authority of court—In general.**—This article and art. 7355, imposing an occupation tax on peddlers of patent medicines, and Pen. Code 1911, art. 130, punishing one pursuing taxable occupations without a license, held not void because the penalty imposed may in part be fixed by the commissioners' court, levying a tax for the county. *South v. State*, 72 Cr. R. 381, 162 S. W. 510.

**Liability of pawnbroker.**—Under this article and art. 7355, and Pen. Code 1911, art. 130, a complaint and information, alleging that accused, pursuing the occupation of pawnbroker without first obtaining a license, need not allege that the commissioners' court had entered an order fixing the county tax, nor allege the facts as to accused loaning money and receiving deposits as security for the payment of loans. *Schapiro v. State*, 75 Cr. R. 17, 169 S. W. 683.

Art. 6155 et seq., and Pen. Code 1911, art. 641, held not to fix the liability of a pawnbroker for pursuing the occupation without obtaining a license, which is determined by this article and art. 7355, and Penal Code, art. 130. *Id.*

**Penal offense.**—Under Pen. Code 1911, arts. 3, 6, providing that all penalties for offenses must be fixed by written law, article 130, punishing the pursuing of taxable occupations without first obtaining a license, when read in connection with this article and art. 7355, imposing a tax on peddlers of patent medicines, prescribes a penal offense on one peddling patent medicines without first obtaining a license. *South v. State*, 72 Cr. R. 381, 162 S. W. 510.

## CHAPTER TWO

## TAXES BASED UPON GROSS RECEIPTS

Art.		Art.	
7369.	Express companies.	7384.	Terminal companies.
7378.	Interurban and electric railway companies.	7386.	Penalty for failure to report.
7379.	Wholesale dealer in or distributors of liquors, etc.	7387.	Penalty for failure to pay tax.
		7390.	Tax in addition to all other taxes.

**Article 7369. Express companies.**

Cited, *State v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 166 S. W. 83.

"Railroad."—The word "railroad," as used in this article, is not limited to commercial steam railroads, but includes interurban railroads run by electricity. *North Texas Transfer & Warehouse Co. v. State* (Civ. App.) 169 S. W. 1045.

Acts 30th Leg. (1st Ex. Sess.) c. 18, § 1, imposing an occupation tax on one doing express business by "railroad," held not to apply to that done by electric interurbans. *North Texas Transfer & Warehouse Co. v. State* (Sup.) 191 S. W. 550.

**Art. 7378. Interurban and electric railway companies.**

Cited, *North Texas Transfer & Warehouse Co. v. State* (Civ. App.) 169 S. W. 1045.

**Art. 7379. Wholesale dealers in or distributors of liquors, etc.**

Cited, *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

**Art. 7384. Terminal companies.**

Interstate commerce.—Terminal railway company held engaged in interstate commerce, though it did not participate in through rates, was not a party to the bills of lading, and though its charges did not come from the shipper, but were made directly against the companies using its terminal facilities on a wheelage basis. *State v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 166 S. W. 83.

This article, held to impose an occupation tax, and not invalid as imposing a burden on interstate commerce, as applied to a terminal company doing domestic and interstate business. *Id.*

The state has power to levy a valid occupation tax upon the domestic business of a company owning and operating a terminal railway within the state and transacting both interstate and domestic business. *Id.*

A tax levied by this article on an interstate railway measured by its gross earnings additional to its property and franchise tax, is invalid as a burden on interstate commerce. *Houston Belt & Terminal Ry. Co. v. State* (Sup.) 192 S. W. 1054.

**Art. 7386. Penalty for failure to report.**

Cited, *North Texas Transfer & Warehouse Co. v. State* (Sup.) 191 S. W. 550.

**Art. 7387. Penalty for failure to pay tax.**

Cited, *North Texas Transfer & Warehouse Co. v. State* (Sup.) 191 S. W. 550.

**Art. 7390. Tax in addition to all other taxes.**

Cited, *State v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 166 S. W. 83.

## CHAPTER THREE

## FRANCHISE TAX

Art.		Art.	
7394.	Tax to be paid by foreign corporations.	7399.	On failure to pay tax, charter forfeited, when; penalty.
		7400.	Notice of forfeiture.

**Article 7394. Tax to be paid by foreign corporations.**—Except as herein provided, each and every foreign corporation authorized, or that may hereafter be authorized, to do business in this State shall, on or before the first day of May of each year pay in advance to the Secretary of State a franchise tax for the year following which shall be com-

puted as follows: The total capital stock of such corporation, the total gross receipts of such corporation from all its business and the total gross receipts from the business of such corporation for the calendar year immediately preceding shall be ascertained by the Secretary of State from sworn reports of the officers of such corporation or by such other method as may satisfy the Secretary of State and the capital stock of such corporation upon which the franchise tax herein provided is based shall be that proportion of the entire authorized capital stock as the gross receipts from the Texas business of such corporation done within the State of Texas bears to the total gross receipts of such corporation from its entire business and the capital stock assignable to the Texas business and upon which the fees hereinafter provided shall be calculated and based being thus ascertained, the franchise tax which is hereby provided shall be computed as follows: \$1.00 on each \$1,000.00 or fractional part thereof up to and including \$100,000.00; \$2.00 on each \$5,000.00 or fractional part thereof in excess of \$100,000.00 and up to and including \$1,000,000.00; \$2.00 on each \$20,000.00 or fractional part thereof in excess of \$1,000,000.00 and up to and including \$10,000,000.00 and \$2.00 on each \$50,000.00 of such stock in excess of \$10,000,000.00; provided, however, that where such corporation has a surplus or undivided profits the same shall be added to the entire capital stock of such corporation and shall be taken and computed as a part thereof in determining the amount of such entire capital stock; provided, that where a foreign corporation applying for a permit has theretofore done no business in Texas the franchise tax herein provided shall not be payable until the end of one year from the date of such permit at which time the franchise tax shall be computed upon that proportion of the entire capital stock ascertained as above required as the receipts from its Texas business bears to the receipts of the corporation from its entire business for the same period; and the second payment of such franchise tax shall be made for the period intervening between the date of such first payment and the first day of May following, the proportion of capital stock upon which the same shall be computed to be the same proportion that the receipts from the Texas business for such period bears to the receipts of the corporation from its entire business for the same period, and that thereafter such franchise tax shall be payable annually on the first day of May for the year succeeding computed upon that proportion of the entire capital stock of such corporation which the receipts from the Texas business of such corporation bears to its entire receipts for the calendar year preceding as herein above provided. [Acts 1907, p. 503, § 2; Act March 17, 1917, ch. 84, § 1.]

**Explanatory.**—Sec. 2 repeals all laws in conflict. The act amends art. 7394, Rev. St. Took effect 90 days after March 21, 1917, date of adjournment.

**Constitutionality.**—This article and art. 3837, imposing a franchise tax on all business, both intrastate and interstate, thereby placing a tax on the corporation's property rights beyond the jurisdiction of the state for taxation purposes, are unconstitutional. *Crane Co. v. Looney* (D. C.) 218 Fed. 260.

### **Art. 7399. Failure to pay tax; charter forfeited, when; penalty.**

**Rights after forfeiture.**—After forfeiture of the right of a corporation to do business, under this article, directors held entitled to sue as stockholders to set aside a void judgment against the corporation, though not as trustees under art. 1206. *Favorite Oil Co. of Beaumont & Cleburne v. Jef Chaison Townsite Co.* (Civ. App.) 162 S. W. 423.

Where a corporation has forfeited its right to do business because of its failure to pay its franchise tax, equity will entertain a suit by stockholders when necessary to protect the interests of the corporation. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

**Nonpayment of tax; effect.**—The right of a corporation to maintain an action cannot be defeated by a mere showing of nonpayment of its franchise tax; this article and

art. 7400, providing for forfeiture for that reason, requiring affirmative action by the Secretary of State and notice as a prerequisite. *Pitts v. Cypress Shingle & Lumber Co.* (Civ. App.) 158 S. W. 799.

A corporation, which fails to pay the franchise tax under this article, may not do any business, or sue or defend a suit. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

**Pleading failure to pay tax.**—The fact that plaintiff corporation had not paid its franchise tax, so that it was not entitled to maintain an action under this article, could only be urged by a plea in abatement. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

**Limitations.**—The fact that when plaintiff corporation sued on notes it was not legally entitled to sue under this article because it had not paid its franchise tax, would not cause the action to be barred by the four-year limitation, though before an amended petition was filed showing compliance with the statute more than four years had elapsed since maturity of the last note. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

#### Art. 7400. Notice of forfeiture.

**Nonpayment of franchise tax; effect.**—The right of a corporation to maintain an action cannot be defeated by a mere showing of nonpayment of its franchise tax; this article and art. 7399, providing for forfeiture for that reason, requiring affirmative action by the Secretary of State and notice as a prerequisite. *Pitts v. Cypress Shingle & Lumber Co.* (Civ. App.) 158 S. W. 799.

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## CHAPTER FOUR

### STATE INTANGIBLE TAX BOARD

**Article 7407. State tax board, of whom composed; tax commissioner, appointment of.**

**Note.**—Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, fixes the salary of the tax commissioner at \$2,500. See art. 7084.

Cited, *State v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 166 S. W. 83.

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## CHAPTER FIVE

### TAX ON LIQUOR DEALERS

Art.	Art.
7427. Tax to be collected.	7443. Same.
7433. Transfer of license, etc.	7446. Petition for license.
7435. Application of license.	7451. Regulating hours of closing, etc.
7436. Comptroller may revoke license.	

#### Article 7427. Tax to be collected.

**Ordinance.**—An ordinance of a city prohibiting license to sell liquors in certain territory held not subject to the criticism that it does not prohibit sale of liquors in view of Pen. Code 1911, art. 130, and Acts 31st Leg. c. 17, § 1. *Le Gois v. State* (Cr. App.) 190 S. W. 724.

#### Art. 7433. Transfer of license, etc.

Cited, *Winterman v. State* (Cr. App.) 179 S. W. 704.

#### Art. 7435. Application for license.

**Sufficiency of information.**—In view of this article and art. 7446, Code Cr. Proc. arts. 453, 460, 464, and Pen. Code, art. 614, an information charging sale of intoxicants without a license, following article 611, held sufficient, while not averring the particular place in the county or that accused was licensed to sell elsewhere. *Winterman v. State* (Cr. App.) 179 S. W. 704.

#### Art. 7436. Comptroller may revoke license.

Cited, *Lane v. Chappell* (Civ. App.) 159 S. W. 905; *Lane v. Higgins* (Civ. App.) 159 S. W. 907.

**Judicial review.**—Under Const. art. 2, § 1, relating to the distribution of powers of government, held, that the district court, in a suit under article 7443, by one dissatisfied

with the comptroller's revocation of his liquor license in accordance with articles 7436-7442, does not act in an appellate capacity but has original jurisdiction. *Lane v. Volz & Falwell* (Civ. App.) 164 S. W. 20.

In a proceeding to annul the comptroller's forfeiture of plaintiff's liquor license, a finding by the trial court that plaintiffs did not willfully and knowingly sell intoxicants to minors and students in institutions of learning held not so contrary to the evidence that it could be disturbed on appeal. *Id.*

The trial of a suit in the district court against the State Comptroller to reinstate a liquor license canceled by him on evidence taken before a notary public, is *de novo*, so that evidence in addition to that taken before the notary is admissible. *Kluth v. Lane* (Civ. App.) 165 S. W. 524.

#### Art. 7443. Same.

**Action for reinstatement of license as "civil case" or "cause of action."**—A suit to reinstate a liquor license forfeited by the comptroller, brought under this article, held a cause of action, within Const. art. 5, § 8, as amended in 1891; and hence the statute was not invalid for failure to provide the method of procedure, the method prescribed for ordinary actions being applicable. *Lane v. Chappell* (Civ. App.) 159 S. W. 905; *Lane v. Higgins* (Civ. App.) 159 S. W. 907.

**Judicial review.**—Plaintiff, in a suit to reinstate a liquor dealer's license, under this article, held entitled to a trial *de novo* in the district court; the court not being limited to a determination whether the comptroller's action was arbitrary, but bound to determine from all the evidence whether plaintiff had violated his bond. *Lane v. Chappell* (Civ. App.) 159 S. W. 905; *Lane v. Higgins* (Civ. App.) 159 S. W. 907.

Under Const. art. 2, § 1, relating to the distribution of powers of government, held, that the district court, in a suit under this article, by one dissatisfied with the comptroller's revocation of his liquor license in accordance with articles 7436-7442, does not act in an appellate capacity, but has original jurisdiction. *Lane v. Volz & Falwell* (Civ. App.) 164 S. W. 20.

In a proceeding to annul the comptroller's forfeiture of plaintiff's liquor license, a finding by the trial court that plaintiffs did not willfully and knowingly sell intoxicants to minors and students in institutions of learning held not so contrary to the evidence that it could be disturbed on appeal. *Id.*

The trial of a suit in the district court against the State Comptroller to reinstate a liquor license canceled by him on evidence taken before a notary public, is *de novo*, so that evidence in addition to that taken before the notary is admissible. *Kluth v. Lane* (Civ. App.) 165 S. W. 524.

#### Art. 7446. Petition for license.

**Sufficiency of information.**—In view of this article and art. 7435, Code Cr. Proc. arts. 453, 460, 464, and Pen. Code, art. 614, an information charging sale of intoxicants without a license, following article 611, held sufficient, while not averring the particular place in the county or that accused was licensed to sell elsewhere. *Winterman v. State* (Cr. App.) 179 S. W. 704.

#### Art. 7451. Regulating hours of closing, etc.

**Violation.**—Act of keeping open cabaret, operated with saloon, after 9:30 p. m., allowing customers to drink beer purchased for them by waiters in saloon before such hour, and allowing waiters to deliver liquors so purchased, etc., held a violation of this article. *Walker v. Terrell* (Civ. App.) 189 S. W. 75.

**Actual or sun time.**—This article, establishing a closing hour of 9:30 p. m. for places selling intoxicating liquors, refers to actual or sun time, and not to standard or railroad time. *Walker v. Terrell* (Civ. App.) 189 S. W. 75.

**"Saloon."**—Cabaret, operated in connection with saloon, held part thereof, within this article, providing a closing hour of 9:30 p. m. for any house or place where the business of selling liquors under a license is conducted. *Walker v. Terrell* (Civ. App.) 189 S. W. 75.

## CHAPTER SIX

### TAX ON SALE OF INTOXICATING LIQUORS IN LOCAL OPTION TERRITORY

**Article 7475a. Annual tax on wholesale drug dealers selling ethyl alcohol; county and city tax; license.**—There is hereby levied upon every person, firm and corporation engaged in the wholesale drug business and located within a county, subdivision of a county, justice's precinct, city or town in which local option is in force and selling ethyl alcohol to the retail trade as provided in Article 598 of the Revised Penal



Code of the State of Texas and Article 5716 of the Revised Civil Statutes of the State of Texas as such articles have been amended by the Act of the Third Called Session of the 35th Legislature, an annual tax of \$375.00 and the Commissioners' Court of the several counties in this State shall have the power to levy and collect from every such person, firm or corporation a tax equal to one-half of the State tax herein levied; and where any such business is located in any incorporated city or town such city or town shall have the power to levy and collect a tax upon such business equal to that levied by the Commissioners' Court of the County in which city or town is situated. Before any such person, firm or corporation shall make any sale or sales of ethyl alcohol as above provided, he, they or it shall pay the tax or taxes lawfully levied under the provisions of this Article; and shall procure from the County Clerk of the county where such business is located a license which shall be dated as of the date of issuance and which shall authorize such person, firm or corporation to sell ethyl alcohol to the retail drug trade for use in their business, in quantities of one gallon or more, at the place set forth in the application for such license. Before any such license shall be issued the applicant shall file with the county clerk a written application therefor, verified by affidavit, which application shall set forth the name of the person, firm or corporation desiring to engage in such business, and an accurate statement as to the location where such business is conducted, and shall state that such applicant has been regularly engaged in the wholesale drug business in the county in which such application is filed, for a period of at least three months prior to the making of such application; and shall describe with sufficient certainty to identify it, the location where such business has been carried on during such preceding three months; and shall state that the value of the average amount of ethyl alcohol carried in stock by such applicant does not and will not exceed 5% of the reasonable market value of the entire stock of goods carried in stock or used in the business of such applicant. If such application shall be made by any firm it shall state the names of each member of the firm and shall be verified by the affidavit of at least one member thereof. If such application be made by a corporation it shall set forth the names of the President and Secretary, and shall be verified by affidavits of such President or Secretary. No license shall be granted for a longer or shorter period than one year, and such license together with the occupation tax receipts together with Internal Revenue Receipt issued by the United States shall be posted by the licensee in a conspicuous place in his or their place of business. For issuing the license herein provided for the County Clerk shall be entitled to charge a fee of 25 cents for each license. \* \* \* [Act Oct. 12, 1917, ch. 19, § 1.]

**Explanatory.**—The act amends ch. 6, Title 126, Rev. Civ. St., by adding thereto art. 7475a. The concluding sentence of section 1 of the act creates an offense, and is set forth post as art. 149b of the Penal Code.

## CHAPTER SEVEN

## TAX ON DEALERS IN NON-INTOXICATING MALT LIQUORS

Art.  
7476. Amount of tax.

Art.  
7477. Application for license to state what;  
must be paid in advance.

**Article 7476. Amount of tax.**

**Disorderly house.**—Pen. Code 1911, art. 496, including in a definition of a disorderly house a place in prohibition territory where nonintoxicating malt liquors, requiring an internal revenue license are sold or kept for sale, held an exception to, and therefore not in conflict with this article and art. 7477, regulating and providing for the licensing of sellers of nonintoxicating malt liquors. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

**Mandamus; petition.**—A petition for mandamus to compel a county tax collector to issue to petitioner a nonintoxicating liquor license alleging the tender of the \$2,000 state license tax imposed by this article, but not alleging payment of the local tax or that no such tax had been levied under such section, held fatally defective. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

**Constitutionality of related statute.**—Pen. Code 1911, art. 496, defining as a disorderly house a place in prohibition territory where nonintoxicating malt liquors, requiring a United States retail malt liquor dealer's license, are sold or kept for sale, construed in connection with this article and art. 7477, held not objectionable as delegating to Congress the power to determine whether or not the business of selling nonintoxicants shall be lawful, and conferring on another jurisdiction power to suspend the laws of the state. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

**Art. 7477. Application for license to state what; must be paid in advance.**

**Disorderly house.**—See *Johnson v. Elliott* (Civ. App.) 168 S. W. 968; note under art. 7476.

**Constitutionality of related statute.**—See *Johnson v. Elliott* (Civ. App.) 168 S. W. 968; note under art. 7476.

## CHAPTER EIGHT

TAX ON PERSONS SOLICITING ORDERS OR OPERATING  
COLD STORAGE FOR INTOXICATING OR NON-  
INTOXICATING BEVERAGES IN LOCAL  
OPTION DISTRICTS**Article 7479. Amount of tax for soliciting orders.**

**Constitutionality.**—This article held not invalid as licensing the sale of intoxicating liquors in local option territory, especially when construed with Acts 31st Leg. (1st Ex. Sess.) chs. 15, 35. *Barnes v. State*, 75 Cr. R. 188, 170 S. W. 548, L. R. A. 1915C, 101.

## CHAPTER TEN

## INHERITANCE TAX

Art.  
7487. Property subject to the tax.

Art.  
7491. Appointment of person to sue for and  
collect tax; compensation; reports;  
appointment of administrators.

**Article 7487. Property subject to the tax.**

**Construction.**—In construing language of this article, it must be presumed to have been used in the same sense which it bears in laws on kindred subjects, as construed by decisions made before the law was enacted. *State v. Yturria* (Civ. App.) 189 S. W. 291.

**Exemption.**—Under this article, property passing by testator's will to his adopted children was exempt, in view of article 2, entitling an adopted heir to all legal and equitable rights and privileges of the legal heir of the party adopting. *State v. Yturria* (Civ. App.) 189 S. W. 291.

**Art. 7491. Appointment of person to sue for and collect tax; compensation; reports; appointment of administrators.**—The Comptroller of Public Accounts of the State of Texas is hereby authorized and empowered, and it is made his duty to appoint and contract with some suitable person or persons whose duty it shall be to look specially after, sue for and collect the taxes provided by this chapter; such person in no event to receive under such contract more than ten (10) per cent of the amount of such taxes collected hereunder, as compensation. It shall be the duty of such person, so contracted with, to make written report to the County Judge of each county in which he may be appointed and employed to assist in the enforcement of this law, of each estate upon which such tax may be due, or may become due, as soon as possible after the death of any person owning such estate. Such report shall state the probably value of such estate, its character and location, if known, and the names of the persons known to be interested therein.

The amount of compensation due such person shall be paid by the Collector of taxes out of the taxes collected on property belonging to such estate, and such payment shall be deducted from said taxes by said Collector and reported to the Comptroller.

It shall be the further duty of such person to aid in every possible way in the collection of such taxes.

It shall be the duty of the County Judge of said County upon his own motion or petition of such appointee of said Comptroller, to appoint an administrator of every estate subject to taxation under the provisions of this chapter where no application for letters testamentary or of administration thereon is made within three (3) months after the death of the person owning such estate taxable hereunder. The person appointed by the said Comptroller may represent the State in any proceeding necessary under the provisions of this chapter to enforce the collection of such taxes but without other compensation than as provided in his original employment. [Acts 1907, p. 496; Act March 30, 1917, ch. 166, § 1.]

**Explanatory.**—The Act amends art. 7491, ch. 10, tit. 126, Rev. Civ. St., so as to read as above. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER ELEVEN

### OF THE PROPERTY SUBJECT TO TAXATION AND THE MODE OF RENDERING THE SAME

Art. 7503. All property to be taxed.	Art. 7517. Shall be under oath, etc.
7504. Real property includes what.	7518. The statement and its requisites.
7505. Personal property what.	7520. Rendition of real estate.
7506. Definition of terms.	7521. Rendition by banker, broker, etc.
7507. Exemptions from taxation.	7526. Assessments of corporate property, etc.
1. Schools and churches.	7527. Assessments to be in owner's name.
1b. Buffalo and catalo.	7528. Lien for taxes.
7509. How to be rendered.	7530. Valuation of property for taxation.
7510. Where to be rendered.	

#### Article 7503. [5061] All property to be taxed.

**In general.**—Laws authorizing taxes are not retrospective, so far as the year in which they are authorized is concerned. *Cadena v. State* (Civ. App.) 185 S. W. 367.

**Property subject to taxation in general.**—Under Const. art. 8, § 1, and this article and arts. 7504, 7509, interest under oil and gas lease held assessable against the lessee, separate from the assessment against the owner of the realty, though subject to forfeiture, and although no well had been drilled. *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129.

**Art. 7504. [5062] Real property includes what.**

**In general.**—Under this article, the privilege of prospecting for and removing oil and gas from land is a franchise taxable against the owner of the fee and not against the oil company. *Texas Co. v. Daugherty* (Sup.) 176 S. W. 717, affirming judgment (Civ. App.) 160 S. W. 129.

A conveyance of gas and oil and gas in place in the ground conveys an interest in realty which is subject to taxation in the hands of the grantee, separate from the value of the land in which they are found. *Id.*

**Fixtures.**—Fixtures, such as a house, become part of the realty on which it is situated, and as such cannot be severed. *Miller v. Himebaugh* (Civ. App.) 153 S. W. 338.

Where the owner of a lot on which a house was located, during several years of ownership recognized the house as belonging to another, and paid rent for it, it constituted the house personal property, and susceptible of separation and removal from the realty at the will of the parties. *Clayton v. Phillipp* (Civ. App.) 159 S. W. 117.

If it is understood when a house is built that it might be severed from the land, it remains personalty. *Id.*

**Art. 7505. [5063] Personal property includes what.**

**Situs of property.**—Prior to enactment of Acts 31st Leg. c. 108, making personal property of a home insurance company taxable at the company's home office, where notes, securities in which insurance company's capital was invested, were deposited with State Treasurer as permitted by Acts 30th Leg. c. 170, to enable the company to obtain better financial standing held their situs was in Austin, and they were taxable there, under Const. art. 8, § 11, and this article and art. 7510. *Guaranty Life Ins. Co. of Houston v. City of Austin* (Sup.) 190 S. W. 189.

Where a particular business purpose can be accomplished only by locating corporate property at a certain place and the property is so located and devoted to the purpose for more than a temporary period, it clearly acquires a situs at that place. *Id.*

**Bonds, notes, etc.**—Bonds, notes and other negotiable instruments held property for the purpose of taxation in view of this article. *Guarantee Life Ins. Co. of Houston v. City of Austin* (Civ. App.) 165 S. W. 53.

**Art. 7506. [5064] Definition of terms.**

Cited, *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129; *Guarantee Life Ins. Co. of Houston v. City of Austin* (Civ. App.) 165 S. W. 53.

**Art. 7507. [5065] Exemption from taxation.****1. Schools and churches.**

**Buildings used by religious societies.**—That part of the property of a church used as an actual place of public worship, and necessary for proper public worship, and owned by a religious organization and an institution of purely public charity, and which has never been used with a view to profit, is exempt from taxation under this article. *State v. Methodist Episcopal Church, South* (Civ. App.) 163 S. W. 628.

Premises used exclusively for religious worship, though not owned by the religious society, but rented by it, are not exempt. *City of Dallas v. Cochran* (Civ. App.) 166 S. W. 32.

**1b. Buffalo and catalo.**—That all buffalo and all catalo now in captivity in the State of Texas, by whomsoever owned, where such animals are kept and used for experimental purposes in crossing same with cattle for the purpose of producing a better strain of beef animals, or where such animals are kept in parks to preserve the species, and not for profit, but for the pleasure of their owners and the general public, they shall be exempt from taxation. [Act April 2, 1917, ch. 172, § 1.]

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

**Art. 7509. [5067] How to be rendered.**

**Assessment against lessee.**—Under Const. art. 8, § 1, and this article and arts. 7503 and 7504, interest under oil and gas lessee held assessable against the lessee, separate from the assessment against the owner of the realty, though subject to forfeiture, and although no well had been drilled. *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129.

**Art. 7510. [5068] Where to be rendered.**

**Place of rendering for assessment.**—Prior to enactment of Acts 31st Leg. c. 108 (Vernon's Sayles' Civ. St. 1914, art. 4749), making personal property of a home insurance company taxable at the company's home office, where notes, securities in which insurance company's capital was invested, were deposited with State Treasurer as permitted by Acts 30th Leg. c. 170 (Vernon's Sayles' Civ. St. 1914, art. 4775), to enable the company to obtain better financial standing held, their situs was in Austin, and they were taxable there, under Const. art. 8, § 11, and this article and art. 7505. *Guaranty Life Ins. Co. of Houston v. City of Austin* (Sup.) 190 S. W. 189.

**Art. 7517. [5075] Shall list under oath.**

Cited, *Coleman v. Crowdus* (Civ. App.) 178 S. W. 585.

**Art. 7518. [5076] The statement and its requisites.**

Cited, *Coleman v. Crowdus* (Civ. App.) 178 S. W. 585.

**Art. 7520. [5078] Rendition of real estate.**

**Discrimination in assessment.**—Mere fact that property was assessed at less than its real value does not show discrimination in assessing other property at its real value, in absence of evidence of scheme or plan to permit inadequate valuations. *Brunnett v. Lucas* (Civ. App.) 194 S. W. 613.

**Art. 7521. [5079] Assessment of personal property by rendition by banker, broker, etc.**

**Assessment of bank stock.**—In suit by banks and stockholders to enjoin collection of excessive tax, stockholders held not entitled to have deducted from the assets of the banks in assessing their bank stock the value of United States bonds owned by the banks. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

In assessing bank stock for taxation to the holders, shares of stock held by banks in industrial corporations should be considered. *Id.*

Paragraph 2 of this article vests no right in stockholders of national banks to have deducted from the assets of the banks, in assessing their shares for taxation, the value of United States bonds owned by the banks. *Id.*

**Art. 7526. [5084] Assessments and collections of corporate property.**

Cited, *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129.

**Art. 7527. [5085] Assessments in owner's name.**

**In general.**—This article, held not to validate an assessment of unrendered property in the name of the deceased former owner, invalid under article 7563. *Coleman v. Crowdus* (Civ. App.) 178 S. W. 585.

**Art. 7528. [5086] Lien for taxes.**

**Liens; extinguishment.**—A lien for taxes was extinguished by the tender thereof made good by the payment in the registry of the court, so that the court properly refused to foreclose a lien on taxpayer's property. *State v. Hoffman* (Civ. App.) 190 S. W. 1163.

**Subrogation of volunteer.**—A volunteer, without title or interest, paying taxes on land, is not subrogated to the tax lien. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 136 S. W. 253.

In suit to recover land, the court correctly refused to reimburse defendant for taxes paid by it, as, having no title either to the land or the timber, the payment was made as a volunteer. *Id.*

**Interest on advances to discharge lien.**—Where defendants, who purchased land from plaintiff's husband which he had purchased with her funds, paid taxes which became a lien on the land, plaintiff having made no offer to reimburse them, defendants are entitled to interest. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

**Art. 7530. [5088] Valuation of property for taxation.**

**Valuation of property for taxation.**—Where, in assessing land to the owners for purposes of taxation, the value of the rights held by an oil and gas lessee was not included, the assessment of such rights to the lessee would not result in double taxation. *Texas Co. v. Daugherty* (Civ. App.) 160 S. W. 129.

**Invalidity of "Houston Plan."**—The "Houston Plan of Taxation," whereby land, stocks of merchandise, etc., were taxed at a certain per cent. of their value, while money, stocks, mortgages, and similar personal property were not taxed at all, held violative of the uniformity required by Const. art. 8, §§ 1, 2. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

## CHAPTER TWELVE

## OF THE ASSESSMENT OF TAXES—ELECTION AND QUALIFICATION OF THE ASSESSOR

Art.	Art.
7533. Election and term of assessor.	7566. Assessment of back taxes on personal property, how made.
7536. Purview of the bond.	7567. Unlisted property; supplemental roll.
7556. Duties of assessors as to same.	7569. Equalization of assessments.
7560. Substitutes to be employed, when.	7570. Boards may equalize without complaint.
7563. Assessment of property not rendered.	7584. How paid by the state.
7564. Boards of equalization.	
7565. Assessment of real property for previous years.	

**Article 7533. [5089] Election and term of assessor.**

**Powers of assessor.**—An assessor has only the powers expressly given by statute. *State v. Cage* (Civ. App.) 176 S. W. 928.

**Art. 7536. [5092] Purview of the bond.**

**What bond chargeable for misappropriations.**—Where a tax assessor wrongfully appropriates excess fees collected by him in his second term but which he should have collected in his first term, the sureties upon his second bond and not those upon the first bond are liable. *Dallas County v. Bolton* (Civ. App.) 158 S. W. 1152.

**Art. 7556. [5112] Duties of assessor as to same.**

**Notice of ownership.**—That the tax records of S. county showed taxes to have been paid for certain years by a certain person held sufficient to notify the county of the ownership thereof, and to bar an action against an unknown owner. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

**Art. 7560. [5116] Substitute to be employed if assessor fails.**

**Validity.**—Under this article, a contract, whereby the commissioners' court engaged individuals to perform the duties of the assessor, does not clothe individuals with governmental powers. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

**Art. 7563. [5119] Assessment of property not rendered.**

Cited, *Holt v. State* (Civ. App.) 176 S. W. 743.

**Name of owner.**—Under this article, assessment of unrendered property in name of former owner, known to assessor to be dead, held invalid. *Coleman v. Crowdus* (Civ. App.) 178 S. W. 585.

**Description of property.**—The description of the land in an assessment roll containing all that this article requires, except the survey number, will, in an action to collect the tax, be held sufficient to identify the land assessed; there being no evidence that there was more than one survey in the county in the name of the original grantee of the survey in question. *American Lumber Co. v. State* (Civ. App.) 165 S. W. 467.

**Validation of assessment.**—Art. 7527, curing assessments of realty rendered for taxation by the owner, defective because not assessed in his name, held not to validate an assessment of unrendered property in the name of the deceased former owner, invalid under this article. *Coleman v. Crowdus* (Civ. App.) 178 S. W. 585.

**Art. 7564. [5120] Boards of equalization.**

**Authority of commissioners' court.**—Under Const. art. 8, § 1, and this article and art. 7570, and Final Title, § 3, the commissioners' court may engage tax ferrets to discover omitted personal property. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

**Complaint by assessor.**—Under this article and art. 7570, held not necessary to equalization by board that assessor make complaint. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Art. 7565. [5120a] Assessment of real property for previous years.**

Cited, *State v. Cage* (Civ. App.) 176 S. W. 928.

**Art. 7566. [5121] Assessment of back taxes on personal property.**

**Validity of article.**—This article, held not in conflict with the Constitution, prohibiting the Legislature from exempting property from taxation or extinguishing indebtedness for taxes. *State v. Cage* (Civ. App.) 176 S. W. 928.

The state may not assail the validity of this article as discriminatory against owners of real estate. *Id.*

This article does not violate Const. art. 8, § 1, requiring taxation to be equal and uniform, notwithstanding article 7702, for the assessment of omitted real property. *Id.*

**Repeal.**—This article is not repealed by article 7661. *State v. Cage* (Civ. App.) 176 S. W. 928.

**Duty of assessor.**—Despite this article, an assessor is not bound to attempt to ferret out property not rendered for taxation. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

### Art. 7567. [5121a] Unlisted property; supplemental roll.

**Poll taxes.**—Assessment of poll taxes held not required by this article as a condition precedent to the right of the taxpayer to compel the collector to assess the amount levied by law as a poll tax, and to issue a receipt therefor; such tax being a tax on the person imposed by article 7354. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

### Art. 7569. [5123] Equalization of assessments.

**Method.**—Under this article and art. 7570, held, that method indicated in article 7570 must be followed whether the issue is raised by the board or by controversy between assessor and owner. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Failure to summon witnesses.**—Under this article and art. 7570, where board of equalization failed to summon witnesses of its own, property owner could not rely upon such failure to invalidate proceedings. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Disregarding testimony; effect.**—Under this article and art. 7570, board of equalization could not legally disregard testimony of value introduced on ground that it was not believed, but if it fails to summon witnesses of its own, must fix values according to evidence actually introduced. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Action of board of equalization in disregarding testimony introduced which was not disputed nor impeached, contrary to this article and art. 7570, is basis for a suit to enjoin collection of taxes on the increased value.** *Id.*

### Art. 7570. [5124] Boards may equalize without complaint.

**Complaint by assessor.**—Under this article and art. 7564, held not necessary to equalization by board that assessor make complaint. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Oath of taxpayer.**—Oath of the taxpayer is not prerequisite to procedure as to witnesses when board of equalization on its own motion undertakes to raise values. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Waiver of defects in notice.**—Property owner who attended meeting and objected to raising of his assessment waived all defects in notice, and order entered at such meeting cannot be attacked for defects in proceedings antedating such meeting. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Failure to summon witnesses.**—Under this article and art. 7556, where board of equalization failed to summon witnesses of its own, property owner could not rely upon such failure to invalidate proceedings. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Method.**—Under this article and art. 7569, held, that method indicated in this article must be followed whether the issue is raised by the board or by controversy between assessor and owner. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Disregard of testimony.**—Under this article and art. 7569, board of equalization could not legally disregard testimony of value introduced on ground that it was not believed, but if it fails to summon witnesses of its own, must fix values according to evidence actually introduced. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Judicial review.**—Where board of equalization failed to summon witnesses, but raised assessments in face of evidence showing that they should not be raised, district court in suit to enjoin collection of assessment could only set it aside. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

**Action of board of equalization in disregarding testimony introduced which was not disputed nor impeached, contrary to this article and art. 7569, is basis for a suit to enjoin collection of taxes on the increased value.** *Id.*

— **Evidence.**—Evidence held insufficient to show that banks in certain county were assessed at 75 per cent. of their real value. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

Evidence that parts of land in certain town were assessed below market value is insufficient on which to base finding that such condition existed generally. *Id.*

Evidence held to show that at equalization hearing no testimony of value of land was taken other than that of the property owner's witnesses, so that increase was unwarranted. *Id.*

**Authority of commissioners' court to engage tax ferrets.**—Under Const. art. 8, § 1, and this article and art. 7564, and Final Title, § 3, the commissioners' court may engage tax ferrets to discover omitted personal property. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

### Art. 7584. [5134] How paid by state.

**Fees of assessor.**—Under arts. 3889, 3892, providing that the assessor shall be entitled to one-fourth of the fees in excess of the amount of his salary and expenses and that in addition he shall be entitled to 10 per cent. of all delinquent fees collected by

him after making his annual statement, a tax assessor is not entitled to a percentage of the delinquent fees due from the state where the delinquency was due to his failure to present the order of such fees given him by the state comptroller as required by this article. *Dallas County v. Bolton* (Civ. App.) 158 S. W. 1152.

## CHAPTER THIRTEEN

### OF THE COLLECTION OF TAXES; ELECTION AND QUALIFICATION OF THE COLLECTOR

<p>Art. 7608. Bond for state taxes; oath.</p> <p>7610. Bond for county taxes; additional bond or security; expense of surety bond; determination of reasonableness of premium.</p> <p>7610a. New bonds may be given by existing officers.</p> <p>7610b. County depositories shall pay money deposited directly to treasurer on check of collector; exception.</p> <p>7614. Collector for all taxes.</p> <p>7617a. Recording of tax receipts.</p> <p>7617b. Duties of county clerk; certified copies as evidence.</p> <p>7617c. Fee; return of original to owner.</p> <p>7617d. Record books to be furnished.</p> <p>7618. Monthly reports as to state taxes; requisites of; duties of county</p>	<p>Art. clerk; payment of money to state treasurer; annual settlements; allowance of delinquent and insolvent list; forms, etc.; duties of comptroller.</p> <p>7624. Forced collections to begin, when.</p> <p>7627. Tax lien superior to assignment, attachment, inheritance or devise, except.</p> <p>7632. If property is insufficient.</p> <p>7637. Homesteads liable only for.</p> <p>7642. Redemption of land within two years.</p> <p>7642a. Extension of time for redemption.</p> <p>7661. District and county attorneys to sue for taxes on personal property.</p> <p>7662. Limitation not available to delinquent taxpayer.</p>
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**Article 7608. [5157] Bond for state taxes; oath.**—Every collector of taxes, within twenty days after he shall have received notice of his election or appointment, and before entering upon the duties of his office, shall give bond based upon unincumbered real estate of the sureties, subject to execution, payable to the Governor and his successors in office, in a sum which shall be equal to forty (40) per cent of the whole amount of the State tax of the county as shown by the last preceding assessment, providing said bond shall not exceed one hundred thousand (\$100,000.00) dollars, with at least three good and sufficient sureties, to be approved by the commissioners court of his county, which shall be further subject to the approval of the Comptroller, and shall take and subscribe the oath prescribed by the Constitution, which, together with said bonds, shall be recorded in the office of the clerk of the county court of said county, and be forwarded by the county judge of the county to the Comptroller, to be deposited in his office. Said bond shall be conditioned for the faithful performance of the duties of his office as collector of taxes for and during the full term for which he was elected or appointed, and shall not become void upon first recovery, but suit may be maintained thereon until the whole amount thereof be recovered. [Act Aug. 21, 1876, p. 259, § 3; Act March 22, 1915, ch. 124, § 1; Act March 30, 1917, ch. 146, § 1.]

**Explanatory.**—Act March 22, 1915, ch. 124, amends arts. 7608, 7610, and 7618, Rev. Civ. St. 1911. Such act took effect 90 days after March 20, 1915, date of adjournment. Sec. 2 of such act repeals all laws in conflict.

Act March 30, 1917, ch. 146, set forth above, amends ch. 1124, general laws 34th Leg. regular session, amending arts. 7608 and 7610, Rev. Civ. St. of 1911. Took effect 90 days after March 21, 1917, date of adjournment. Sec. 3 repeals all laws in conflict. The amendment consists in reducing the amount of the bond from 60 per cent. to 40 per cent. of the whole amount of the state tax, and the maximum amount of the bond from \$125,000 to \$100,000.

**Art. 7610. [5159] Bond for county taxes; additional bond or security; expense of surety bond; determination of reasonableness of premium.**—Collectors of taxes shall give a like bond, with like condi-



tions, to the county judge of their respective counties and their successors in office in a sum not less than forty (40) per cent of the whole amount of the county tax, as shown by the last preceding assessment, providing said whole amount shall not exceed one hundred thousand (\$100,000.00) dollars, with at least three good and sufficient sureties, to be approved by the commissioners court of his county, which bond shall be recorded and deposited in the office of the clerk of the county court. A new bond and additional security may be required, and, for a failure to give such new bond or additional security, the collector of taxes may be removed from office in the manner prescribed by law. In the event the bonds required under the terms of this article and also under article 7608 or either thereof, and executed by a satisfactory surety company or companies or by any private party or parties as surety or sureties thereon in counties with a total taxable valuation of thirty million (\$30,000,000) dollars or more, the county of which the principal in said bonds is tax collector shall pay a reasonable amount as premium on said bond or bonds which amount shall be paid out of the general revenue of the county upon presentation of the bill therefor to the commissioners' court of the county properly authenticated as required by law in other claims against the county, and should there be any controversy as to the reasonableness of the amount claimed, as such premium, such controversy may be determined by any court of competent jurisdiction. [Act Aug. 21, 1876, p. 260, § 4; Act March 22, 1915, ch. 124, § 1; Act March 30, 1917, ch. 146, § 1.]

**Explanatory.**—See note under art. 7608. Act March 22, 1915, provided that the amount of the bond should be 60 per cent. of the total county tax, but not to exceed \$125,000. It did not contain the provision as to expense of bond.

**Art. 7610a. New bonds may be given by existing officers.**—Provided further that as soon as this Act shall take effect, or at any time thereafter, tax collectors shall be allowed to make new bonds under the provisions hereof, such bonds to be in lieu of the bonds given by them under the law existing at the time such bonds were given. [Act March 30, 1917, ch. 146, § 2.]

**Art. 7610b. County depositories shall pay money deposited directly to treasurer on check of collector; exception.**—Provided that except as to compensation due such tax collector as shown by his approved reports, tax money deposited in county depositories shall be paid by such depositories only to treasurers entitled to receive the same, on checks drawn by such tax collector, in favor of such treasurer. [Id., § 3a.]

**Art. 7614. [5163] Collector for all taxes.**

**Authority of collector.**—Only the commissioners' court can release property from void tax liens, and the tax collector is without power to do so. *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

**Liability of collector to suit.**—The tax collector's sole duty being to collect taxes, suit cannot be maintained against him to cancel an invalid tax assessment. *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

**Art. 7617a. Recording of tax receipts.**—Every receipt for the payment of taxes on property, real, personal or mixed, hereafter paid, as well as those heretofore paid, collected by state, county or municipal officers, may be recorded in the office of the County Clerk of the county where the property is situated. [Act March 22, 1915, ch. 85, § 1.]

Took effect 90 days after March 20, 1915, the date of adjournment.

**Art. 7617b. Duties of County Clerk; certified copies as evidence.**—On presentation of a tax receipt to the County Clerk it shall be his duty to immediately file the same in the same manner of filing a deed to land;

and he shall enter and record such receipt at length and in full in a record book or books kept by him for the purpose of recording tax receipts, which said records shall be called "Tax Receipt Record," and shall have the name and number written or printed thereon, and such record shall be evidence to all the world of the payment of such tax, and certified copies thereof may be used in evidence on issues involving the same under like rules admitting certified copies of deeds in evidence. [Id., § 2.]

**Art. 7617c. Fee; return of original to owner.**—A fee of twenty-five cents shall be paid to the clerk for filing, recording and certifying to each tax receipt, and when recorded such receipt shall be returned to the party filing the same or the owner. [Id., § 3.]

**Art. 7617d. Record books to be furnished.**—The Commissioners Court of each county shall provide and furnish to the County Clerk of such county tax receipt record books which may be made in form as books for recording deeds or in form with printed blanks conforming to the form of the tax receipts as provided under authority of the state for tax collectors, or in any form suitable to the purposes of this Act, in the discretion of said Commissioners Court, with the name "Tax Receipt Record" endorsed on the same, with successive numbers on each separate volume, and properly index said record alphabetically in the name of the holder of the tax receipt. [Id., § 4.]

**Art. 7618. [5167] Monthly reports as to state taxes; requisites of; duties of county clerk; payment of money to State Treasurer; annual settlements; allowance of delinquent and insolvent list; forms, etc.; duties of Comptroller.**—1. At the end of each month the collector of taxes shall, on forms to be furnished by the Comptroller of Public Accounts, make an itemized report under oath to the Comptroller, showing each and every item of ad valorem, poll and occupation taxes collected by him during said month, accompanied by a summarized statement showing full disposition of all state taxes collected. Provided, however, that said itemized reports for the months of December and January of each year may not be made for twenty-five (25) days after the end of such months if same can not be completed by the end of such respective months.

2. He shall present such report, together with the tax receipt stubs, to the County Clerk, who shall, within two days, compare said report with said stubs, and if same agree in every particular as regards names, dates and amounts, he (the clerk) shall certify to its correctness, for which examination and certificate he shall be paid by the Commissioners Court twenty-five cents for each certificate and twenty-five cents for each two hundred taxpayers on said report.

3. The Collector of Taxes shall then immediately forward his reports so certified to the Comptroller, and shall pay over to the State Treasurer all moneys collected by him for the state during said month, excepting such amounts as he is allowed by law to pay in his county, reserving only his commissions on the total amount collected, and to enable him to do so, he may, at his own risk, send the same to the State Treasurer at the least cost to the state, on which he shall be allowed credit by the Comptroller upon filing receipts showing actual amount of exchange paid; provided, that the State Treasurer shall accept no payment other than money orders, or direct cash payments, which may be made through express companies, banks, or any other source. The State Treasurer, whenever he may receive a remittance from a Collector of Taxes, shall promptly pay the money so remitted to the State Treas-

ury, on the deposit warrant of the Comptroller, and the money, when so deposited, shall be a credit to the said Collector of Taxes.

4. The Collector of Taxes shall pay over to the State Treasurer all balances in his hands belonging to the state, and finally adjust and settle his account with the Comptroller on or before the first day of May of each year, and to enable him to do so, the Commissioners Court shall convene on or before the third Monday in April for the purpose of examining and approving his final settlement papers.

5. The allowance of a delinquent and insolvent list to the collector, in accordance with Article 7621, shall not absolve any taxpayer or property thereon from the payment of taxes, but it shall be the duty of the collector to use all necessary diligence to collect the amounts due thereon, after it is allowed by the Commissioners Court; and he shall issue special tax receipts therefor, to be furnished by the Comptroller, which blank receipts shall be numbered and charged to the collector, who shall account for same at his next annual settlement, in the same manner as occupation tax receipts. He shall also make itemized monthly reports of such collections, using special blanks for that purpose.

6. To enforce the prompt and speedy collection and remittance of taxes, and to provide for the proper accounting of same, the Comptroller shall prescribe and furnish the forms to be used by Collectors of Taxes, and the mode and manner of keeping and stating their accounts, and shall adopt such regulations as he may deem necessary in regard thereto. It shall be his imperative duty to enforce a strict observance of all the provisions of these articles.

7. It shall be the duty of the Comptroller to notify the District Attorney of the District, or the County Attorney of the county in which the collector resides, and the sureties on the bond of the collector, of any failure to comply with any of the provisions of this article. [Acts 1893, p. 90; Act March 22, 1915, ch. 124, § 1.]

See note under art. 7608.

Cited, *Quillin v. State* (Cr. App.) 187 S. W. 199.

#### **Art. 7624. [5173] Forced collections to begin, when.**

**Drainage district taxes.**—Under this article and arts. 7632, 7687, 7692, a suit for delinquent drainage district taxes cannot be brought earlier than April 21st of the year succeeding the year for which assessed. *Holt v. State* (Civ. App.) 176 S. W. 743.

#### **Art. 7627. [5175a] Tax lien superior to assignment, attachment, inheritance or devise, except.**

**Priority of liens.**—This article does not give a junior tax lien priority over a senior chattel mortgage, taken for the price of the personalty. *Salt City Co. v. Padgett* (Civ. App.) 186 S. W. 391.

**Rights of purchaser.**—Under a contract of sale requiring vendor to furnish an abstract showing clear and perfect title, the purchaser had the right to have a lien for \$8.88 taxes removed before paying the purchase money. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

#### **Art. 7632. [5178] If property is insufficient.**

**Drainage district taxes.**—Under this article and arts. 7624, 7687, 7692, a suit for delinquent drainage district taxes cannot be brought earlier than April 21st of the year succeeding the year for which assessed. *Holt v. State* (Civ. App.) 176 S. W. 743.

#### **Art. 7637. [5183] Homesteads liable only for their own taxes.**

Cited, *Hoefling v. Hoefling*, 106 Tex. 350, 167 S. W. 210.

#### **Art. 7642. Redemption within two years, when.**

**Limitations.**—Possession under a tax deed is not adverse to title of owner, and cannot be used as a basis for possession under statute of limitation until after the period of two years allowed for redemption. *O'Hanlon v. Morrison* (Civ. App.) 187 S. W. 692.

**Art. 7642a. Extension of time for redemption.**—That the owner or any one having an interest in land or lots heretofore sold to the State,

or any city or town, under the decrees of court, in any suit or suits brought for the collection of the taxes thereon, or by the collector of taxes, or otherwise, shall have the right at any time within two years after the taking effect of this Act to redeem the same upon the payment of the amount of taxes for which sale was made, together with all costs, penalties and interest now required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of said redemption. And where lands or lots shall hereafter be sold to the state or to any city or town for taxes under decree of court in any suit or suits brought for collection of taxes thereon, or by a collector of taxes, or otherwise, the owner having an interest in such lands or lots shall have the right at any time within two years from date of sale to redeem the same after such sale upon payment of the amount of taxes for which sale was made, together with all costs and penalties required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of redemption. [Act June 4, 1915, 1st C. S., ch. 30, § 1.]

Sec. 2 repeals laws in conflict. The act took effect 90 days after May 28, 1915, date of adjournment.

**Art. 7661. [5212a] Duty of district and county attorneys to sue for taxes on personal property.**

**Right of action.**—Under this article, a right of action for taxes does not exist without an assessment. *State v. Cage* (Civ. App.) 176 S. W. 928.

**As repeal.**—Art. 7566, providing for the assessment of omitted property, is not repealed by this article. *State v. Cage* (Civ. App.) 176 S. W. 928.

**Art. 7662. [5212b] Limitation not available to delinquent taxpayer.**

Cited, *State v. Cage* (Civ. App.) 176 S. W. 928.

**In general.**—Under this article, a defendant, sued for delinquent drainage district taxes, may not plead limitations. *Holt v. State* (Civ. App.) 176 S. W. 743.

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## CHAPTER FOURTEEN

### OF THE ASSESSMENT AND COLLECTION OF BACK TAXES ON UNRENDERED LANDS

Art.	Art.
7663. Back taxes on unrendered lands.	7677. Effect of deed, etc.

**Article 7663. [5213] Back taxes on unrendered lands.**

**Assessments for prior years when other assessors were in office.**—A general statute for the assessment of property does not authorize assessments for prior years when other assessors were in office. *State v. Cage* (Civ. App.) 176 S. W. 928.

**Art. 7677. [5227] Effect of deed, etc.**

**Deed as evidence of title.**—Unless evidence is offered to show that the requirements of the law with reference to sale for taxes had been complied with, so that a valid conveyance could be made, a tax deed is no evidence of title. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

A legal levy of taxes for which a sale is made must be shown or a tax sale is invalid, and the tax deed is no evidence of title. *Purinton v. Broughton* (Civ. App.) 158 S. W. 227.

## CHAPTER FIFTEEN

### DELINQUENT TAXES

<p>Art. 7687. Delinquent tax lists to be published.</p> <p>7687a. Notices to owners of land on delinquent list; duplicates of notes to be furnished to county or district attorney; unknown owners; statements to persons interested; redemption receipt on payment.</p> <p>7687b. Notices, how made up; supplemental tax lists; examination of other records to determine delinquency; publication; assessor to enter addresses on tax rolls.</p> <p>7688. Suits to foreclose tax liens on delinquent lands.</p> <p>7688a. Duty of county or district attorney to institute suit; fees; compensation of tax collector.</p>	<p>Art. 7689. Proceedings in suits to foreclose tax liens.</p> <p>7690. Sheriff to execute deeds.</p> <p>7691. Attorneys to represent state, fees, etc.</p> <p>7692. Assessor to list unpaid taxes annually.</p> <p>7693. Law available to cities and towns.</p> <p>7694. Exemptions from this chapter.</p> <p>7696. May redeem in two years by paying double.</p> <p>7698. Proceedings against unknown and nonresident owners.</p> <p>7699. Similar proceedings by cities and towns.</p> <p>7700a. Settlement of officer not to be accepted until compliance with this chapter.</p>
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#### Article 7687. Delinquent tax list to be published.

See art. 7687b as to publication of tax records and supplements thereto.

**Contracts for publication.**—County debt for the publication of delinquent tax lists held under this article to be an obligation imposed by law and a current expense of the municipality, as to which the article makes special provision for the extinction of the debt, so that such debt is not invalid under Const. art. 11, § 5. *Boesen v. Potter County* (Civ. App.) 173 S. W. 462.

Under this article and art. 7691, commissioners' court of county had right to contract to pay for publication of delinquent tax list 25 cents per description, and publisher's recovery was not limited by provision of article 7691. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

Neither county nor publisher could have contract reformed in district court in accordance with expressed intention of parties when it was made, because commissioners' court was court of record, and amendment could only be by motion to amend minutes made in that court. *Id.*

Publisher of county's delinquent tax list of about 14,000 items, who was to receive 25 cents per description, was not estopped from claiming the contract price because reasonable compensation for making publication would not exceed \$1,000. *Id.*

Where payments were to be made as delinquent taxes were paid the collector, amount was payable within reasonable time after publication, and, in the publisher's action, it was not necessary for him to allege that any of delinquent taxes had been paid the county, or that county had failed to collect taxes, and publisher's act in receiving from collector fee of 25 cents as taxes were collected could not be considered construction on his part of contract. *Id.*

Proof of fact that by exercise of reasonable diligence taxes could have been collected was not essential. *Id.*

Publisher held not required to resort to mandamus to compel county officials to collect the taxes; amount due him being payable out of fund set aside for county's current expenses. *Id.*

**Drainage district taxes.**—Under this article and arts. 7624, 7632, 7692, a suit for delinquent drainage district taxes cannot be brought earlier than April 21st of the year succeeding the year for which assessed. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Art. 7687a. Notices to owners of land on delinquent list; duplicates of notices to be furnished to county or district attorney; unknown owners; statements to persons interested; redemption receipt on payment.**—Not later than the first day of May, 1916, in all counties of less than 50,000 inhabitants, and not later than the first day of May, 1917, in all counties of more than 50,000 inhabitants, and not later than the first day of June in every year following thereafter, it shall be the duty of the Collector of Taxes in the various counties of this state to mail to the address of every record owner of any lands or lots situated in such counties, a notice showing the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots according to the delinquent tax records of their respective counties on file in the office of the Tax Collector, and a duplicate of which shall also have been filed in the office of the Comptroller of Public Accounts of the State of Texas and

approved by such officer; such notice shall also contain a brief description of the lands or lots appearing delinquent, and various sums or amounts due against such lands or lots for each year they appear to be delinquent according to such records, and it shall also be the duty of the tax collectors of the various counties in this State not later than the dates named, and every year thereafter, to furnish to the county or district attorneys of their respective counties duplicates of all such statements mailed to the tax payers in accordance with the provisions of this Act, together with similar statements, or in lieu thereof, lists of lands and lots located in such counties containing amounts of State and county taxes due and unpaid, and the years for which due, on lands or lots appearing on such records in the name of "Unknown" or "Unknown Owners," or in the name of persons whose correct address or place of residence in or out of the county said tax collector is unable by the use of due diligence to discover or ascertain; and it shall be the further duty of the tax collector to furnish on demand of any person or persons, firm or corporation, like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office attached; said notices or statements herein provided for shall also recite that unless the owner or owners of such lands or lots described therein shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within 90 days from date of notice, then, and in that event, the county or district attorney will institute suits not later than January 1, next, for the collection of such moneys, and for the foreclosure of the constitutional lien existing against such lands and lots; and whenever any person or persons, firm or corporation shall pay to the tax collector all of the taxes, interest, penalties and costs shown by the records aforesaid to be due and unpaid against any tract, lot or parcel of land for all of the years for which said taxes may be shown to be due and unpaid, then it shall be the duty of the tax collector to issue to such person or persons, firm or corporation a redemption receipt covering such payment as is now required by law. [Act April 3, 1915, ch. 147, § 1.]

**Note.**—Sec. 5 of the act repeals art. 7707, Rev. Civ. St. 1911, and all other laws or parts of laws in conflict. The act took effect 90 days after March 20, 1915, date of adjournment.

**Notice after date.**—Under this article, held that notice could not be sent out after date named, and to successfully prosecute such suit state must allege and prove that all requirements of act have been complied with. *State v. Seidell* (Civ. App.) 194 S. W. 1118.

**Art. 7687b. Notices, how made up; supplemental tax lists; examination of other records to determine delinquency; publication; assessor to enter addresses on tax rolls.**—In making up the notices or statements provided for in Section 1 of this Act [Art. 7687a], it shall be the duty of the tax collectors of the various counties in the State to rely upon the delinquent tax records compiled, or to be compiled, under the provisions of Article 7685 and Article 7707 of the Revised Civil Statutes of the State of Texas for 1911, which have been approved by the commissioners court of such counties and a duplicate of which has been filed in the office of the Comptroller of Public Accounts of the State of Texas, and which has or shall hereafter be approved by such State officer; and it shall be the duty of the tax collector, whenever there shall be as many as two years of back taxes that have not been included in such delinquent tax records to prepare or cause to be prepared a supplement to such records which shall be prepared in duplicate, one copy to be filed in the office of the county clerk and one copy thereof to be furnished to the Comptroller of Public Accounts subject to his approval; and whenever said supple-

ment shall have been approved by the commissioners court and by the State Comptroller, then the tax collector shall rely thereon for the data covering delinquent taxes for said years in making out the notices or statements provided for in Section 1 of this Act [Art. 7687a]; provided, said tax collector in making up said delinquent tax record and supplement, shall examine the records of the district court and the county clerk's office of his county and no tract of land shall be shown delinquent on said delinquent tax record for any year where the records of the district court or the county clerk's office show that the taxes for said year have been paid. It shall not be necessary to publish said delinquent tax records and supplements thereto if the delinquent list for each year has been advertised as required by Article 7692 of the Revised Civil Statutes of 1911. To enable the tax collector to comply with the provisions of Section 1 of this Act [Art. 7687a], it shall be the duty of the tax assessors of the various counties of the State to hereafter enter the postoffice address of each and every tax payer after his name on the tax rolls, and the Comptroller shall hereafter provide a column for the entry of such address on the sheets furnished the assessors for making up the tax rolls. [Id., § 2.]

#### **Art. 7688. Suits to foreclose tax liens on delinquent lands.**

**Note.**—Jurisdiction in tax suits in Nueces, Kleberg, Willacy, and Cameron Counties has been transferred to the Criminal District Court. See arts. 97½a-97½i, post, of the Code of Criminal Procedure.

**Suits in name of state.**—Under this article and art. 2603, suits for delinquent drainage taxes must be brought in the name of the state. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Jurisdiction.**—Proceedings in a district court to collect taxes by foreclosure sale depend solely upon the statute, and its jurisdiction is limited and special, and nothing is taken by intendment in favor of the court's action, but it must appear from the record that the court was authorized to act, and that it kept within its jurisdiction. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

**Venue.**—A sale of land lying in a different county from that in which the suit was brought and to which the taxes were alleged to be due held void. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

**Petition—Requisites of, in general.**—A petition, in an action for delinquent drainage taxes and exhibits attached thereto, held to sufficiently describe the land. *Holt v. State* (Civ. App.) 176 S. W. 743.

— **Verification.**—Under this article, an unverified petition will not support judgment by default. *Hill v. State* (Civ. App.) 190 S. W. 255.

**Art. 7688a. Duty of county or district attorney to institute suit; fees; compensation of tax collector.**—Not later than January 1, 1917, in counties of less than 50,000 inhabitants, and not later than January 1, 1918, in counties of more than 50,000 inhabitants, and not later than June 1 of each year thereafter, it shall be the duty of the county attorney, or the district attorney if there be no county attorney, to file and institute suits as otherwise provided by law for the collection of all delinquent taxes due at the time of filing such suit on land or lots situated in such county, together with interest, penalties and costs then due as otherwise provided by law; provided, that for the work of filing such suits, the county or district attorney shall receive a fee of \$5 for the first tract of land included in each suit, and \$1 for each additional tract included therein; provided, that where unimproved town lots are sued upon or included in a suit with other land or improved town lots in the same town, only one such additional fee shall be added for each twenty lots or any number less than twenty; and, provided further, that in counties containing over 50,000 inhabitants such attorney's fee shall be \$2.50 for the first tract and 50 cents for additional fees as above provided.

The tax collector shall, in addition to the compensation and costs now allowed by law, be entitled for making up the delinquent record or sup-

plements thereto where necessary under this Act the sum of 5 cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, such compensation to be paid out of the general fund of the county upon the completion of said record or supplement. The tax collector shall also receive a commission of 5 per cent on the amount of all delinquent taxes collected in addition to the commissions now allowed him by law. [Id., § 3.]

**Notice after date.**—Under this article, held that notice could not be sent out after date named, and to successfully prosecute such suit state must allege and prove that all requirements of act have been complied with. *State v. Seidell* (Civ. App.) 194 S. W. 1118.

### Art. 7689. Proceedings in suits to foreclose tax lien.

**Citation—Sufficiency and service of.**—Evidence held to sustain a finding that husband, owning land in his separate right, was not served with citation in a suit to recover state and county taxes and to foreclose a lien on the land. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

A citation purporting to be served upon owner in a suit to recover state and county taxes on land, commanding him to appear on a day in September, 119010, an impossible date was void, so that if it had been served, it would have been of no effect. *Id.*

**Judgment—Requisites and conclusiveness of.**—If a valid judgment may be rendered in a proceeding to foreclose a tax lien under Rev. St. 1895, art. 5232g, in the absence of necessary parties, those only who are actually parties are bound; the statute adding nothing to the general rule as to parties in litigation. *Adams v. West Lumber Co.* (Civ. App.) 162 S. W. 974.

Entries in the abstract in a tax assessor's office, showing that a patent was rendered for taxation in 1881 by a certain person, held to charge the county attorney, when bringing a suit in 1900 to sell the land for taxes, with knowledge that she had an interest in the land, so that a judgment foreclosing the tax lien, against unknown owners, would not bind her. *Id.*

A proceeding for collecting delinquent taxes is an action in rem against the property, and a judgment foreclosing the tax lien is good as against parties in interest joined in the suit, and parties not joined are not bound by such judgment. *Id.*

Judgment, foreclosing state's lien for delinquent taxes on land, covering years, in one of which land was not assessed, and sale thereunder, held invalid. *Coleman v. Crowds* (Civ. App.) 178 S. W. 585.

Entry on docket, in suit to foreclose tax lien, of "Judgment for plaintiff as prayed" held not to be accepted on appeal, to sustain sale, in place of formal judgment, invalid as including taxes for year when land was not assessed; the petition not praying judgment for taxes for such year. *Id.*

Judgment, in state's suit to foreclose lien for delinquent taxes for a series of years including 1885, for an amount covering the tax for such year, for which year no amount was claimed or due, was excessive. *Id.*

— **Suit to vacate; parties.**—In husband's suit, making purchaser at tax sale defendant, to vacate and set aside judgment under which sale was made, and for a decree for land, though wife of owner was not a necessary party making her a party did not injuriously affect defendant, but purchaser, while not a party to the tax suit, was a necessary party. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

In suit by owner of land making the purchaser at a tax sale defendant to vacate and set aside judgment under which sale was had, the state is not a necessary party, in view of the impracticability of making it a party. *Id.*

— **Collateral attack.**—Suit by owner of land sold for taxes, making the purchaser the defendant, to vacate and set aside judgment under which land was sold and for a decree for the land was not a collateral attack on judgments for taxes and for sale. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

**Validity of sale.**—Under this article, the fact that a levy for taxes is excessive through the sheriff and district clerk retaining unlawful fees out of the proceeds of the sale of the land, does not render the sale null and void. *Bonougli v. Brown* (Civ. App.) 185 S. W. 47.

Under this article and art. 7690, title of purchaser at tax sale from sheriff who retained an illegal fee, the district clerk receiving more than his legal costs, could not be attacked in trespass to try title by a third party claiming under the owner. *Id.*

**Purchaser in good faith.**—Upon levy and execution for taxes a purchaser for \$40, when it was worth about \$3,000, was not a purchaser in good faith, as he bought it for a grossly inadequate price. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

**Limitations.**—The running of limitations will not give any validity to a void judgment for delinquent taxes. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

### Art. 7690. Sheriff to execute deeds.

**Title of purchaser at tax sale.**—Under this article and art. 7689, title of purchaser at tax sale from sheriff who retained an illegal fee, the district clerk receiving more than his legal costs, could not be attacked in trespass to try title by a third party claiming under the owner. *Bonougli v. Brown* (Civ. App.) 185 S. W. 47.

**Deeds as evidence.**—In trespass to try title by a purchaser from buyer at tax sale, judgment, order of sale, and the sheriff's deed in tax suit, which was against unknown



owners, were admissible in evidence, against defendants, not parties to the tax suit, as muniments of title to establish that grantee had acquired title of the unknown owner. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

A tax deed is not evidence of title unless authority of maker of deed is shown by proof of compliance with requirements of law conferring authority to make sale. *O'Hanlon v. Morrison* (Civ. App.) 187 S. W. 692.

### Art. 7691. Attorneys to represent state; fees, etc.

See art. 7638a.

**Costs in general.**—Under this article, allowing the county attorney a fee of \$3, the district clerk a fee of \$1.50, and the county clerk a fee of \$1 in a tax sale foreclosure, a sale under a judgment including an excess of \$14.71 for those items was void. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

Under this article, no fee bills can be lawfully made in tax cases except as provided. *Bonough v. Brown* (Civ. App.) 185 S. W. 47.

An excessive levy for taxes is absolutely void, whether the excess is caused by including unlawful expenses, such as officers' fees, with lawful taxes, or otherwise. *Id.*

**Power of commissioners' court.**—Under this article and art. 7687, commissioners' court of county had right to contract to pay for publication of delinquent tax list 25 cents per description, and publisher's recovery was not limited by provision of article 7691. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

### Art. 7692. Assessor to list unpaid taxes annually, etc.

**Application.**—Laredo City Charter creates a statutory remedy for the recovery of delinquent taxes, and arts. 7692, 7693, are inapplicable. *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

**Cost, interest, and penalties.**—Under this article, defendant, who tendered the amount of his legal taxes within the time allowed therefor, thereby relieved himself of all penalties, interests, and costs. *State v. Hoffman* (Civ. App.) 190 S. W. 1163.

**Order of commissioners' court making levy.**—Under this article, it is not necessary for plaintiff to allege or show the order of the commissioners' court making the levy. *American Lumber Co. v. State* (Civ. App.) 165 S. W. 467.

**Suit for delinquent drainage district taxes.**—Under this article and arts. 7624, 7632, 7687, a suit for delinquent drainage district taxes cannot be brought earlier than April 21st of the year succeeding the year for which assessed. *Holt v. State* (Civ. App.) 176 S. W. 743.

### Art. 7693. Law available to incorporated cities and towns.

**Application.**—See *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091; note under art. 7692.

**Limitations.**—Charter of San Antonio, § 123, providing that taxes delinquent for ten years before suit is filed to collect them shall be barred by limitation, is not violative of Const. art. 3, § 55, providing that the Legislature shall have no power to extinguish, in whole or in part any debt to the state or any municipal corporation. *City of San Antonio v. Johnson* (Civ. App.) 186 S. W. 866.

### Art. 7694. Exemptions from this chapter.

**Applicability in general.**—Execution sale in S. county of land on which taxes had been paid in H. county held void. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

**Effect in obviating default under deed of trust.**—Under this article, there was no default under a deed of trust which provided that failure to pay taxes should mature the secured notes, where the mortgagor had paid his taxes in full, but according to an erroneous description. *Downs v. Wilson* (Civ. App.) 183 S. W. 803.

### Art. 7696. May redeem in two years by paying double.

**Failure of county attorney in diligence.**—Under this article, county attorney's failure to exercise such reasonable diligence as would have ascertained the true owner, rendered tax proceeding and sale thereunder as against unknown owners void. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

### Art. 7698. Proceedings against delinquents, unknown or non-resident.

Cited, *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

**In general.**—Unless a party's title by limitation to land has been fully perfected before bringing a tax suit against unknown owners, he is not a necessary party. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

**Validity and conclusiveness of judgment.**—Where a judgment foreclosing a tax lien recited proper process and service, such recital imported absolute verity on collateral attack, and plaintiff in trespass to try title could not show that the recital was erroneous. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

Unless a party's title by limitation to land has been fully perfected before bringing

of a tax suit against unknown owners, he is not a necessary party, and judgment binds him, though not served with notice. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

**Evidence.**—In trespass to try title by a purchaser from buyer at tax sale, judgment, order of sale, and the sheriff's deed in tax suit, which was against unknown owners, were admissible in evidence, against defendants, not parties to the tax suit, as muniments of title to establish that grantee had acquired title of the unknown owner. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

#### Art. 7699. Similar proceedings by city or town.

**In general.**—This article gives incorporated cities and towns the power to institute suits for delinquent taxes "for the recovery of the taxes due on said property, together with penalty, interest, and costs of suit," such penalty, interest, and costs being those provided by Acts 1897, of which article 7699 is section 16. *Bonough v. Brown* (Civ. App.) 185 S. W. 47.

Under Laredo City Charter, an action by the city attorney on behalf of the city for taxes due held presumptively authorized and want of authority is available as a defense under a sworn plea. *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

**Art. 7700a. Settlement of officer not to be accepted until compliance with this chapter.**—No county or district officer charged with any duty under Title 126, Chapter 15, of the Civil Statutes, 1911, can make settlement with the commissioners court of his county or the Comptroller of this State until he shall have performed the duties required of him under said Title 126, Chapter 15, of the Civil Statutes of 1911. [*Id.*, § 4.]

**Explanatory.**—The above section of the act declares that the provisions of the act are mandatory and makes a failure to comply with the same a misdemeanor, and is set forth in Vernon's Pen. Code 1916 as art. 420d.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Setting aside tax sale—Grounds—Rights and liabilities of parties.**—Purchaser at an execution sale of land for taxes who had settled the taxes which had not been paid by the owner was entitled to be reimbursed in owner's suit to vacate and set aside the sale. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

### CHAPTER SEVENTEEN

#### ASSESSMENT AND COLLECTION OF TAXES IN CERTAIN CASES

Art.		Art.	
7702.	Property omitted from tax rolls, etc., list of.	7704.	List to operate a lien on property.
7703.	Property listed to be assessed, how.	7707.	[Repealed.]

#### Article 7702. Property omitted from tax rolls, etc., list of.

Cited, *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

**Effect.**—Art. 7566, authorizing the assessment of omitted personal property, does not violate Const. art. 3, § 1, requiring taxation to be equal and uniform, notwithstanding this article. *State v. Cage* (Civ. App.) 176 S. W. 928.

#### Art. 7703. Property listed to be assessed, how.

Cited, *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

#### Art. 7704. List to operate a lien on property.

Cited, *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

#### Art. 7707.

Repealed by Act April 3, 1915, c. 147, § 5. See note under art. 7687a.

**Employment of tax ferrets.**—The enactment of this article held not to show that the commissioners' courts could not employ tax ferrets to discover omitted personal property. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

As this article relates exclusively to the taxation of real estate, it does not authorize the commissioners' courts to engage tax ferrets to discover omitted personal property. *Id.*

**Duty of state comptroller to recognize collector.**—Within art. 5732, prohibiting any court, except the Supreme Court, from issuing mandatory injunction to an officer of the

executive department of the government of the state to perform a duty prescribed by law, it is the duty of the State Comptroller, under the law, to recognize plaintiff as collector of delinquent taxes under his contract with the commissioners' court of a county, joined in by the State Comptroller, as authorized by this article, on behalf of the state. *Lane v. Mayfield* (Civ. App.) 158 S. W. 223.

**Employment of counsel.**—Under this article, commissioners' court may employ counsel to sue in the name of the state for delinquent drainage taxes. *Holt v. State* (Civ. App.) 176 S. W. 743.

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## CHAPTER NINETEEN

### NEW COUNTIES

#### Article 7722. [5239] When new counties are created, etc

**Note.**—Act Feb. 16, 1917, c. 25, creating Hudspeth county from the territory of El Paso county, contains special provisions for assessment and collection of taxes pending organization of the new county.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Reimbursement of one paying taxes as claimant.**—A person who, in good faith and under color of title, claims to be the owner of real estate may pay taxes assessed thereon, and if his title is afterwards defeated, he is entitled to be reimbursed by the true owner. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

**Payment of taxes by volunteers.**—Where defendants paid taxes on plaintiff's land without the authority of plaintiff, and without any contract for the purchase of the land, the defendants were mere volunteers, and cannot recover the payments made. *Marshall v. Beason* (Civ. App.) 165 S. W. 75.

**Compliance with conditions.**—Where the burden of taxation is authorized to be laid upon the property of citizens under certain conditions, a compliance with all such conditions is essential to the validity of the tax. *Cochran v. Kennon* (Civ. App.) 161 S. W. 67.

## TITLE 127

## TIMBER

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Sale of timber in general.**—Purchasers of standing timber who bought after vendor's agent had pointed out to them the wrong land held entitled to rescind for mutual mistake upon first receiving notice of the mistake or information putting them on inquiry. *Waugh v. Hudson* (Civ. App.) 159 S. W. 893.

Where it is contemplated by a conveyance of growing trees that the purchaser shall have some beneficial use of the land in connection with the trees, which shall remain on the land and receive their sustenance therefrom, the sale is of an interest in land, and carries the right to the use of the land for the sustenance of the trees and of entering thereon to enjoy the interest conveyed. *Davis v. Conn* (Civ. App.) 161 S. W. 39.

Description of land in contract for sale of timber held not so indefinite as to render the contract void, where the map attached thereto, as shown by the evidence, accurately and fully defined the boundaries of the land. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

A mere intimation that a contract for the sale of timber might be repudiated by the buyer held not to avoid the contract when unaccepted by the seller. *Id.*

Deed of standing timber held to convey a fee-simple title thereto, so that plaintiff could enter at any time to remove it, and was under no obligation to do so within a reasonable time. *Chapman v. Dearman* (Civ. App.) 181 S. W. 808.

— **Limitation as to time.**—A sale of growing trees with the privilege of removing them within five years, or after that time, if an annual rental shall be paid, operates as a sale of chattels rather than of an interest in realty. *Davis v. Conn* (Civ. App.) 161 S. W. 39.

Where, in conveying growing trees, a severance and taking away from the land is contemplated, the sale is of an interest in chattels only, and the right of removal must be exercised within the time agreed. *Id.*

A stipulation that the agreed time for removing trees may be extended as long as the buyer "may want" upon payment of a certain rental means that the time may be extended for as long as needed. *Id.*

Standing timber conveyed by an instrument giving the purchaser a specified time in which to remove the timber, and an extension of time on the purchaser first removing timber from the part of the land the vendor wished to cultivate, held forfeited by failure to remove within the specified time. *Chavers v. Henderson* (Civ. App.) 171 S. W. 798.

Under a deed giving grantee right to cut and remove timber within a specified time and an additional time on making specified payments, any right of grantee terminates on cutting and removal of all the timber in less than the specified time. *Broocks v. Moss* (Civ. App.) 175 S. W. 791.

Where a grantee of standing timber, to cut and remove within a specified period, cut timber within the period, but did not remove it, the title of the timber cut passed to him. *Id.*

**Deed of timber construed.**—A deed of standing timber, giving the grantee the right to cut and remove the same within a specified time, held a conveyance only of such of the timber as is actually cut within the time limit. *Broocks v. Moss* (Civ. App.) 175 S. W. 791.

**Logging contracts.**—Where purchasers of standing timber, upon being told that the timber they were cutting and which prior to the purchase was pointed out to them was not covered by their deed, continued cutting and paid the purchase price, they were not entitled to rescind and recover back the price. *Waugh v. Hudson* (Civ. App.) 159 S. W. 893.

Where the buyer of all trees of 12 inches or greater diameter growing on certain land sold the right of turpentineing, he was not liable in damages because those turpentineing the trees destroyed trees under 12 inches in diameter. *Davis v. Conn* (Civ. App.) 161 S. W. 39.

Under a conveyance of growing trees with the right of removing them within five years, or thereafter if an annual rental should be paid, the buyer had the right to turpentine the trees while standing, where he proceeded, with diligence, to remove them in accordance with the contract, and no damage was done the soil beyond that necessarily incident to turpentineing the trees. *Id.*

Under agreement between party having right to cut timber and party claiming interest in the land, held, that party claiming such interest, having failed to establish it in litigation, was not entitled to stipulated payments. *American Nat. Bank v. Warner* (Civ. App.) 176 S. W. 863.

**Preservation of right to occupy.**—Where grantors, in a deed to their daughter, reserved only a right to occupy the land as their home until their death, they did not, by virtue of such reservation, enjoy the right to cut timber from the land or to authorize others to do so. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Emerson v. Rice* (Civ. App.) 165 S. W. 471.

## TITLE 127 A

## TORTS—SITUS OF SUITS FOR

**Article 7730 $\frac{1}{2}$ . Suits for death or personal injury by wrongful act committed outside the state.**—That whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any such foreign state or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign state or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statute of this State, and the law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure. [Act March 30, 1917, ch. 156, § 1.]

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

## TITLE 128

## TRESPASS TO TRY TITLE

Chap.

1. Pleadings and practice.

Chap.

2. Claim for improvements.

## CHAPTER ONE

## THE PLEADINGS AND PRACTICE

Art.		Art.	
7731.	Method of trying title to land, etc.	7742.	What is sufficient title, etc.
7732.	Rules in other cases observed how far.	7743.	Either party may demand abstract of title.
7733.	The petition shall state what.	7745.	Abstracts shall state what.
7734.	Indorsement on petition.	7746.	Amended abstract.
7735.	Warrantor, etc., may be made a party.	7747.	Surveyor appointed, etc.
7737.	The possessor shall be defendant.	7749.	Common source of title, proof of.
7738.	May join as defendants, whom.	7750.	Judgment by default.
7739.	May file plea of "not guilty" only.	7752.	When defendant claims part only.
7740.	What proof may be made under such plea.	7753.	Where plaintiff proves part.
7741.	Answer taken as admitting possession.	7754.	May recover a part, etc., when.
		7755.	The judgment, etc.
		7756.	Damages, etc., when recovered.
		7758.	Final judgment conclusive.

**Article 7731. [5248] Method of trying titles to land, etc.**

**Nature and scope of remedy in general.**—The holder of the title to land may maintain trespass to try title and recover the land with damages for taking timber, and an injunction restraining defendants, who were without title, from taking other timber therefrom. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Emerson v. Rice* (Civ. App.) 165 S. W. 471.

An action involving title to land, whatever its form, or a suit to recover title to land, whether upon legal or equitable grounds, is in effect an action of "trespass to try title." *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

**Equities and rights of vendor and purchaser.**—A grantee in possession, making improvements without objection, held entitled to establish his equitable title to a portion omitted by mistake from the deed to his grantor, without first procuring reformation of the deed. *Gilmore v. O'Neil* (Sup.) 173 S. W. 203.

**Forcible entry and detainer action as election.**—Where plaintiffs were entitled to maintain an action of trespass to try title, the fact that they had resorted to an action of forcible entry and detainer in the county court, which was still pending, to recover possession will not deprive them of the remedy of trespass to try title in the district court. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

**Art. 7732. [5249] Rules in other cases observed how far.**

**Pleading.**—Under statutory pleadings for trespass to try title, notice required to be given by pleadings in other character of causes is not required, but when parties further plead specially, the pleadings are subject to ordinary rules of pleading requiring sufficient definiteness to apprise the opponents of contentions relied upon. *Martinez v. De Barroso* (Civ. App.) 189 S. W. 740.

**Art. 7733. [5250] The petition shall state what.**

**Petition.**—A petition held sufficient to state a cause of action in trespass to try title under this article. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

A petition in trespass to try title, which averred that defendants based their claim of sole title on a deed executed by plaintiffs as members of a firm, which included only the firm property, and that the land was the individual property of plaintiffs, states a cause of action. *Dye v. Livingston Lumber Co.* (Civ. App.) 161 S. W. 53.

Counts of a petition held to state no cause of action. *Id.*

Allegations in an answer seeking affirmative relief that plaintiff's grantor held under a deed which included the land in controversy by mistake, of which mistake plaintiff had knowledge, do not support a suit in trespass to try title, since they do not amount to an allegation of title in defendant. *Hamilton v. Green* (Civ. App.) 166 S. W. 97.

Under allegations of a petition, held, that a suit, though designated as a suit to quiet title, was in effect a suit in the nature of trespass to try title founded upon an equitable title to the land. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Petition held to sufficiently allege withholding of possession, and, in spite of equitable

prayer, to be a sufficient petition in an action in trespass to try title. *American Cement Plaster Co. v. Acme Cement Plaster Co.* (Civ. App.) 181 S. W. 257.

If either party in trespass to try title pleads specially his title, he must recover, if at all, on the title pleaded. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

Allegations in trespass to try title held an admission that plaintiffs had no title to the part of the land described in their petition as claimed by defendants. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Petition in trespass to try title merely showing defendant was owner in fee when plaintiff condemned the land for railroad right of way is not subject to demurrer predicated on it showing that he is still such owner. *Davidson v. Houston E. & W. T. Ry. Co.* (Civ. App.) 194 S. W. 211.

Petition in trespass to try title by railroad as to right of way, not showing that defendant is the owner of the fee, need not show how he is interfering with plaintiff's easement. *Id.*

— **Description of premises.**—A petition in trespass to try title held not demurrable as not stating that the boundaries set forth were correct. *Birge-Forbes Co. v. Wolcott* (Civ. App.) 176 S. W. 605.

In trespass to try title, a petition, describing the property generally as the property of an irrigation company, is insufficient to support a judgment without extrinsic evidence identifying the property. *Welles v. Arno Co-operative Irr. Co.* (Civ. App.) 177 S. W. 985.

— **Interest or ownership.**—In trespass to try title, allegations of plaintiff wife supplemented by the defendant's pleadings, held to sufficiently apprise defendant that plaintiff wife would prove the same deed under which both claimed as common source of title. *Martinez v. De Barroso* (Civ. App.) 189 S. W. 740.

— **Limitation.**—Under petition in trespass to try title, any title except title by limitation held provable, and facts supporting any other character of title may be introduced. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

To authorize judgment for one claiming under ten-year limitations part of larger survey, land recovered need not be specifically described in pleadings, but under appropriate pleadings adverse claimants may recover undivided part of larger tract. *Patterson v. Bryant* (Civ. App.) 191 S. W. 771.

— **Issues, proof and variance.**—Where plaintiff in trespass to try title pleads his title specifically, he will be held to prove his allegations as made. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

Where plaintiff generally alleges title in himself, proof that he is only a tenant in common in possession of an undivided tract of land does not constitute a variance. *Hill v. Whitworth* (Civ. App.) 162 S. W. 434.

Where, in trespass to try title, the controlling issue was the location of an old bed of a river, with reference to the land in controversy, and not with reference to calls for course and distance, failure of plaintiff to prove that the course of the old bed was along the calls for course and distance in his pleadings was not a variance between the pleadings and the proof. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

The fact that plaintiff, by an amended petition, demanded less land than he was lawfully entitled to recover did not prevent him from proving the true boundaries of his grant, as determined by the location of the bed. *Id.*

In an action to recover an interest in land, where plaintiff relied upon possession by her intestate as a fact showing his right therein, evidence that, before defendant had purchased the land in question, intestate or his company was in possession, held admissible. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

A plaintiff in trespass to try title who sues as landlord against a tenant holding over after the term and notice to vacate, or in violation of the rental contract, must show a wrongful holding of possession by defendant. *McKee v. Garner* (Civ. App.) 168 S. W. 1031.

Deeds through which plaintiff in a suit to recover land deraigned title held not a departure from the petition as amended. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 186 S. W. 258.

— **Defenses.**—In trespass to try title, showing a right of recovery without alleging that the partnership obligations of plaintiff's predecessor had been discharged, facts, if any, showing that on account of partnership equities his interest in the land was less than that claimed, were matters to be pleaded in defense. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

#### Art. 7734. [5251] Indorsement on petition.

Cited, in dissenting opinion *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

#### Art. 7735. [5252] Warrantor, etc., may be made a party.

— **Parties owning title.**—This article does not dispense with the rule that requires parties really owning title to land, in order to be affected by judgment disposing of title, to be made parties to suit. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

#### Art. 7737. [5254] The possessor shall be defendant.

— **Agents for state.**—Under this article and art. 7738, a plaintiff may maintain trespass to try title against agents for the state in possession, where he has title and right of possession, although the state has not consented to the suit. *Imperial Sugar Co. v. Cabell* (Civ. App.) 179 S. W. 83.

Showing that plaintiff did not acquiesce in defendants' possession.—In an action in the nature of an action in trespass to try title, it being necessary for the plaintiff to allege possession by the defendant, the plaintiff could not thereafter be compelled to show that he did not acquiesce in such possession. *American Cement Plaster Co. v. Acme Cement Plaster Co.* (Civ. App.) 181 S. W. 257.

#### Art. 7738. [5255] May join as defendants, whom.

**Plaintiff's attorneys.**—Plaintiff's attorneys, to whom he had conveyed part of the land claimed, held not necessary parties, in trespass to try title, to segregate the tract claimed from the entire tract. *Wickizer v. Williams* (Civ. App.) 173 S. W. 1162, denying rehearing 173 S. W. 288.

**Defendant's wife.**—In trespass to try title against party occupying the land, his wife held not a necessary party, the homestead right not being a defense. *Nunez v. McElroy* (Civ. App.) 174 S. W. 829.

A judgment in trespass to try title to defendant's homestead held void, where defendant's wife was not a party, though she had subsequently died childless. *Harper v. Stewart* (Civ. App.) 179 S. W. 277.

**Agents for state.**—Under this article and art. 7737, a plaintiff may maintain trespass to try title against agents for the state in possession, where he has title and right of possession, although the state has not consented to the suit. *Imperial Sugar Co. v. Cabell* (Civ. App.) 179 S. W. 83.

#### Art. 7739. [5256] May file plea of "not guilty" only.

**Reliance on laches under plea.**—In trespass to try title, where plaintiff claimed under a foreclosure of a deed of trust 25 years after the maturity of the indebtedness, defendants in possession can rely on the defense of laches under their plea of not guilty. *Mensing v. Fidelity Lumber Co.* (Civ. App.) 194 S. W. 208.

**Sufficiency of answer as defense.**—In trespass to try title, an answer, setting up plaintiff's breach of an agreement to extend the time for payment of vendor's lien notes, which did not offer to pay the notes, but merely sought enforcement of the agreement or damages for its breach, presents no defense. *Workman v. Ray* (Civ. App.) 180 S. W. 291.

**Sufficiency of answer as cross-action.**—Answer of defendants in trespass to try title, setting up limitations, with appropriate prayer, held, in the absence of special exceptions, sufficient as a cross-action. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

**Lack of title in cross-complainant.**—Where the court found that a cross-complainant in trespass to try title had no title, he is not entitled to judgment because of his prior possession against the plaintiff, though plaintiff had no title. *Richardson v. Houston Oil Co. of Texas* (Civ. App.) 176 S. W. 628.

#### Art. 7740. [5257] What proof may be made under such plea.

**Defenses in general.**—In action of trespass to try title party claiming an easement against the owner of the fee is bound to plead and prove it. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

In trespass to try title, where defendants denied plaintiff's title, the issue as to whether the rents prior to a certain date were an offset to defendants' claims for expenditures was presented. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

**Equitable defenses in general.**—Under this article, defendants in trespass to try title may, under a plea of not guilty, prove equitable estoppel. *Birge-Forbes Co. v. Wolcott* (Civ. App.) 176 S. W. 605.

It is not necessary, under plea of not guilty in action of trespass to try title, to plead estoppel before it can be urged as defense. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

**Stale demand and laches.**—In trespass to try title, the pleading of stale demands is not available as a defense, where one equitable claim is asserted against another. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

**Proof under plea of not guilty or general issue.**—Under this article, a defendant may, under the plea of not guilty, prove that he is a bona fide purchaser. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

A defendant in trespass to try title may, under pleas of the general denial, not guilty, and a special defense, prove any fact in rebuttal of plaintiff's testimony, but cannot introduce evidence in confession and avoidance, except as pleaded. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In trespass to try title, defendants are entitled to give in evidence any lawful defense to the action, except the defense of limitation, without any special pleading as a predicate therefor. *Ryan v. Lofton* (Civ. App.) 190 S. W. 752.

**Proof under plea of title by limitation.**—A party who specially sets up a title by limitation may prove other title. *Buie v. Penn* (Civ. App.) 172 S. W. 547.

**What plaintiff may plead.**—Notwithstanding this article, plaintiff may plead by supplemental petition any fact which shows the superiority of his title over that claimed by an intervener. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

**What plaintiff must show.**—When plaintiff's title is controverted by plea of not guilty, he must show that the title was in him at the commencement of the suit, either by derivation from the sovereignty of the soil or from a common source of title. *Atkinson v. Shelton* (Civ. App.) 160 S. W. 316.



**Art. 7741. [5258] Answer taken as admitting possession.**

**In general.**—The answer in trespass to try title held an admission that it only involved a question of boundary, and relieved plaintiffs of the burden of proving title to their land. *Harris v. Kiber* (Civ. App.) 178 S. W. 673.

Under direct provisions of this article and art. 7758, whenever the defendant in trespass to try title pleads not guilty, he puts in controversy plaintiff's title to all land sued for, and a judgment that plaintiff take nothing by his suit has same effect as a judgment that defendant recover the land. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**Art. 7742. [5259] What is sufficient title, etc.**

**Title to support action.**—In trespass to try title, plaintiff must recover upon the strength of his own title, and not upon the weakness of his opponent's. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 193 S. W. 179; *Hooper v. Acuff* (Civ. App.) 159 S. W. 934; *Patrick v. Barnes* (Civ. App.) 163 S. W. 408; *Allison v. Richardson* (Civ. App.) 171 S. W. 1021; *Houston Oil Co. of Texas v. Miller & Vidor Lumber Co.* (Civ. App.) 178 S. W. 830.

That a third party had an easement in land did not prevent the recovery of title and possession as against an oral licensee of such third person. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

Where plaintiff has a title, whether legal or equitable, sufficient to maintain trespass to try title, his right to recover will be barred only by adverse occupancy in the manner and for the length of time prescribed by the statute of limitations and cannot be barred by mere laches. *Loomis v. Cobb* (Civ. App.) 159 S. W. 305.

Plaintiff in trespass to try title, seeking to recover on a title by limitations, can only recover on the strength of his own title. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

Plaintiff, in trespass to try title, can recover only upon the strength of his own title, and he cannot recover if the evidence shows that he has title to only a part of the land claimed, but does not show the part to which he has title. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

Before a mortgagor can recover property mortgaged, of which the mortgagee is rightfully in possession, he must tender the amount of money due on the mortgage. *Vanderwolk v. Matthaehi* (Civ. App.) 167 S. W. 304.

A mortgagee who has never been in possession cannot maintain a suit in trespass to try title. *Alexander v. Conley* (Civ. App.) 187 S. W. 254.

In an action of trespass to try title a deed of trust held not such outstanding superior title or interest as will prevent recovery by plaintiff. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

In trespass to try title, the defendant need not elect as between two deeds, both of which are valid and convey the same title. *Wentzell v. Chester* (Civ. App.) 189 S. W. 304.

Plaintiff in trespass to try title, to be entitled to judgment, must show title superior to defendant's. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

Where property was conveyed through a third person to defendant for immoral purposes, and plaintiff purchased same on foreclosure, court will not grant plaintiff relief in trespass to try title. *Hall v. Edwards* (Civ. App.) 194 S. W. 674.

— **Equitable title.**—An equitable title can be sued upon or set up as a defense in an action of trespass to try title. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

The superior title, which will entitle a party to prevail in trespass to try title, may be either legal or equitable. *Gilmore v. O'Neil* (Sup.) 173 S. W. 203, reversing judgment (Civ. App.) 139 S. W. 1162.

— **Right of plaintiff to possession.**—Oral licensee of one in possession without right or title held to be a naked trespasser within the rule that as against a naked trespasser prior possession coupled with some sort of written title is sufficient in trespass to try title. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

In trespass to try title against a naked trespasser, where plaintiffs relied on prior possession under a deed, it was immaterial that the deed to their grantor did not cover the land in question where the grantor's deed to them did cover such land. *Id.*

Mere possession of school land without a showing of right thereto will not confer a right to maintain trespass to try title to a disputed strip of land of which plaintiff was not in actual possession. *Hooper v. Acuff* (Civ. App.) 159 S. W. 934.

Plaintiff, in trespass to try title, could not recover, where he showed neither title nor such prior possession as would entitle him to recover as against a naked trespasser. *Smith v. Huff* (Civ. App.) 164 S. W. 429.

Plaintiff could not recover on mere proof of prior possession with which he connected himself, where it appeared that such possession had been abandoned for many years and not reasserted till the sale to plaintiff. *Conn v. Marshburn* (Civ. App.) 169 S. W. 1113.

In trespass to try title, prior possession of property in plaintiffs' grantors establishes a prima facie title warranting recovery unless rebutted by defendant. *Buie v. Penn* (Civ. App.) 172 S. W. 547.

Mere evidence of prior possession without proof of title from the sovereignty or that the parties claimed under a common source will not warrant judgment for plaintiffs. *Sweeten v. Taylor* (Civ. App.) 184 S. W. 693.

— **Title of cotenant or joint tenant.**—Where defendants were only trespassers, they could not defeat recovery by showing that plaintiff was merely a tenant in common of a large tract of land and that by selling specific parcels he had relinquished his right to the property in suit. *Hill v. Whitworth* (Civ. App.) 162 S. W. 434.

A tenant in common in actual possession of part of the land has constructive posses-

sion of the whole and has sufficient title to maintain trespass to try title against strangers who enter upon any portion of the property. *Id.*

A cotenant may recover the whole property as against one showing no title. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

The rule that a tenant in common may recover possession of the entire tract as against a trespasser did not apply as against defendant, claiming under a deed which the grantors and their heirs for more than 50 years had recognized as valid, and which was insufficient only in the certificate of acknowledgment. *Houston Oil Co. of Texas v. Sudduth* (Civ. App.) 171 S. W. 556.

Plaintiff may recover all the land as against a mere trespasser, though he shows title only to a five-sevenths of the land as tenant in common. *Padgett v. Guilmartin*, 172 S. W. 1101, 106 Tex. 551, reversing judgment *Guilmartin v. Padgett* (Civ. App.) 138 S. W. 1143.

A tenant in common may sue in trespass to try title for the whole tract, against a trespasser, without joining cotenants. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

— **Contract to purchase.**—Where purchaser repudiated the contract, vendor, who was willing to comply therewith, held not bound to tender a deed before rescinding and suing in trespass to try title. *Pollard v. McCrummen* (Civ. App.) 160 S. W. 1148.

If defendant is a naked trespasser, it is enough for plaintiff to show a bond for title to his grantor, without showing consideration to support it. *Randell v. Robinson* (Civ. App.) 172 S. W. 735.

A purchaser in possession under a land contract, on which he paid part cash and was to execute notes for the balance, which notes were never executed by him, could not, without tendering the balance, recover the land in trespass to try title, by pleading and proof that the notes would have been barred by the four-year limitation if they had been executed; such action amounting to a repudiation of the contract under which he held. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

A vendor's action of trespass to try a title in default of payment of purchase money may be defeated by tender of the unpaid purchase money, or by showing that no part of the purchase money remains unpaid. *Miller v. Pouter* (Civ. App.) 189 S. W. 105.

**Weight and sufficiency of evidence.**—In trespass to try title, evidence held to sustain a finding that the person through whom plaintiff claimed had reconveyed the premises, by deed not found and not recorded, to one through whom defendant claimed. *Freund v. Sabin* (Civ. App.) 159 S. W. 168.

In trespass to try title evidence held sufficient to support a finding for plaintiff. *Nona Mills Co. v. Jackson* (Civ. App.) 159 S. W. 932.

In trespass to try title, where both parties claimed under a location made under a certificate which concededly belonged to plaintiffs' ancestor at one time, plaintiffs' long acquiescence in the claim of defendants is not entitled to much weight where there was nothing to show that they knew that their ancestor ever owned the certificate; it appearing that it was not recorded in the county and had not been issued directly to him. *Id.*

In trespass to try title, evidence held to support a finding that plaintiff purchased the land in controversy for one or another of the persons named. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

In trespass to try title to two tracts of land, to one of which defendant had formerly had a bond for title from plaintiff's grantor, which plaintiff claimed had been surrendered and canceled, and the other of which defendant claimed to have purchased from plaintiff, paid for, and made valuable improvements thereon, evidence held to support a verdict for defendant. *Wofford v. Strickland* (Civ. App.) 160 S. W. 623.

Evidence held sufficient to support a conclusion that defendant's grantor by deed or settlement had acquired the title of two of his brothers to their interest in the land. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

In trespass to try title wherein an intervener and certain of the defendants claimed under the ten-year statute of limitation by reason of improvements and possession by their ancestor, evidence held not to show that their ancestor, had conveyed 160 acres to a third person. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

Evidence held to sustain a finding that the grantors in a deed under which defendant claimed were the same persons named as beneficiaries in the will of a testator, who was the common source of title. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

Evidence in trespass to try title, held insufficient to show acquiescence on the part of a prior grantee to a subsequent grantee's selection and holding of more than 100 acres out of a larger tract. *Hermann v. Thomas* (Civ. App.) 163 S. W. 1037.

In trespass to try title brought by heirs of the only child of M., recitals in deed by H.'s administrator and order of probate court directing its execution held insufficient to show that M., who had no record title, acquired the equitable title from H. *McBride v. Loomis* (Civ. App.) 170 S. W. 825.

In trespass to try title evidence held sufficient to sustain a finding that the heirs of a prior owner, other than H., conveyed their interests in the land to him. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

In trespass to try title against party in possession, finding that his possession was not under a claim of right or title held not to be disturbed in view of the evidence. *Nunez v. McElroy* (Civ. App.) 174 S. W. 329.

Evidence held sufficient to show that plaintiffs' predecessor in title owned land in controversy. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

Evidence held sufficient to show title in plaintiffs' remote grantor. *Id.*

Extrinsic evidence, which fails to define the boundaries of the tracts conveyed by a sheriff's deed containing only a general description, is insufficient to support a recovery in trespass to try title. *Welles v. Arno Co-operative Irr. Co.* (Civ. App.) 177 S. W. 985.

Finding, justified by evidence that plaintiff acquired no title under original grantee of a certificate under which the land was located and patented, held to require judgment for defendants. *Houston Oil Co. of Texas v. Miller & Vidor Lumber Co.* (Civ. App.) 178 S. W. 830.

Evidence in an action of trespass to try title, wherein the question of title depended on whether the former owners of the property had transferred, prior to making an assignment for the benefit of creditors, vendor's lien notes retained by them held to show that the notes had been transferred. *Etheridge v. Campbell* (Civ. App.) 179 S. W. 1144.

Evidence in an action of trespass to try title to a tract of land including 320 acres out of a 3,000-acre survey, covered by an invalid deed, held not to show any outstanding title as against plaintiffs to the 320 acres by reason of a location contract entitling the locator to one-third of the entire survey. *Ayers v. Snowball* (Civ. App.) 181 S. W. 827.

In trespass to try title, evidence held sufficient to warrant a finding that defendant and plaintiffs never intended that the 217-acre tract involved, part of a larger one conveyed to defendant, be turned over to a land corporation in which he and plaintiffs owned stock. *Dewees v. Nicholson* (Civ. App.) 182 S. W. 396.

Where plaintiffs introduced a patent to the heirs of one deceased and deeds from certain persons of the same name, but made no showing that such persons were the heirs of deceased, and the deeds did not so recite, they failed to deraign title from the sovereignty. *Sweeten v. Taylor* (Civ. App.) 184 S. W. 693.

Evidence held to support the finding of the jury that plaintiffs, in trespass to try title, had no title to the land, in question, since it was not included within the grant under which they specifically claimed. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Evidence held to support a judgment for the defendants in trespass to try title, where there was no evidence that it was physically impossible for the land to have been located as the jury found it was. *Id.*

In suit for trespass to try title, the defense being equitable rights under an oral contract to convey, evidence held to show that plaintiff's creditor, an aged man, promised when title was taken in his own name to convey the property to defendants in consideration of support until his death, which was given him. *Ryan v. Lofton* (Civ. App.) 190 S. W. 752.

#### Art. 7743. [5260] Either party may demand abstract of title.

**Abstract of title—Definition.**—An "abstract of title" is defined as a statement in substance of what appears in the public records affecting title to land, together with a statement in substance of such facts as do not appear upon the public records which are, however, necessary to perfect the title. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

**Evidence under abstract.**—Under this article and arts. 3708, 7745, 7746, comptroller's certificate of assessment and payment of taxes held admissible in trespass to try title, though not contained in abstract of title offered after demand. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

#### Art. 7745. [5262] Abstract shall state what.

**Admissibility of certificate of assessment.**—Under this article and arts. 3708, 7743, 7746, comptroller's certificate of assessment and payment of taxes held admissible in trespass to try title, though not contained in abstract of title offered after demand. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

#### Art. 7746. [5263] Amended abstract.

**Evidence admissible under abstract.**—Under this article and arts. 3708, 7743, 7745, comptroller's certificate of assessment and payment of taxes held admissible in trespass to try title, though not contained in abstract of title offered after demand. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

#### Art. 7747. [5264] Surveyor appointed, etc.

**Compensation of surveyor.**—A surveyor appointed in trespass to try title, under this article, should be allowed reasonable compensation to be taxed as costs against the losing party. *Beaumont Irrigating Co. v. De Laune* (Civ. App.) 173 S. W. 514.

#### Art. 7749. [5266] Common source of title, proof of.

Cited, *Hamer v. Sanford* (Civ. App.) 189 S. W. 343.

**Title from common source in general.**—It is not necessary that a common source of title be pleaded, where it is proved by undisputed testimony. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

**Effect of common source or claim thereunder in general.**—Title in a common source being shown, a superior title in a third person with which defendants were not connected is unavailable. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Where both deraigned title from the same source, plaintiff need not prove his title. *Harris v. Kiber* (Civ. App.) 178 S. W. 673.

**Showing outstanding or paramount title.**—Defendant, in trespass to try title, cannot defeat plaintiff's prima facie title under a deed from the common source merely by showing that he holds a senior deed from such source without also showing that the land conveyed to him thereby conflicts with plaintiff's title. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

**Proof of common source.**—Judgment for defendants on the ground that the land was conveyed by deed from the common source to their predecessors, and locating the true boundary line, held sustained by the evidence. *Cariker v. Davis* (Civ. App.) 172 S. W. 728.

Where plaintiffs deraign title from two persons, and defendants from only one of them, plaintiffs did not show the parties claimed from a common source; there being no proof of the interest of their grantors. *Sweeten v. Taylor* (Civ. App.) 184 S. W. 693.

In suit to recover land wherein defendant claimed that its predecessor furnished the money with which plaintiff's predecessor purchased from the common source of title, evidence held to sustain a directed verdict for plaintiff for the title and possession of the land. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 186 S. W. 258.

#### Art. 7750. [5267] Judgment by default.

Cited, *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922.

**Defective petition.**—Where the original petition upon which an interlocutory judgment of default was taken was not in the statutory form of trespass to try title, but rather a petition to quiet title, this article would not apply to relieve plaintiff from proving title, since the effect of a default judgment must be measured by plaintiff's pleadings. *Atkinson v. Shelton* (Civ. App.) 160 S. W. 316.

**Defendants who answer.**—This article does not purport to prescribe the rights of defendants who do answer, and their rights are controlled by article 1937 as to answering and defaulting defendants. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

#### Art. 7752. [5269] When defendant claims part only.

**Disclaimer in general.**—The effect of a disclaimer by a defendant in trespass to try title is only an admission upon record of plaintiff's right to recover title, and a denial of the assertion of any title by defendant. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922.

**Defective answer.**—In trespass to try title, an answer failing to describe lands claimed by adverse possession is demurrable. *Birge-Forbes Co. v. Wolcott* (Civ. App.) 176 S. W. 605.

#### Art. 7753. [5270] When plaintiff proves part.

**Recovery by plaintiff.**—Where plaintiff in trespass to try title sues for more land than defendant claims or is in possession of, the latter should promptly disclaim that part not in his possession, and the fact that plaintiff sues for more than defendant claims will not prevent recovery of the land claimed by defendant to which plaintiff proves title. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**Costs.**—In trespass to try title where plaintiff recovered judgment against defendants for a large portion of the land in controversy, plaintiff is entitled to costs. *Dupont v. Texas & N. O. R. Co.* (Civ. App.) 158 S. W. 195.

Art. 6125, relating to costs in partition, held inapplicable to costs in trespass to try title, where partition was ordered between the parties. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

#### Art. 7754. [5271] May recover a part, etc., when.

**Recovery of part.**—Where plaintiff recovered a large part of land sued for, to which defendants did not disclaim, and defendants recovered no part of that sued for additional to that sued for by plaintiff, the costs were properly taxed against defendants. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

#### Art. 7755. [5272] The judgment, etc.

**Judgment in general.**—Where, in trespass to try title, the issues involved the right of possession and damages for the wrongful removal of defendant out of possession, a judgment for defendant for possession, and for damages as found by the jury, was sufficient as against plaintiff not entitled to possession. *McKee v. Carner* (Civ. App.) 168 S. W. 1031.

In trespass to try title judgment against plaintiffs tending to show title in defendants' predecessor held not inadmissible because reciting that the "defendant" was served with notice of the suit while the judgment, which was by default, purported to be against three persons. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

A judgment in trespass to try title will not be reversed as not supported by the verdict, where it appears that both parties attempted to put in issue the title to the land described in the judgment, but made a mistake as to the length of a line. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

In trespass to try title, that actual adverse possession of each defendant was found to extend to less area than claimed by them in their answer affords no ground to set verdict for plaintiff for the balance of the tract aside. *Thompson v. Richardson* (Civ. App.) 186 S. W. 275.

Purchaser in possession, having lost his right to lien for valuable improvements through inequitable conduct, held nevertheless entitled to judgment for the land upon payment of balance of purchase money, because of his improvements through years of effort. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

**Description of land.**—Where the petition did not locate the land as to any known monument, and the defendant disclaimed title to the land described, but located the corner thereof by reference to monuments, a verdict for plaintiff for the land sued for

was not sufficient as the basis of a judgment. *Government Hill Co. v. Mundy* (Civ. App.) 165 S. W. 78.

Where the verdict was insufficient, because the land thereby awarded to the plaintiff could not be determined, the court could not by its judgment determine the location of the land, which was the point in issue. *Id.*

Where the verdict was for the plaintiff for the land sued for, the indefinite description in the petition, which was referred to in the verdict, could not be made definite in the judgment by reference to the answer. *Id.*

In trespass to try title, held, that the court could not render judgment for defendant for any part of the tract, where there was no evidence as to the quantity of land actually occupied by defendant, except that under cultivation, upon which it could describe the land actually occupied for the ten years prior to the commencement of the suit. *York v. J. M. Thompson Lumber Co.* (Civ. App.) 169 S. W. 187.

In trespass to try title to land which was inclosed by plaintiffs, a verdict for them, which did not accurately describe the land in controversy will sustain a judgment for plaintiffs for the land inclosed, where the verdict could be construed as a finding in plaintiff's favor either on a question of boundary or adverse possession. *Schubert v. Voges* (Civ. App.) 169 S. W. 409.

In trespass to try title, a petition, describing the property generally as the property of an irrigation company, is insufficient to support a judgment without extrinsic evidence identifying the property. *Welles v. Arno Co-operative Irr. Co.* (Civ. App.) 177 S. W. 985.

That the description in a judgment for plaintiff in trespass to try title did not conform to its pleadings held not to require a reversal, where defendants filed a cross-action putting in controversy the title to additional land, and the court decreed that they take nothing in their cross-action. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

**Partition.**—Where, in trespass to try title, it appeared that plaintiff and defendant were part owners of the land, the court properly directed a partition. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

In trespass to try title, where defendant pleaded title to a specifically described 160 acres, but did not allege that to award him part of the tract would be an equitable partition between himself and plaintiff, and disclaimed as to the rest of the tract; held, that the court could not render judgment for the specific 160 acres or any part of the tract. *York v. J. M. Thompson Lumber Co.* (Civ. App.) 169 S. W. 187.

Where a decree in a proceeding to recover title decreed title and possession of a designated part to plaintiff bank, an unmaturing growing crop on the land was a part of realty and passed by the decree. *Schaefer v. First Nat. Bank, Bay City* (Civ. App.) 189 S. W. 556.

Where jury found that plaintiff was entitled to undivided 640 acres with improvements by adverse possession, it was proper to appoint commissioners to survey and segregate the land and to enter judgment upon their report. *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

Where party claiming under deed to fractional undivided interest could have established title by adverse possession, he could not recover the specific land described without a showing that it was a fair and equitable partition. *Dowdell v. McCardell* (Civ. App.) 193 S. W. 182.

**Fixing disputed line.**—In trespass to try title, a judgment, establishing as a boundary line between the property of plaintiffs and defendant, the fence then existing, and decreeing to plaintiffs title to all land north of the fence, sufficiently establishes the boundary. *Schubert v. Voges* (Civ. App.) 169 S. W. 409.

A judgment in trespass to try title for defendant claiming 160 acres of a larger survey under ten-year statute of limitations should determine boundaries of defendant's land by metes and bounds. *Patterson v. Bryant* (Civ. App.) 191 S. W. 771.

In action of trespass to try title to land claimed by plaintiffs under mineral land patents from the state, held, that errors in field notes could be corrected to conform location to ground actually covered, marked, and identified when locations were made. *Plummer v. McLain* (Civ. App.) 192 S. W. 571.

By direct provision of this article, in trespass to try title in which issue was whether land claimed was within a Mexican grant, a judgment for plaintiff describing land was proper, and it was not necessary to fix boundary of such grant; as case would not settle other persons' rights even by fixing boundary. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**Writ of possession.**—Where plaintiffs in trespass to try title recovered a judgment for an undivided right of possession in certain premises, the writ of possession issued upon each judgment could only be one placing them in possession jointly with the defendants. *Zarate v. Villareal* (Civ. App.) 159 S. W. 873.

Where judgment in action to try title to land expressly dismissed party from case without prejudice to his rights, a writ of possession could not properly issue against him or his tenant. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

### Art. 7756. [5273] Damages, etc., when recovered.

**Use and occupation.**—Where a purchaser of land was admitted into possession without payment of any of the purchase price, the vendor, upon rescission of the contract, is entitled to recover for the use and occupation of the land, whether the rescission was by mutual agreement or because the vendor could not convey a marketable title. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

Where a contract for the sale of land is rescinded because of the inability of the vendor to convey good title, the purchaser, who was admitted into possession without

payment of any of the purchase price, cannot offset, in an action for use and occupation, anything for the loss of his bargain. *Id.*

Where a vendor is unable to make title, and the contract is rescinded, the rule that the land should be restored, without profits, and the purchase money, without interest, does not apply where valuable improvements have been made by the vendee, or the sum paid is not in proportion to the value of the use of the property. *Kilborn v. Johnson* (Civ. App.) 164 S. W. 1108.

Evidence held insufficient to establish plaintiffs' right to recover rental value of land during term of their dispossession on ground that land was productive. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

Plaintiffs could not recover rental value of the land unless land was productive. *Id.*

Land held not of such wild character as to preclude the vendor, upon rescission of contract of sale, from recovering rents. *Id.*

In trespass to try title, held, that court did not err in not awarding the plaintiff a judgment for rent claimed by him. *Hollie v. Taylor* (Civ. App.) 189 S. W. 1091.

In trespass to try title to land, upon which defendant had planted rice crop, defendant held, under evidence, a "naked trespasser," without title to crop or right to have the same on payment of rent. *Pinchback v. Swasey* (Civ. App.) 194 S. W. 446.

### Art. 7758. [5275] Final judgment conclusive.

Cited, *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

*Res judicata*.—The entry of a judgment is a ministerial act of the clerk, and cannot affect the judgment as rendered by the court, which is a judicial act, and therefore this article does not prevent the correction of a mutual mistake in the entry of the judgment, whereby the land was described differently than in the judgment as rendered. *Sabine Hardwood Co. v. West Lumber Co.* (D. C.) 238 Fed. 611.

Where, in trespass to try title, judgment was rendered that the defendant go hence without day and recover his costs, the pleadings, charge, and judgment in that suit were inadmissible as a muniment of title in those claiming under such defendant in a subsequent suit for partition. *Wauhob v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

Where defendants in a previous action of trespass to try title recovered a judgment against plaintiff's husband, the then owner of the land, that judgment was conclusive as to the question whether the land constituted plaintiff's homestead. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

A judgment for plaintiff, in trespass to try title against a husband, is conclusive on the rights of the wife, where the property was community property. *Treadwell v. Walker County Lumber Co.* (Civ. App.) 161 S. W. 397.

A judgment in an action of trespass to try title, in which the husband was a party, held conclusive on the wife as to their community property, though she was not a party thereto. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

A subsequent judgment, involving the same land as that affected by a prior judgment in favor of one who was not a party to the action in which the subsequent judgment was rendered, would not affect such person or the prior judgment in her favor. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

A judgment for plaintiff in a suit to try title held not *res judicata* of a subsequent action by defendant as a creditor of plaintiff's husband, attacking his deed to plaintiff as in fraud of creditors. *Lane v. Kuehn*, 167 S. W. 804, 106 Tex. 440, affirming judgment (Civ. App.) 141 S. W. 363.

Defendant's secret attornment to his codefendant held not to become the basis of any title by limitations which he himself could not assert under this article. *Shaw v. Thompson Bros. Lumber Co.* (Civ. App.) 177 S. W. 574.

Where, in trespass to try title, judgment was in favor of defendant, with no adjudication as to defendant's claim for improvements, as to which no proof was offered and the judgment was reversed, and judgment rendered for plaintiff, the judgment held conclusive as to defendant's claim in a subsequent suit for rent. *Beaumont Irrigating Co. v. Delaune* (Sup.) 180 S. W. 98.

One is not estopped by a judgment that he has no title to land, from setting up an after-acquired title, or a title based on the ten-year statute of limitations. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

By direct provisions of this article and art. 7741, whenever the defendant in trespass to try title pleads not guilty, he puts in controversy plaintiff's title to all land sued for, and a judgment that plaintiff take nothing by his suit has same effect as a judgment that defendant recover the land. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

## CHAPTER TWO

## CLAIM FOR IMPROVEMENTS

Art.	Art.
7760. Suggestion of improvements in good faith.	7762. Rents and profits to be offset against.
7761. Issue as to.	7763. Judgment for excess, etc.

**Article 7760. [5277] Suggestion of improvements in good faith.**

Cited, *Hume v. Carpenter* (Civ. App.) 188 S. W. 707; *Hume v. Moore* (Civ. App.) 188 S. W. 712.

**Rights of parties as to improvements in general.**—In trespass to try title by a vendor against a purchaser, where the evidence showed that the purchaser had not complied with the contract, instructions as to his right to reimbursement for improvements, held a correct presentation of the law, and those requested by the purchaser properly refused. *Pollard v. McCrummen* (Civ. App.) 160 S. W. 1148.

Purchasers of land under a deed of trust, who placed improvements in good faith upon the property with a belief in the sufficiency of the title, which they deraigned through the mortgagor, cannot recover, as against a prior mortgage, the value of such improvements. *Memphis Cotton Oil Co. v. Gist* (Civ. App.) 179 S. W. 1090.

Where the decree vested title to land in plaintiff in action of trespass to try title, held, that it was proper to further provide that plaintiff should have poles of the defendant placed on the land to which no right by prescription in defendant was shown. *American Cement Plaster Co. v. Acme Cement Plaster Co.* (Civ. App.) 181 S. W. 257.

Where vendor, selling land under false representation of title, knew of purchaser's intended improvements, purchaser held entitled to recover value thereof in judgment for rescission. *Fahey v. Kaes* (Civ. App.) 181 S. W. 782.

Although the right to recover for improvements in good faith is established by this article, yet to avail himself of the right one must show himself ready and willing to do equity. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

A purchaser in possession under a land contract held to have forfeited his lien for valuable improvements by suing for title without tendering the balance due, claiming that if the notes contracted to be executed therefor had been executed they would have been barred by limitations. *Id.*

**Possession and good faith as grounds for compensation.**—Where defendant obtained a quitclaim deed to land for \$15, intending to perfect her title by adverse possession, his claim of reimbursement for improvements in good faith cannot be allowed; the improvements being very slight and of no benefit to the land. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

A purchaser cannot, after repudiating the purchase on the ground of the fraud of the vendor, continue to make improvements and recover therefor in a suit to rescind the purchase. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

A mistake by a grantor as to the location of the boundaries of property which he held by unperfected adverse possession affects only his right to recover for improvements in good faith. *Crump v. Sanders* (Civ. App.) 173 S. W. 559.

That one in possession knew of plaintiff's adverse claim to the land will not deprive him of the right to compensation for improvements; for he might, in good faith, have believed himself the true owner, and have been ignorant of plaintiff's superior rights. *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70.

Though defendant in trespass to try title had a deed to land upon which he entered, he was not entitled to go to the jury on the issue of improvements made in good faith where before making improvements he had notice that his deed was void. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

**Art. 7761. [5278] Issue as to.**

**Judgment.**—In a suit to recover land where there was no evidence of the value with or without improvements, there was no basis for any judgment allowing the value of improvements in good faith. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 186 S. W. 258.

**Art. 7762. [5279] Rents and profits to be offset against.**

**Set off against value of use and occupation and damages.**—The plaintiff in trespass to try title may be required to pay to the one in possession, if his possession was in good faith and on belief that he was entitled to possession, based upon good grounds, the difference between the rental value of the land while he had possession and the value of improvements placed thereon by him. *Hamer v. Sanford* (Civ. App.) 189 S. W. 343.

**Art. 7763. [5280] Judgment for excess, etc.**

**Showing of increased value.**—A defendant in trespass to try title cannot recover judgment for improvements made in good faith under this article without showing that the value of the premises was increased by the improvements. *Crump v. Sanders* (Civ. App.) 173 S. W. 559.

## TITLE 129

## TRIAL OF RIGHT OF PROPERTY

Art.		Art.	
7769.	Claimant must make affidavit.	7781.	Requisites of issue.
7770.	And give bond.	7785.	Burden of proof on plaintiff, when.
7771.	Bond, condition of.	7786.	Burden of proof on defendant, when.
7773.	Return of oath and bond.	7787.	Damages.
7776.	Return of oath, bond and copy of writ when levy made in county other than that where writ issued.	7790.	Judgment upon failure to establish title.
7777.	Return of original writ.	7791.	Execution shall issue.
7778.	Jurisdiction.	7793.	Return of property by claimant within ten days.
7779.	Cause, how docketed.		

**Article 7769. [5286] Claimant must make affidavit.**

Cited, *Dyke v. Farmersville Mill & Light Co.* (Civ. App.) 175 S. W. 478.

**Persons entitled to remedy.**—That defendant in sequestration under arts. 7094-7118, authorizing writs of sequestration, gave the statutory replevin bond and sold the property pending the suit to a third person was no defense to plaintiff contesting the title with the third person in the statutory proceeding for the trial of the right of property. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

Claimant of a landlord's lien on property of a tenant levied on under execution could not enforce his lien in a statutory proceeding for the trial of a right of property, where the claimant was not in possession at the time of the levy. *Goins v. Zanderson* (Civ. App.) 164 S. W. 918.

A chattel mortgagee out of possession but entitled to possession at the time of the levy of an attachment of the mortgaged chattels in an action by a third person against the mortgagor may maintain, though a nonresident, the statutory action for the trial of the right of the property. *State Exchange Bank v. Smith* (Civ. App.) 166 S. W. 666.

A chattel mortgagee failing to take immediate possession of the chattels on the nonpayment of the debt at maturity and accepting partial payments or written consent, on a compromise with the mortgagor of the indebtedness after the levy of the attachment, to take possession of the property in controversy when released from the levy, is not thereby estopped from maintaining the statutory action for the trial of the right of property. *Id.*

A mortgagee, who has, under the mortgage, the right to take possession on default, can prosecute an action for the trial of the right of property against one who attaches the mortgaged chattels. *State Exchange Bank v. Shive & Keys Mill & Grain Co.* (Civ. App.) 170 S. W. 1051.

One in lawful possession of personal property when stolen may tender issue as a title claimant upon sequestration thereof. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

Where, upon payment of theft policy, the owner's interest, in a stolen automobile and a bill of sale of the car is assigned to the insurance company, the latter may maintain suit as claimant upon sequestration of the automobile. *Id.*

**Other remedies.**—One claiming title and possession of property wrongfully attached and sold as the property of another, may elect to sue to recover the property itself. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

**Affidavit or pleading by claimant—Amendment.**—Amendment of claimant's oath, setting up claim to property levied on under execution to include allegation that he was also acting for his minor brother, held properly permitted. *Grisham v. Ward* (Civ. App.) 179 S. W. 893.

**Right to have all claimants brought in.**—A garnishee is entitled to have all claimants made parties, that he may not be required to pay more than is justly owing defendant. *National Fire Ins. Co. of Hartford, Conn., v. McEvoy Furniture Co.* (Civ. App.) 192 S. W. 270.

**Reliance on record and limitation title.**—Claimant in action to try title may rely both on record and limitation title. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 181 S. W. 851.

**Venue.**—See *Josey v. Masters* (Civ. App.) 179 S. W. 1134.

**Art. 7770. [5287] Bond.**

**Right of constable to substitute surety.**—Receipt of a claim bond by a constable held an approval of the sureties, after which he had no right to erase one of their names, and substitute another. *Sumner v. Swink* (Civ. App.) 163 S. W. 355.

**Art. 7771. [5288] Condition of bond.**

Cited, *Moore v. Rabb* (Civ. App.) 159 S. W. 85.



**Art. 7773. [5290] Return of oath and bond.**

**Jurisdiction of justice.**—Under this article and art. 7778, the constable's appraisal of attached property claimed by a third person at more than \$200 is conclusive against the justice's jurisdiction. *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

**Art. 7776. [5293] Return of oath, bond and copy of writ when levy made in county other than that where writ issued.**

**Transfer of jurisdiction by claim of ownership.**—Under arts. 7769–7795, where, in a suit in justice court in one county to foreclose a chattel mortgage, a writ of sequestration was issued to another county, a claim of ownership interposed by defendant's wife, who was not a party to the suit and filed in the county court of the latter county, held to transfer complete jurisdiction to the county court and to divest that of the justice of the peace. *Harris v. Wise* (Civ. App.) 191 S. W. 588.

**Notice of return of affidavit and bond.**—Claimant and his sureties held chargeable with knowledge that affidavit and claim bond were returned to the justice court from which writ of sequestration was issued, instead of to a court in the county in which they contended they should have been returned. *Josey v. Masters* (Civ. App.) 179 S. W. 1134.

**Venue.**—Where claimant in a sequestration suit in T. county secures possession of the property in D. county pursuant to art. 7769 et seq., and fails to see that his affidavit and claim bond are returned to the court of D. county as required by this article and art. 7777, held, that he cannot object that judgment was rendered against him and the sureties on his bond in T. county. *Josey v. Masters* (Civ. App.) 179 S. W. 1134.

**Art. 7777. [5294] Return of original writ.**

Cited, *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

**Venue.**—See *Josey v. Masters* (Civ. App.) 179 S. W. 1134; note under art. 7776.

**Art. 7778. [5295] Jurisdiction.**

**Justice of the peace.**—Under this article and art. 7773, the constable's appraisal of attached property claimed by a third person at more than \$200 is conclusive against the justice's jurisdiction. *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

**Depositions.**—Under art. 3677, as to depositions, and this article and article 7779, as to trial or right of property, depositions taken by claimants held to be in claimant's suit, although entitled in original suit. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

**Art. 7779. [5296] Cause, how docketed.**

**Depositions.**—See *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522; note under art. 7778.

**Art. 7781. [5298] Requisites of issue.**

**Necessity for tender of issue.**—A claimant in execution cannot without pleading or proof attack validity of the execution. *Collin County Nat. Bank v. Satterwhite* (Civ. App.) 184 S. W. 338.

**Art. 7785. [5302] Burden of proof on plaintiff, when.**

**In general.**—The question as to whether the claimant had possession, or as to who had possession, held for jury. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

In claimant's issue in sequestration proceedings for trial of right of property of stolen automobile, the rule that the jury should pass on the testimony where the only evidence of title and right of possession is that of interested parties did not apply where disinterested witnesses not parties to the suit identified the car by its number, etc. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

Where it is uncertain in whose possession the property was when seized, the trial court should direct which party shall assume the burden of proof of ownership, etc. *Id.*

Where funds were garnished as belonging to a defendant, on answer of garnishee and of claimants brought into case that funds belonged to claimants, burden was on plaintiff to show that such funds belonged to defendant. *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (Civ. App.) 194 S. W. 835.

Fact that a shipper's order bill of lading in favor of consignee attached to a draft drawn by consignee in favor of bank was indorsed in name of the consignee, and presented to bank by shipper who collected proceeds, does not discharge burden of proof upon a garnisher to show that funds belonged to the consignee. *Id.*

Where a third person claimed liquors levied on, the question of ownership being made one of fact by this article, was for the jury. *Steed v. Wren & Berry* (Civ. App.) 194 S. W. 963.

**Attached property.**—The burden is on the plaintiff in the writ of proving that possession was in the writ defendant where the return of the officer does not disclose in whose possession the property was when levy was made. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

Where a third person claimed liquors levied on, and defendant testified that they belonged to claimant, plaintiff had the burden of proving that property belonged to defendant. *Steed v. Wren & Berry* (Civ. App.) 194 S. W. 963.

**Art. 7786. [5303] Burden of proof on defendant, when.**

**In general.**—The burden of proving title and right of possession is on claimant if when levy was made the property was in the possession of the writ defendant. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

**Art. 7787. [5304] Damages.**

**Amount.**—A judgment against a claimant of property not a party to a writ of sequestration levied on the property rendered on his failure to establish his claim should be for the value of the property claimed, with legal interest from the date of the bond and the statutory penalty by way of damages. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

**Art. 7790. [5307] Judgment upon failure to establish title, etc.**

**Amount of judgment.**—A judgment against a claimant of property not a party to a writ of sequestration levied on the property rendered on his failure to establish his claim should be for the value of the property claimed, with legal interest from the date of the bond and the statutory penalty by way of damages. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

This article does not authorize a recovery of the value of the rent and hire of the property. *Moore v. Rabb* (Civ. App.) 159 S. W. 85.

Where an automobile sequestered by plaintiff in action for divorce, was replevied by a claimant, judgment, having gone for plaintiff, she is entitled to the actual earnings of the machine while in claimant's possession, or, if they could not be ascertained, to the reasonable and probable earnings of the machine. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

Where property, sequestered, was replevied and judgment went against claimant, held, that judgment which was for principal sum named in the bond, and allowed only a partial credit in event of return, was fundamentally erroneous. *Id.*

Where, on plaintiff's divorce suit, the property which was sequestered was claimed by appellant and he gave a replevy bond, judgment having gone for plaintiff, judgment on the bond should be for the value of the property at time of trial plus reasonable rental value. *Id.*

In an action on a claimant's bond to recover title and possession of an automobile, held, that judgment for plaintiff for the automobile will be charged with the value of beneficial repairs made with plaintiff's knowledge and before he asserted his claim. *Van Velzer v. Stryker* (Civ. App.) 188 S. W. 723.

**Pleadings.**—In a divorce suit, where plaintiff sequestered property and it was replevied by claimant, judgment may be rendered on the replevin bond furnished by the claimant, though there were no pleadings on which to base such judgment. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

**Judgment as waiver.**—Where an automobile held under a claimant's bond in sequestration proceedings was sold pending suit, and execution was returned nulla bona, the fact that plaintiff took judgment in the alternative for its value held not to operate as a waiver of claim to the property, and the sale did not pass title to the purchaser. *Van Velzer v. Stryker* (Civ. App.) 188 S. W. 723.

**Art. 7791. [5308] Execution shall issue.**

Cited, *Moore v. Rabb* (Civ. App.) 159 S. W. 85.

**Art. 7793. [5310] Return of property by claimant within ten days.**

**In general.**—Under this article, the court should, in rendering judgment against a claimant of sequestered property, failing to establish his right, fix the amount of the reasonable rent and hire of the property while so held under a claimant's bond. *Moore v. Rabb* (Civ. App.) 159 S. W. 85.

On trial of claim to property levied on under execution, agreement by claimants to pay the judgments by the delivery of such property held enforceable. *Grisham v. Ward* (Civ. App.) 179 S. W. 893.

**Costs.**—Payment of costs of suit is required by this article. *Kilgore v. Savage* (Civ. App.) 164 S. W. 1081.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Weight and sufficiency of evidence.**—Evidence in an action upon a claim to property attached as the property of another held sufficient to sustain a verdict for defendant. *Taylor v. Butler* (Civ. App.) 168 S. W. 1004.

Evidence held to sustain a finding that claimant had no interest in the property. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

In a trial of right of property attached in the hands of a tenant and claimed by the landlord as security, the jury might properly reject the testimony of both tenant and landlord on ground of interest, and answer, as to a portion of the goods attached, that the tenant still had possession thereof. *Riley v. Hallmark* (Civ. App.) 180 S. W. 134.

In statutory proceeding of trial of right of property of wood attached by defendant as property of a third person, and claimed by plaintiff under contract to purchase from third person, evidence held to sustain finding that plaintiff refused to accept wood when delivered. *McDougle, Cameron & Webster v. Pennington* (Civ. App.) 194 S. W. 657.

## TITLE 130

## TRUSTS—CONSPIRACIES AGAINST TRADE

## CHAPTER ONE

## DEFINITIONS, FORFEITURES AND OTHER PROVISIONS

Art.		Art.	
7796.	"Trusts" defined.	7805.	Successor to convicted foreign corporation may continue business; permit; modification of judgment; retention of jurisdiction for enforcement of act.
7797.	"Monopoly" defined.		
7798.	Conspiracies against trade, what constitutes.		
7799.	Acts and things mentioned declared illegal.	7807.	All agreements in violation void.
7802.	Successors to defaulting corporation prohibited from doing business.		

**Article 7796. "Trusts" defined.**

Cited, *Wood v. Texas Ice & Cold Storage Co.* (Civ. App.) 171 S. W. 497; *State v. International & G. N. Ry. Co.* (Sup.) 179 S. W. 867.

**Combinations prohibited.**—A lessor's agreement that he would not allow any cold drink stands, shows, exhibitions, dance halls, or platforms on the land he owned within 400 yards of the leased land, or allow any use of such contiguous land antagonistic to the purpose and welfare of the lessee, held not to violate arts. 7796-7809, defining and prohibiting trusts, monopolies, and conspiracies against trade. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

A contract binding a party to prevent the use of a building for a lunch counter in competition with the lunch business of the adverse party held violative of the anti-trust statute. *Smith v. Kousiakos* (Civ. App.) 172 S. W. 586.

Neither the school superintendent, principal, nor trustees can, in establishing cafeteria and forbidding trading with plaintiff, act in violation of this article and art. 7798, prohibiting trusts. *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

**Interstate commerce.**—Contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that cars would be invoiced to the distributor at the regular catalogue price, subject to certain discounts constituting his profits; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the state of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day cars were sold; that, when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was canceled the manufacturer would take over any new cars then on the distributor's show floor at the invoice price with carload freight added; and that if the distributor canceled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars were to be shipped from Indiana f. o. b. to the distributor in Texas. Held, that the transaction was a consignment, and not a sale, and the contract was an interstate one, the validity of which was governed by the federal anti-trust laws (Act July 2, 1890, c. 647, 26 Stat. 209), and not by this article and following articles. *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 142 C. C. A. 572.

Where, in an action on contracts claimed to violate the state anti-trust laws, plaintiff sued on the contracts as contracts of consignment, but by the court's ruling that they were contracts of sale was compelled to proceed as if they were contracts of sale, this enforced change of attitude did not preclude an appellate court from regarding the contracts in their true light as contracts of consignment. *Id.*

The contract was valid under the anti-trust laws, both of the United States and of Texas, as it in no way restrained competition or trade. *Id.*

If contracts between a manufacturer of motor cars and a dealer, claimed to violate the anti-trust laws of the state, were open to two reasonable interpretations, one defeating the manufacturer's claim for a balance due and the other enforcing it, the court would be at liberty to adopt the latter interpretation. *Id.*

That the sale of goods by a citizen of another state to a citizen of Texas under a contract which violated the anti-trust Act also constituted interstate commerce would not prevent the anti-trust act from applying to invalidate the contract and prevent a recovery thereon. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

The anti-trust laws of the state do not apply to transactions involving interstate commerce. *Dr. Koch Vegetable Tea Co. v. Malone* (Civ. App.) 163 S. W. 662.

A contract for the sale of goods to be retailed in the state, the buyer to sell only the seller's products, is not saved from invalidity, as creating a trust in violation of this ar-

ticle, because of its providing for interstate shipment thereof. *Armstrong v. W. T. Rawleigh Medical Co.* (Civ. App.) 178 S. W. 582.

Contract for sale of patterns by New York fashion company to Texas buyer, held violative of the Texas Anti-Trust Act, the goods having lost their character as interstate commerce. *Segal v. McCall Co.* (Sup.) 184 S. W. 188.

Contract between Texas mercantile corporation and Illinois advertising corporation for furnishing of advertising cuts and type held interstate commerce, and not subject to Texas Anti-Trust Laws. *Bogata Mercantile Co. v. Outcault Advertising Co.* (Civ. App.) 184 S. W. 333.

Contract of resident of Texas with Illinois medical company for purchase of goods at wholesale prices for resale held not enforceable, though dealing with merchandise in interstate commerce, in view of provisions of the contract, operative after arrival of the goods in Texas, violative of this article and art. 7798. *W. T. Rawleigh Medical Co. v. Fitzpatrick* (Civ. App.) 184 S. W. 549.

Agreement, obligating defendant to sell only plaintiff's goods at prices to be fixed by plaintiff held invalid under this article, though transaction was interstate. *W. T. Rawleigh Medical Co. v. Mayberry* (Civ. App.) 193 S. W. 199.

A sales agreement that buyer should sell goods only within a certain territory and engage in no other business violates the Anti-Trust Law, although sale and delivery of goods involved transportation in interstate commerce. *Whisenant v. Shores-Mueller Co.* (Civ. App.) 194 S. W. 1175.

**Contracts with carriers.**—An agreement by a lumber company which leased a portion of a railroad company's right of way that it should ship all of its freight over the railroad company's lines, where the railroad company's rates were equal to those of competitors, is not invalid under this article, denouncing as "trusts" agreements intended to stifle competition in transportation, etc. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

**Contracts for sale of goods.**—A contract for the purchase of medicines for resale at the regular retail prices in a certain part of the county and providing that the buyer should sell no other goods pending the contract held to violate the anti-trust act. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

A sale by one to two competitors of his stock, with agreement not to re-engage in business, held an illegal trust under this article, so that re-engaging in business cannot be enjoined. *Robinson v. Levermann* (Civ. App.) 175 S. W. 160.

A contract for sale of goods by a manufacturer to be retailed, the buyer to sell products of no one else, and to have no other business, is invalid as creating a trust, violating this article. *Armstrong v. W. T. Rawleigh Medical Co.* (Civ. App.) 178 S. W. 582.

A contract whereby a brewing company, in consideration of plaintiff's agreement to pay its agent's debt, gave plaintiff the exclusive right to sell its beer in Orange county, held not violative, as a conspiracy in restraint of trade, of this article and arts. 7797, 7798. *Woods v. American Brewing Ass'n* (Civ. App.) 183 S. W. 127.

Contract, whereby defendant agreed to buy only from medical company, to resell at prices fixed by the company, and to have no other business, held violative of this article and art. 7798, and void under article 7799. *W. T. Rawleigh Medical Co. v. Fitzpatrick* (Civ. App.) 184 S. W. 549.

A contract to purchase fashion patterns only from plaintiff and to charge for them at a fixed rate held to be one tending to create a monopoly within this article, subds. 1, 2, 4, 5, and hence unenforceable. *Pictorial Review Co. v. Pate Bros.* (Civ. App.) 185 S. W. 309.

It was not purpose of this article, to restrict right of a brewery leasing premises for saloon use to stipulate tenants shall not buy beer of competitor. *Celli & Del Papa v. Galveston Brewing Co.* (Civ. App.) 186 S. W. 278.

Under anti-trust laws, recovery cannot be had upon a contract wherein defendant agrees to sell no other goods than those sold him by plaintiff, to sell such goods at prices to be indicated by plaintiff, and to have no other business or employment. *W. T. Rawleigh Medical Co. v. Gunn* (Civ. App.) 186 S. W. 385.

Sale of gin and mill outfit on agreement that, while purchaser should operate outfit in community, seller would not engage in such business, was not in restraint of trade at common law. *Malakoff Gin Co. v. Riddlesperger* (Sup.) 192 S. W. 530.

Sale of gin and mill outfit on agreement that, while purchaser should operate outfit in community, seller would not engage in such business, was not in violation of state Anti-Trust Act. *Id.*

Agreement, obligating defendant to sell only plaintiff's goods at prices to be fixed by plaintiff, held invalid under this article and Act Cong. July 2, 1890, § 1, as a trust. *W. T. Rawleigh Medical Co. v. Mayberry* (Civ. App.) 193 S. W. 199.

A sales agreement under which buyer should sell the goods only within a certain territory and engage in no other business violates this article and arts. 7797, 7798, prohibiting combinations to maintain prices and prevent competition. *Newby v. W. T. Rawleigh Co.* (Civ. App.) 194 S. W. 1173.

Where a seller, after sales contract was signed before shipping goods, required buyer to agree not to sell outside a certain territory, and to devote all his time to the business, such agreement rendered sale void under this article and arts. 7797, 7798, prohibiting combinations preventing competition, etc., and precludes recovery of purchase price. *Id.*

Where a buyer, after a sales agreement was signed, but before goods were shipped, impliedly agreed not to sell outside a certain territory and to devote all his time to business, such agreement rendered sale void under the Anti-Trust Law and precludes recovery of purchase price. *Whisenant v. Shores-Mueller Co.* (Civ. App.) 194 S. W. 1175.

**Effect on account partly due and stated.**—That a part of the account between the parties was due and stated when a contract was made between them which was invalid

under the anti-trust act, and provided for the paying of the account, would not save such part of the contract from being unenforceable so as to permit recovery of such amount; all items of the illegal contract being invalid. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

### Art. 7797. "Monopoly" defined.

Cited, *Robinson v. Levermann* (Civ. App.) 175 S. W. 160.

**What are monopolies.**—See *Woods v. American Brewing Ass'n* (Civ. App.) 183 S. W. 127; note under art. 7796.

Requiring an officer to perform some governmental function to the exclusion of all others is not the creation of a monopoly or perpetuity, within the meaning of Const. art. 1, § 26, prohibiting the creation of perpetuities and monopolies. *Ex parte London*, 73 Cr. R. 208, 163 S. W. 968.

### Art. 7798. Conspiracies against trade, what constitutes.

Cited, *Armstrong v. W. T. Rawleigh Medical Co.* (Civ. App.) 178 S. W. 582.

**Restraint of trade.**—A contract by which plaintiff, in consideration of the execution of certain notes in his favor by other moving picture concerns, agreed to discontinue his business and warrant that no showhouse besides those existing should open in the town for a certain period held to violate the Anti-Trust Act as stated. *Crandall v. Scott* (Civ. App.) 161 S. W. 925.

A combination in violation of the anti-trust statute is void, irrespective of the common-law distinction between reasonable and unreasonable restrictions on trade. *Id.*

Contract giving exclusive right to sell patented article and fixing selling price held not in violation of the anti-trust statute. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

Contract giving exclusive right to sell article and fixing selling price held not in violation of anti-trust statute, where the articles were to be manufactured and delivered in another state. *Id.*

A contract for the exclusive purchase of ice by a retail dealer from a wholesale dealer is a conspiracy in restraint of trade as defined by subd. 1. *Wood v. Texas Ice & Cold Storage Co.* (Civ. App.) 171 S. W. 497.

That a contract for the purchase of ice which was in restraint of trade under subd. 1, gave the purchaser the benefit of the market price, whatever it might be, does not render the contract valid. *Id.*

A contract whereby a retail ice dealer agreed to purchase all of his ice from a certain manufacturer so long as the latter could supply his demand held to be a "conspiracy in restraint of trade" within subd. 1. *Id.*

A contract requiring defendant to buy of plaintiff all beers which he might need, held in violation of the monopoly statute (this article and arts. 7799, 7807), and an action thereon could not be maintained. *Carroll v. Evansville Brewing Ass'n* (Civ. App.) 179 S. W. 1099.

New York fashion company selling patterns to Texas buyer and fixing prices, etc., so that the contract was partially violative of the Texas Anti-Trust Act, could not recover for the buyer's breach. *Segal v. McCall Co.* (Sup.) 184 S. W. 188.

Act of brewing company in demanding of tenants of saloon premises that they cease purchasing liquors from a competitor of the brewery under penalty of not having their leases renewed was not a violation of this article, prohibiting conspiracies in restraint of trade. *Celli & Del Papa v. Galveston Brewing Co.* (Civ. App.) 186 S. W. 278.

Acts of principal, superintendent, and school trustees in inaugurating school cafeteria and supply house, and punishing pupils who purchased supplies of plaintiff, held a boycott, and beyond their authority. *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

See, also, *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394; *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423; *Woods v. American Brewing Ass'n* (Civ. App.) 183 S. W. 127; *W. T. Rawleigh Medical Co. v. Fitzpatrick* (Civ. App.) 184 S. W. 549; *Hailey v. Brooks* (Civ. App.) 191 S. W. 781; notes under art. 7796.

### Art. 7799. Acts and things mentioned declared illegal.

Cited, *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

**Contract of sale.**—A contract requiring defendant to buy of plaintiff all beers which he might need, held in violation of this article and arts. 7798, 7807, and an action thereon could not be maintained. *Carroll v. Evansville Brewing Ass'n* (Civ. App.) 179 S. W. 1099.

Contract, whereby defendant agreed to buy only from medical company, to resell at prices fixed by the company, and to have no other business, held violative of arts. 7796, 7798, and void under article 7799. *W. T. Rawleigh Medical Co. v. Fitzpatrick* (Civ. App.) 184 S. W. 549.

### Art. 7802. Successors to defaulting corporations prohibited from doing business.

**Foreign corporations.**—Under art. 7805, excluding the successor of a foreign corporation, whose right to do business in the state has been forfeited for violation of the anti-trust law, as provided in article 7802, held that a foreign corporation purchasing the property and business and assuming the obligations of a foreign corporation which had been convicted and excluded from the state, was itself prohibited from doing business therein. *Pierce Oil Corporation v. Weinert*, 106 Tex. 435, 167 S. W. 808.

Art. 7805, providing that when a foreign corporation has forfeited its right to do business in the state, as provided in article 7802, no other corporation to which it may transfer its property and business, or which may assume its obligations, shall be permitted to incorporate or do business in the state held not an exertion of extraterritorial power. *Id.*

**Art. 7805. Successor to convicted foreign corporations may continue business; permit; modification of judgment; retention of jurisdiction for enforcement of act.**—When any foreign corporation has been convicted of a violation of any of the provisions of this chapter and its right to do business in this State has been forfeited, as provided in Article 7803, then, before any other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas, such other corporation shall be required to go into the court where the original judgment was entered and show that it is independently owned and is independently operated, and has no connection with any person, firm or corporation engaged in violating the laws against trusts or monopolies, and is not itself so engaged. Provided further, that at the time of the organization of such other corporation, at the time of making application for the permit to do business in Texas, at the time of receiving such permit, and at all other times thereafter, the ownership of a majority of its stock shall actually and in good faith, be held by other and different persons than those who owned a majority of the stock in the convicted corporation at the time of such conviction and at the time of the doing of the acts and things for which it was convicted, or at each or either of such times; whereupon, and after a hearing had after the notice to the Attorney General herein provided, the court may modify or reform such judgment so as to permit such other corporation to incorporate, or secure a permit, and do business in Texas, and such modified or reformed judgment shall be by the clerk of said court certified to the Secretary of State, who shall issue such permit.

Provided, that notice of filing of such proceeding and the taking of evidence shall be served upon the Attorney General of the State, whose duty it shall be to represent the State in such proceeding; and provided, further, that the court may require the production of all books and records and may appoint a commission to take testimony, either within or without the state; and provided, further, that the expense of the entire proceeding shall be borne in all events by such corporation; and it is further provided that the court, after modifying or reforming the judgment, as provided herein, shall retain jurisdiction of the case and at any time thereafter shall, upon showing that the said corporation which has taken over such properties or business, or its assigns or successors, is violating the laws against trusts or monopolies, or has connection with any person, firm or corporation engaged in violation of the laws against trusts or monopolies, the court shall set aside any order or judgment entered, and in which event all proceedings based thereon, including all transfers of any and all properties, shall be nullified, and it shall be the duty of the Attorney General, for good cause, to enter proceedings to set aside and nullify the modified judgment of the court and its proceedings, as herein provided; and provided further that if the court shall, after the hearing provided for, refuse to modify or reform such judgment, no permit shall be issued by the Secretary of State to the corporation to whom the properties or business of the convicted corporation have been transferred or to the corporation which has assumed the payment of the obligations of the

convicted corporation. [Acts 1903, p. 119, § 10; Act Feb. 23, 1917, ch. 37, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. The act amends art. 7805 of ch. 1, tit. 130, Rev. Civ. St. 1911.

**Validity and operation.**—This article held not an exertion of extraterritorial power, and to involve no question of the attainder of property. *Pierce Oil Corporation v. Weinert*, 106 Tex. 435, 167 S. W. 808.

A foreign corporation purchasing the property and business and assuming the obligations of a foreign corporation which had been convicted and excluded from the state, was itself prohibited from doing business therein. *Id.*

**Art. 7807. All agreements in violation of, void.**

**Validity of contracts—Contract of sale.**—A contract requiring defendant to buy of plaintiff all beers which he might need, held in violation of this article and arts. 7798, 7799, and an action thereon could not be maintained. *Carroll v. Evansville Brewing Ass'n* (Civ. App.) 179 S. W. 1099.

TITLE 131

WAREHOUSES AND WAREHOUSEMEN, AND MARKETING

<p>Art. 7819. Who and what are public warehouses and warehousemen. 7820. Certificate and bond of public warehousemen. 7821a, 7821b. 7823. Must deliver property immediately on production of receipt. 7825. Force and effect of warehouse receipts; negotiable, etc. 7826. Liability for damages.</p> <p>WAREHOUSES AND MARKETING</p> <p>7827a. Purpose of act. 7827aa. Commissioner of markets and warehouses; board created; appointment of commissioner; salary; oath and bond; removal. 7827b. Employment of clerk and employes; expenses; expenditures; office space. 7827bb. Seal; power to administer oaths; examination of corporation. 7827c. Public gins charged with public use; license; bond; suits on bond; venue; new bond; conditions of bond. 7827cc. Sample from cotton bales ginned; certificate. 7827d. Wrapping of cotton ginned; marking. 7827dd. Commissioner shall enforce the provisions of this act. 7827e. Reviewing board; chairman; meetings; judicial supervision. 7827ee. Standards of weights and measures; classification of products; duplicate of standards shall be kept at warehouses. 7827f. Public weighers subject to supervision of commissioner; appeals to commissioner; inspection of sales; provisos. 7827ff. Application for charter as public warehouseman. 7827g. Issuance of charter; bond; suits on bonds; new bond; liquidation on failure to give bond. 7827gg. Board of directors; meetings; right of members to vote. 7827h. Examination of corporation; insolvency; financial statements. 7827hh. Expense of examination; payment. 7827i. Examiners; competency and qualifications; not to be appointed as receiver; bond; number and compensation. 7827ii. Impairment of capital stock or other wrongful practices; proceedings by attorney general; insolvency; receiver; special agent; placing corporations under charge of commissioner; notice; attachment. 7827j. Refusal to submit to inspection or examination or other violation of law; insolvency proceedings. 7827jj. Corporate officers; removal; transfer or pledge of property held by corporation. 7827k. Erection, purchase, or lease of warehouses, etc.; certification of employes in charge.</p>	<p>Art. 7827kk. Regulation of charges; powers of commissioner as to issuance of permits; buildings; insurance. 7827ll. Dividends; reserve. 7827ll. Powers as warehousemen; other powers; loaning money; priority; investment of capital, etc.; restrictions. 7827m. Contracting debts and issuing bonds; sinking fund; sinking fund bonds. 7827mm. Crop statistics; appropriations. 7827n. General corporation laws; charter fees; commissioner to promulgate rules. 7827nn. Warehouse receipts; form; damages. 7827o. Negotiability of receipts; numbering and recording; duplicates; indorsements as to incumbrances, title, etc.; change of form of receipt; delivery of goods. 7827oo. Delivery of goods on surrender of receipt. 7827p. Transfer of receipts. 7827pp. Commissioner to prescribe forms of receipts, etc.; uniformity. 7827q. Rights and liabilities as warehousemen; lien. 7827qq. Enforcement of liens. 7827r. Board of examiners of cotton classers; meetings. 7827rr. License of cotton classers; examination; fee; compensation of board of examiners; classers shall keep record and issue certificates; federal standards. 7827s. Cotton classers to give bond. 7827ss. Certificate of classer as evidence; additional boards of examiners of classers of other products. 7827t. Sureties on bonds; form of bond; suit; venue; new bond. 7827tt. All warehouses placed under control of commissioner; existing corporations may amend their charters. 7827u. Landlord's lien shall continue unless negotiable receipt is given. 7827uu. Partial invalidity of act. 7827v. Repeal.</p> <p>DEPOSIT OF COTTON AND GRAIN IN BONDED WAREHOUSES</p> <p>7827vv. Right of producers to deposit cotton and grain; certificate of deposit. 7827vvv. Pledge of certificates with state banks; negotiable notes; lien. 7827w. Interest on notes. 7827ww. Maturity of notes. 7827x. Depreciation of cotton or grain; sale. 7827xx. State banks to hold notes until put into circulation. 7827y. Agreements as to compensation of bank. 7827yy. Additional security for notes; sale of cotton or grain by bank. 7827z. Sale of cotton or grain for redemption of notes. 7827zz. Indication of bank on notes. 7827zzz. Statement on back of notes.</p>
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**Article 7819. Who and what are public warehousemen and warehouses.**

**Rights and duties of public warehouseman.**—Under the warehouse act that one is a public warehouseman is not sufficient to invest him with the rights and charge him with the responsibilities of public warehousemen as defined in the act. *Security Nat. Bank of Dallas v. Farmers' Educational & Co-op. Warehouse Co.* (Civ. App.) 185 S. W. 649.

**Art. 7820. Certificate and bond of public warehousemen.**

**Suit by private individual.**—There can be no recovery on a statutory bond of a public warehouseman at the suit of a private individual. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**Arts. 7821a, 7821b.**

**Note.**—The duties imposed by these sections on the Commissioner of Insurance and Banking are transferred to the Board of Supervisors of Warehouses by Act Sept. 26, 1914 [post, arts. 7827a, 7827u].

**Art. 7823. Must deliver property immediately upon production of receipt.**

**Care of property stored.**—One with whom, for hire, apples are stored for purpose of resale, having, on direction of the bailor to deliver to a purchaser, undertaken to load them for shipment, is liable to the purchaser for negligence in loading them, causing injury thereto. *Pure Ice & Cold Storage Co. v. Weinberg* (Civ. App.) 174 S. W. 911.

A stockyards company held liable if damages result from its failure to exercise ordinary care to handle stock intrusted to it. *Hovenkamp v. Union Stockyards Co.* (Sup.) 180 S. W. 225.

A warehouseman is liable for loss by fire occasioned by his negligence or the negligence of his employés. *American Express Co. v. Duncan* (Civ. App.) 193 S. W. 411.

**Duty as to delivery in general.**—A warehouseman issuing for cotton stored nonnegotiable receipts stating no time of delivery, is under obligations to redeliver the cotton on reasonable demand therefor. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

A public warehouseman formerly the manager of a private warehouseman, having custody of goods bailed with the private warehouseman, held jointly liable with the warehouseman for a misdelivery of the goods. *Id.*

A warehouseman, holding cotton as bailee without definite time for delivery, breaches its obligation to redeliver by turning over its business to a successor without the consent of the bailor, and hence is liable for a conversion by the successor. *Id.*

**Delivery to person not the holder of receipt.**—The delivery by a warehouseman after notice of transfer of nonnegotiable receipts of the goods to one not a holder of the receipts held a conversion. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**Conversion.**—To constitute a conversion by a bailee there must be such an intention of deviation from the contract as would be equivalent to an assertion of diminution over the property inconsistent with the bailor's right of ownership. *Staley v. Colony Union Gin Co.* (Civ. App.) 163 S. W. 331.

A bailee's refusal to surrender possession of the property on demand is not of itself a conversion, but only evidence thereof, which is open to explanation, as by showing that it has been lost without the bailee's fault, etc. *Id.*

Where plaintiff stored a rice mixer in defendant's warehouse under an agreement that it might be used in storage, defendant's refusal to permit such use constituted conversion if plaintiff had not forfeited its right to use by default in rents, but if he had, and subsequently tendered rents, the right of action accrued when the machine could have been set in another place. *Texas Warehouse Co. v. Imperial Rice Co.* (Civ. App.) 164 S. W. 396.

A compress company holding cotton as the bailee of the buyer and owner and converting it to its own use, was liable for its value. *Shippers' Compress & Warehouse Co. v. Cumby Mercantile & Lumber Co.* (Civ. App.) 172 S. W. 744.

Where plaintiff's automobile while in storage awaiting his order after repair by defendant railroad, who had damaged it, was taken out by an unauthorized third person and misused, whereupon defendant repaired and locked it in the roundhouse, there was not illegal use or abuse constituting conversion. *Gulf, C. & S. F. R. Co. v. Pratt* (Civ. App.) 183 S. W. 103.

A warehouseman to whom goods were delivered by another is liable for their loss by his negligence, regardless of whether delivery to him was a conversion. *Thornton v. Daniel* (Civ. App.) 185 S. W. 585.

Removal of plaintiffs' goods from the warehouse in which they were to be stored was a conversion which renders the warehouseman liable for their destruction by fire not caused by negligence. *Id.*

**Delivery of excess.**—In an action to recover the value of cotton seed and lint cotton delivered to defendant in excess of what he was entitled to under his contract, and an excess credit for cotton seed, evidence held reasonably sufficient to support the verdict for defendant. *Farmers' & Merchants' Gin Co. v. Simmons* (Civ. App.) 178 S. W. 621.

**Art. 7825. Force and effect of warehouse receipts; negotiable, etc.**

**Rights of assignee for security.**—A lender receiving, as security cotton warehouse receipts, not knowing of a prior mortgage, cannot hold the warehouseman liable, though

the receipts are not indorsed "nonnegotiable" or "not a public warehouse receipt," where the warehouseman is not operating under arts. 7819-7827. *Security Nat. Bank of Dallas v. Farmers' Educational & Co-op. Warehouse Co.* (Civ. App.) 185 S. W. 649.

**Transfer of non-negotiable receipts.**—Cotton compress receipts are warehouse receipts, and the sale or transfer thereof carries the constructive delivery and ownership of the goods for which they stand. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403.

The transfer of nonnegotiable warehouse receipts by the bailor operates as between the parties as a symbolic delivery of the goods, and carries the title and constructive possession to the transferee. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

Where goods are placed in a warehouse and nonnegotiable receipts are issued therefor, the bailor may make a valid transfer of the receipts (art. 583). *Id.*

**Conversion.**—Even if plaintiff had a lien on cotton owned and stored in a warehouse by C., there was no conversion by defendant bank, which at C.'s direction, on his selling the cotton to S. Brothers, delivered the warehouse receipt to them, and received, and credited his account with, the price, afterwards being paid a debt therefrom by him. *Provine v. First Nat. Bank of Honey Grove* (Civ. App.) 180 S. W. 1107.

#### Art. 7826. Liability for damages.

**Evidence in actions against warehouseman.**—The mere fact that plaintiffs' goods were destroyed by fire in a warehouse does not necessarily show negligence by the warehouseman. *Thornton v. Daniel* (Civ. App.) 185 S. W. 585.

Evidence held not sufficient to show negligence of a warehouseman as the cause of the fire which destroyed plaintiffs' goods. *Id.*

### WAREHOUSES AND MARKETING

**Art. 7827a. Purpose of act.**—The purpose of this Act is to develop a systematic plan for marketing farm and ranch products. To effect this purpose, the State will encourage the organization of marketing warehouse corporations with policies intended to aid producers of such farm and ranch products in securing the highest market prices for their products. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 1; Act May 26, 1917, 1st C. S., ch. 41, § 1.]

**Explanatory.**—Act May 26, 1917, ch. 41, in its title, but not in its enacting part, purports to amend Act approved Sept. 26, 1914, 2nd Called Session, 33rd Legislature, so as to read as follows (arts. 7827a-7827v, civil statutes, and arts. 936a, 977f-977n, Penal Code, post): "And any part or parts of the said act, \* \* \* in conflict herewith, are hereby repealed." Took effect 90 days after May 17, 1917, date of adjournment.

Act Sept. 14, 1914 (Acts 33rd Leg., 2d Called Sess., c. 3), provides for a system of state warehouses to meet an emergency declared by the act. By section 19 the act was to remain in operation not later than Aug. 31, 1915. Since it is merely temporary, and has ceased to have operative effect, it is omitted from this compilation. By sections 33 and 34 it is expressly declared that the act shall not affect the existing warehouse acts.

**Art. 7827aa. Commissioner of Markets and Warehouses; board created; appointment of commissioner; salary; oath and bond; removal.**—The office of Commissioner of Markets and Warehouses is hereby created, and the Governor, the Commissioner of Agriculture, and the Commissioner of Insurance and Banking shall constitute a board, which is hereby authorized to appoint a Commissioner of Markets and Warehouses to fill that office and discharge its duties; and shall have such other authority as is conferred on said Board by this Act. The appointment shall be with the advice and consent of the Senate. The commissioner so appointed shall hold office for two years, and he shall receive thirty-six hundred (\$3,600.00) dollars per annum as compensation for his services. Said commissioner shall take the oath of office and give a bond, payable to the Governor, in the amount of ten thousand (\$10,000.00) dollars, for the faithful performance of his duties. Said commissioner may be removed by the board at any time, for cause. The word "Commissioner", wherever used in this bill, shall mean the Commissioner of Markets and Warehouses of the State of Texas. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 1; Act May 26, 1917, 1st C. S., ch. 41, § 2.]

**Note.**—By Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, the salary of the "manager of the Warehouse and Marketing Department" is fixed at \$3,600.

**Art. 7827b. Employment of clerk and employes; expenses; expenditures; office space.**—Said commissioner shall have authority to employ, with the consent of the said board, a Chief Clerk, and such other help as may be necessary in carrying out the provisions of this Act, at such salaries as may be fixed by the Commissioner, with the consent of the board, except as otherwise herein provided; and such employees, and the Commissioner, in addition thereto, shall, when traveling on official business, receive actual necessary expenses. All expenditures, including all expenses of administering this Department, shall be paid by a warrant, drawn by the Comptroller on the State Treasurer, on accounts approved by the Commissioner, or on his authority. The Commissioner shall be furnished sufficient room and office space, in the Capitol or other public building to be selected by the Governor, to meet the requirements of the Department. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 2; Act May 26, 1917, 1st C. S., ch. 41, § 3.]

**Note.**—By Act June 5, 1917, 1st C. S., ch. 48, § 2, ante, art. 7085b, the salary of the chief clerk of the warehouse and marketing department is fixed at \$2,000.

**Art. 7827bb. Seal; power to administer oaths; examination of corporations.**—The Commissioner shall use a seal with five points, and with the words "Commissioner of Markets and Warehouses of Texas" engraved thereon. The Commissioner and such persons as may be appointed by him shall have authority to administer oaths for the purpose of this Act, and such persons may, upon their warrants, at any time examine into the affairs of any gin or corporation licensed under this Act. Such examinations shall be under the direction and at the instance of the Commissioner. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 3; Act May 26, 1917, 1st C. S., ch. 41, § 4.]

**Art. 7827c. Public gins charged with public use; license; bond; suits on bond; venue; new bond; conditions of bond.**—All gins operated in this State, whether by individuals, partnerships, joint stock companies, or corporations, ginning cotton for commercial purposes, shall be known as ginners; and shall be charged with the public use; and shall be required to obtain a license as a licensed ginner, from the Commissioner, which license shall be renewed each year, upon the payment of an annual fee of one dollar (\$1.00). Applications for such license shall be made to the Commissioner of Warehouses, stating the location and amount of capital of the gin, by whom owned, by whom conducted, and the postoffice address of the owner and operator. Such application shall be accompanied by a bond in the form prescribed by the Board. Such bond may be that of a bonding and indemnity company authorized to do business in Texas, or may be a personal surety bond; and in the event of a personal surety bond, such bond shall be renewed once each year; provided, in no event shall a bond of less than two hundred and fifty dollars (\$250.00), nor more than one thousand (\$1,000) dollars, be required of any one ginner for each gin he may own. Said bond shall be payable to the State of Texas, for the use and benefit of all who may have a cause of action against the maker thereof under the terms and provisions of this Act; and suit may be brought thereon against the maker thereof in any court of competent jurisdiction in the name of the aggrieved party, without the necessity of binding the State in the suit; but venue of the suit, shall be subject to the general venue statutes of the State. Said bond shall not be void on first recovery but repeated suits may be brought on one bond until the amount of same has been exhausted; and when the bond has become impaired by reason of any judgment thereon, the maker thereof shall be required to give a new bond, or make good the impairment; otherwise, the Board

shall cancel his license as a public ginner. The conditions and obligations in the bond shall be that the cotton ginned by the gin designated in the bond, and in its application for license, has been carefully ginned, and that no foreign matter or substance has been placed in the cotton, nor has any water or anything that would increase the weight thereof been placed therein during the process of ginning, or thereafter, while the cotton was in possession of the gin; and that the gin will separate the dirt from the seed; and that any sample of cotton taken from the bale during the process of ginning, as provided in this Act, is a fair and true sample of the cotton in the bale. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 4; Act May 26, 1917, 1st C. S., ch. 41, § 5.]

**Art. 7827cc. Sample from cotton bales ginned; certificate.**—Each licensed ginner, under this Act, shall take from each bale of cotton ginned by him one fair, true, and correct sample of cotton, unless requested in writing, by the owner of the cotton, not to do so. When a sample of cotton is taken, such sample shall weigh not less than four, nor more than six, ounces; and the ginner shall wrap the same tightly in a sample wrapper, to secure a reasonable degree of compactness. Such sample shall be taken in three draws, as nearly as practicable, representing the parts of a bale. With each sample of cotton there shall be placed a certificate, under the signature of the ginner, that same is a fair and true sample, as far as said ginner may be able to determine; and that the ginner guarantees no fraud was practiced in taking such sample; and that it was taken from the bale in such manner as to secure a correct sample of the cotton in the bale. Whether or not a sample of the bale of cotton so ginned shall be requested and taken by the ginner as provided herein, the ginner shall, nevertheless, place with each bale of cotton ginned by him a certificate guaranteeing under his bond that during the process of ginning, or thereafter, while the cotton was in the possession of the ginner, no water or foreign substance of any nature had been placed in such cotton, with intent to defraud. Such certificate shall bear the name and address of the person for whom the cotton was ginned, the number of the bale on the books of the ginner, and the weight of the bale at the gin. Provided, that any ginner who takes a sample from a bale of cotton, under the provisions of this Act, may at his option, take and file a like sample from such bale of cotton, for his own protection under this bond. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 5; Act May 26, 1917, 1st C. S., ch. 41, § 6.]

**Art. 7827d. Wrapping of cotton ginned; marking.**—Each bale of cotton ginned by a licensed and bonded ginner in this State shall be so wrapped that the bale will be completely covered when compressed; provided, that the ends of the bale shall be closed and well sewed; and, provided, further, that the quality of the bagging shall at all times be such that markings thereon will, under ordinary conditions, remain intact and visible. Each and every licensed and bonded ginner shall place in letters and figures, on one side of each bale of cotton ginned by him, in appropriate and distinct letters, the following: "B———" and "B.G.———". The manner of marking for identification may at any time be changed or regulated by the Commissioner. The first blank above indicated shall be filled in by the ginner by placing the same number, numerically, as that of the bale, as shown on the books of the gin ginning the same; and the letter "B" shall stand for "bale." The second blank shall be filled in by the ginner, by inserting the number of the gin license assigned to it by the Commissioners; and the letters "B.G." when so used, shall stand for "Bonded Gin". All laws

and parts of laws heretofore enacted, providing for the marking or branding of cotton in the bale, are hereby repealed. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 6; Act May 26, 1917, 1st C. S., ch. 41, § 7.]

**Art. 7827dd. Commissioner shall enforce the provisions of this act.**—The Commissioner shall have power and authority, and it shall be his special duty, to enforce the different provisions of this law relating to ginners, and to regulate and control such cotton gins in all matters relating to the performances of their duties as such. [Act May 26, 1917, 1st C. S., ch. 41, § 8.]

**Art. 7827e. Reviewing board; chairman; meetings; judicial supervision.**—All matters relating to the issuance of a ginner's license, as in this Act provided, and all rules and regulations pertaining to gins, ginning, and ginners, as authorized and required by any provision or section of this Act, shall be subject to review for affirmation, modification, or rejection, by a board hereby created, which board shall be composed of the Commissioner of Agriculture, Commissioner of Insurance and Banking, and the Commissioner of Markets and Warehouses. The last named Commissioner shall be the Chairman of said board, and shall have the power, and it shall be his duty, to convene said board at all reasonable and necessary times to hear and decide all questions properly coming before it for review and decision. All rules, regulations and acts of the Commissioner of Markets and Warehouses, or of said board, pertaining to gins, ginners, and ginning, shall be subject to review by any court of competent jurisdiction in this state. [Act May 26, 1917, 1st C. S., ch. 41, § 9.]

**Art. 7827ee. Standards of weights and measures; classification of products; duplicate of standards shall be kept at warehouses.**—The standards of weights and measures of this State shall be the standards of weights and measures used under the terms and provisions of this Act. It shall be the duty of the Commissioner to establish standards of classifications of cotton, corn, and other farm and ranch products, of whatever kind and character, which may be subject to classification, and originals of such standards so established shall be maintained, subject to public inspection, in the office of the Commissioner, at all reasonable times; and duplicates of such standards, as well as the standards of weights and measures, shall be furnished by the Commissioner to all persons who may apply therefor, upon the payment of the necessary cost thereof. It shall be the duty of each public warehouse company to keep a duplicate of said standards, as well as the standards of weights and measures, at its warehouse, subject to inspection and comparison of grades and classification, by persons storing products therein; provided, that the standards of classification shall always be the standards established by the Government of the United States, or by this State. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 7; Act May 26, 1917, 1st C. S., ch. 41, § 10.]

**Art. 7827f. Public weighers subject to supervision of Commissioner; appeals to Commissioner; inspection of scales; provisos.**—All public weighers in the State of Texas, as provided for in Title 132, Revised Civil Statutes of the State of Texas, 1911, shall be under the supervision of the Commissioner, and all weights made by them shall be subject to his approval. In all cases where any discrepancy arises in the matter of weights and measures of cotton and other farm products, made between public weighers in different sections of this State, or between public and private weighers, the difference shall be subject to

review by the Commissioner; and any party, or parties, who may be dissatisfied with the weights or measures of any public or private weigher, may appeal to the Commissioner, and have such cotton or other farm products re-weighed or re-measured, for the purpose of ascertaining and deciding the correct weight and measure thereof. The scales of all public and private weighers weighing cotton and other products shall at all reasonable times be subject to inspection by the Commissioner, or his duly authorized representative, as herein provided; provided, further, that submission to and compliance with the section shall be an absolute prerequisite to the right to institute and maintain any action concerning the subject matter hereof, in any of the courts of this State. Provided, the authority herein conferred upon the Commissioner, to review the weights, shall not be construed as in any manner affecting the manner of selecting public weighers, or of fixing the charge to the public, of such public weighers. [Act May 26, 1917, 1st C. S., ch. 41, § 11.]

**Art. 7827ff. Application for charter as public warehouseman.**—Any number of persons, not less than ten, at least sixty per cent of whom shall be engaged in agriculture, horticulture, or stock-raising as a business, and not less than three-fourths of whom shall be resident citizens of Texas, may apply to the Commissioner for a charter to permit them to organize and operate as a co-operative association, under the provisions of this Act, Provided, that in cities of a population of forty thousand (40,000) or over, the above provisions shall not apply. The application for such a charter shall contain:

1. The name of the corporation.
2. The place where its principal office and place of business is to be located.
3. The purpose for which the corporation is formed.
4. The term for which it is to exist.
5. The number of its directors, which shall not be less than three, nor more than twenty-five, and the names and residences of those selected for the first year.
6. The amount of the capital stock.
7. The application shall be accompanied by the affidavit of three of such applicants, showing that not less than fifty per cent of the capital stock is actually paid in, which capital stock shall be, in no instance, less than five hundred (\$500.00) dollars, divided into shares of five (\$5.00) dollars each; and if the same has been paid in otherwise than in cash, then a detailed statement as to the kind, character, and value of the property in which paid shall be made a part of the affidavit. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 9; Act May 26, 1917, 1st C. S., ch. 41, § 12.]

**Art. 7827g. Issuance of charter; bond; suits on bond; new bond; liquidation on failure to give bond.**—When such an application for a charter is filed with the Commissioner, and approved by him, the Secretary of State shall, upon notice of such filing and approval, and the payment of the following fees: Five (\$5.00) dollars for five thousand (\$5,000.00) dollars, or less; ten (\$10.00) dollars for ten thousand (\$10,000.00) dollars, or more than five thousand (\$5,000.00) dollars; and twenty-five (\$25.00) dollars for all over that amount, issue a charter to the applicants; and thereupon the Commissioner shall record said charter, and furnish the corporation a certified copy thereof; and he shall issue to the corporation a certificate of authority showing that it has complied with the laws of the State of Texas, and is authorized to do busi-

ness until the last day of April, of the succeeding year; provided, however, that before said charter is delivered to the corporation, and before said certificate is furnished, the corporation shall execute, by its proper officers, a bond, payable to the State of Texas, the amount of such bond to be determined by the Commissioner. The amount of any such bond may be changed from time to time, in accordance with the volume of business done or to be done by the corporation; and such bond shall be approved by the Commissioner, before it is filed. The condition of such bond shall be to obligate the corporation to observe all provisions of this law, and the rules of the Commissioner, in so far as its business is regulated and controlled by them; and it shall guarantee that the corporation will exercise ordinary care in the storage, preservation, and handling of all farm, ranch, and orchard products intrusted to it for storage or sale, or both; and shall also be for the purpose of guaranteeing the classification, weights, grades, and measures made by the corporation, or under its authority, as approximately correct. The bond herein provided for shall indemnify any person who may be damaged by any statement made by the corporation, or under its authority, in any certificate it may issue for such product stored with it. Such bond may be sued upon by any person sustaining damage by reason of any breach of its condition, growing out of any default or dereliction of duty by said corporation, or any person authorized to act for it. If any such bond shall become impaired from any cause, the Commissioner may require the maker to furnish a new and sufficient bond, by written notice, and if such impairment is not made good within thirty days after notice, the Commissioner shall have authority to proceed to close the doors of the corporation, liquidate its affairs, and discharge its debts, as is provided for in this Act. In the event the Commissioner shall take charge of such corporation, he is empowered to collect, by suit, or otherwise, the full amount of the bond, or so much thereof as is necessary, which, taken with the other assets of the corporation, may be found sufficient to discharge its obligations. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 10; Act May 26, 1917, 1st C. S., ch. 41, § 13.]

**Art. 7827gg. Board of directors; meetings; right of members to vote.**—The property and business of corporations chartered hereunder shall be controlled and managed by a Board of Directors of not less than three, nor more than twenty-five in number, who shall be members of the corporation, and bona fide citizens of Texas, and no member of the Board of Directors, of one such corporation shall be a member of a Board of Directors of any other such corporation. The directors shall be elected annually, at a general meeting of the directors of such corporation, which meeting shall be held at such time and place as may be prescribed by the by-laws of the corporation. The notice of such meeting shall be mailed to each member at least two weeks before the date set for the same. Each member of the corporation, at all general and special meetings of the same, shall have one vote, and no more. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 12; Act May 26, 1917, 1st C. S., ch. 41, § 14.]

**Art. 7827h. Examination of corporation; insolvency; financial statements.**—Every bonded warehouse corporation chartered under the laws of this State shall be subject to the supervision and control of the Commissioner, and he shall make, or cause to be made, an examination of the affairs and dealings of each such corporation, at its expense, at least once each year, and at such other times as the Commissioner may deem necessary. If, upon examination, any such corporation is found to be insolvent, or has exceeded its powers, or its business is being con-

ducted in an unsafe manner, or it has failed to comply with any provisions or requirements of this Act within a reasonable time, not to exceed, in any event, thirty days, the Commissioner shall report the condition of the corporation to the Attorney General, who may bring such action as the necessities of the case and law may require. The Commissioner shall, also, not less than twice each year, and more frequently if deemed necessary, require each such corporation to file in his office a statement of its affairs, showing the condition of its reserve fund, its assets and liabilities, and such other information as he may deem advisable. Such statement shall be made upon the oath of one of the managing officers of the corporation, and shall be attested by at least a majority of its directors, which report shall be upon forms prescribed by the Commissioner. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 13; Act May 26, 1917, 1st C. S., ch. 41, § 15.]

**Art. 7827hh. Expense of examination; payment.**—The expense of each and every regular and special examination of corporations chartered under this Act shall be paid by the corporation examined, in such an amount as the Commissioner shall certify to be just and reasonable; provided, such expense shall be paid in proportion to the capital stock of the various corporations, as follows: Those with a capital stock of less than twenty-five hundred (\$2500.00) dollars, shall not pay more than five (\$5.00) dollars; those with a capital stock of two thousand five hundred (\$2,500.00) dollars, and not exceeding ten thousand (\$10,000.00) dollars, shall be not exceeding ten (\$10.00) dollars; those with a capital stock of twenty-five thousand (\$25,000.00) dollars, and not less than ten thousand (\$10,000.00) dollars, shall pay not exceeding twenty (\$20.00) dollars; those with a capital stock of one million (\$1,000,000.00) dollars, or more, shall pay not exceeding two hundred (\$200.00) dollars, for each examination. All sums of money collected as examination fees shall be paid by the Commissioner, directly into the State Treasury, to the credit of the general revenue fund. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 14; Act May 26, 1917, 1st C. S., ch. 41, § 16.]

**Art. 7827i. Examiners; competency and qualifications; not to be appointed as receiver; bond; number and compensation.**—Every warehouse examiner appointed by the Commissioner shall be a cotton grader and classer, and a competent bookkeeper. Before entering upon the discharge of his duties as such, each warehouse examiner shall make oath before some clerk of a court of record, using a seal, and file same with the Commissioner, that he will make fair and impartial examinations, and that he will not accept as pay any presents or emoluments, directly or indirectly, for any service that he may perform in the line of his duty, other than the compensation fixed and given to him by law; and that he will not reveal the conditions of any corporation or public warehouse examined by him, or give out any information secured in the course of any examination, to anyone except the Commissioner, and except when required to do so in the enforcement of the law in some court of this State. No such examiner shall be appointed who is, at the time, an officer or stockholder in any warehouse company or corporation, or who owns any interest in any warehouse; or in any firm or corporation engaged in the purchase or sale of farm, ranch, or orchard products, on commission, or otherwise. No such examiner shall be appointed receiver of any State bonded or public warehouse company whose papers and affairs he shall have examined. Each such examiner shall enter into a bond, payable to the State of Texas, in the sum of five thousand (\$5,000.00) dollars, to be approved by the Commissioner, conditioned that he



will faithfully perform his duties as such examiner. The Commissioner shall, from time to time, appoint such number of State warehouse examiners as he may deem necessary to make examination of public warehouses, and corporations chartered under this Act, which number shall at no time exceed one examiner for each fifty corporations and public warehouses subject to examinations under this Act, and the laws of this State. As full compensation for the performance of the duties of examiner, each person so appointed shall be entitled to receive a salary of not exceeding two thousand (\$2,000.00) dollars per annum, and all reasonable and necessary expenses, including hotel bills. An itemized and sworn account of such expenses shall be presented to, and approved by, the Commissioner. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 15; Act May 26, 1917, 1st C. S., ch. 41, § 17.]

**Art. 7827ii. Impairment of capital stock or other wrongful practices; proceedings by Attorney General; insolvency; receiver; special agent; placing corporations under charge of Commissioner; notice; attachment.**—Whenever, after an examination, the Commissioner shall have reason to believe that the capital stock of any corporation, subject to the provisions of this Act, is impaired, he shall, by written notice, require the corporation to make good the impairment. Whenever it shall appear to the Commissioner, from any examination made by an examiner, that such corporation is conducting its business in unsafe, and unauthorized manner, he shall, by an order under his hand and seal, direct the discontinuance of such illegal, unsafe, and unauthorized practice, and shall require a strict compliance with the requirements of the law. If wrong entries are made in the books of a corporation, or if wrong or unlawful uses of its funds have been made, the Commissioner shall require that such entries be corrected and such sums as were unlawfully paid out shall be restored to the corporation by the person or persons responsible for the wrongful use thereof. Whenever any corporation shall refuse or neglect to make any such report as is hereinbefore required, or to comply with any such order as aforesaid; or whenever it shall appear to the Commissioner that it is unsafe or inexpedient for any such corporation to continue to transact business, by reason of neglect or mismanagement, or that any officer or director has abused his trust, or has been guilty of misconduct, or of malversation of his official position, injurious to the institution, or that it has suffered a serious loss by fire, repudiation, or otherwise, the Commissioner shall communicate the facts to the Attorney General, who shall institute such proceedings as the nature of the case may require. The court, or judge, in term time or vacation, before whom such proceedings may be instituted, shall have power to grant such orders in its or his discretion as may be necessary to grant such relief as the evidence and the situation of the parties may require. If, from any examination made by the examiner, it shall be discovered that any corporation organized under this Act is insolvent, or that its continuance in business will seriously jeopardize the interest of its stockholders or its creditors, it shall be the duty of the Commissioner to immediately close such corporation, and to take charge of all of its property and effects. Upon taking charge of any such corporation, the Commissioner shall, as soon as practicable, ascertain by a thorough examination into its affairs, its actual financial condition; and whenever the Commissioner shall become satisfied that such corporation cannot resume business or liquidate its indebtedness to the safety of its shareholders and its creditors, he shall report the fact of its insolvency to the Attorney General. Upon receipt of such notice and information, the

Attorney General shall institute proper proceedings, in the proper court, for the purpose of having a receiver appointed to take charge of such corporation, and to wind up its affairs and business for the benefit of its creditors and members; and it is made the duty of the court, and judge thereof, in term time or vacation, after notice and hearing, if it appear necessary, to appoint a receiver to take possession of the property and effects of said corporation, for the purpose of winding up the business thereof. Also, the Commissioner may appoint a special agent to take charge of the affairs of any such insolvent corporation, until a receiver is appointed. The special agent so appointed shall qualify, give bond, and receive compensation, the same as regularly appointed warehouse examiners; such compensation to be paid by the corporation, out of its assets, when allowed by the court as costs, in the case of the appointment of a receiver; provided, that in no case shall any corporation continue in charge of such special agent for a longer period than sixty days. Any corporation chartered hereunder may place its affairs and effects under the control of the Commissioner, on notice to him, and by posting a notice on its front door as follows: "This institution is in the hands of the Commissioner of Marketing and Warehouses of the State of Texas." The posting of this notice, or a similar notice, by the Commissioner, or under his direction, that he has taken possession of any corporation, shall be sufficient to place the property and assets of the corporation, of whatever nature, in possession of the said Commissioner, and shall operate as a bar to any and all attachment proceedings. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 16; Act May 26, 1917, 1st C. S., ch. 41, § 18.]

**Art. 7827j. Refusal to submit to inspection or examination or other violation of law; insolvency proceedings.**—If any corporation subject to the provisions of this Act shall refuse to submit its books, and papers, and correspondence, for inspection, to the Commissioner, or any of his authorized examiners; or, if any officer or director of any such corporation shall refuse to be examined on oath touching the business and property of the corporation; or, if it shall be found to have violated its charter, or any law of the State binding upon it, the Commissioner shall report the facts to the Attorney General, who shall institute such proceedings against such corporation as is authorized to be instituted against insolvent corporations. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 17; Act May 26, 1917, 1st C. S., ch. 41, § 19.]

**Art. 7827jj. Corporate officers; removal; transfer or pledge of property held by corporation.**—The directors of any corporation chartered hereunder may appoint, or remove any officer or other employé at pleasure. No officer or employé shall have power to endorse, sell, pledge, or hypothecate any bond, note or other obligation received by such corporation, or any property deposited with it as warehousemen, until such power and authority shall have been given such officer or employé of the Board of Directors, in a meeting of the Board, regularly called and held, a written record of which proceedings shall have first been made upon the minutes of the corporation; and all such acts of any officer or employé, endorsing, selling, pledging, or hypothecating any such pledge or property, shall, without the authority of the Board of Directors, as herein provided, be null and void. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 18; Act May 26, 1917, 1st C. S., ch. 41, § 20.]

**Art. 7827k. Erection, purchase, or lease of warehouses, etc.; certification of employés in charge.**—Corporations chartered hereunder shall have the right to erect, purchase or lease, and to operate warehouses,

buildings, elevators, gins, storage tanks, silos, and such other places of storage and security as may be necessary for the storage, grading, weighing, and classification of cotton, and all farm products, and for the purpose of preparing such products for the market. Before any such corporation shall be permitted to open its doors for business, and in order for it to continue to transact business, the employé, or officer, in active management, shall obtain a certificate from the Commissioner, certifying that he is qualified and authorized to perform the duties of said corporation. In order to receive such certificate, such person must present satisfactory evidence to the Commissioner that he is competent to discharge the duties of such position. Upon receiving satisfactory evidence of qualification, and upon the payment of a filing fee of one (\$1) dollar, the Commissioner may issue to any applicant therefor a certificate showing that such applicant is qualified; provided, however, that the life of any such certificate shall not exceed two years, at the expiration of which time the applicant must obtain a new certificate. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 19; Act May 26, 1917, 1st C. S., ch. 41, § 21.]

**Art. 7827kk. Regulation of charges; powers of commissioner as to issuance of permits; buildings; insurance.**—All charges for storage in warehouses operating under the provisions of this Act, in this State, shall be subject to limitation and regulation by the Commissioner to the extent of fixing a minimum charge therefor. The charges so fixed need not be the same at all places or at all times, but the Commissioner may take into consideration the local conditions, and the volume of business of each warehouse. In fixing charges for gin-compressed cotton, consideration shall be given to the size of the bale. The Commissioner shall have power to deny a permit to do business under this Act, and to revoke a permit when in his judgment there are sufficient warehouse facilities at the point where a new corporation may desire to do business. The Commissioner shall have power to prohibit the storage of cotton or other inflammable commodities in an unsafe building, or require a storage house to be remodeled within certain specified dates, so as not to unduly hamper the conduct of the business and the convenience of the public. The Commissioner shall require fire insurance by blanket policies or individual policies, in some solvent insurance company chartered under the laws of the State of Texas, or having a permit to do business in the State, to be carried by all public warehouses and all warehouse corporations operating under this Act, and to require such other means and methods of protection from fire and weather, or depreciation of warehouse property, as the Commissioner may deem necessary in each case. No fire, fire and marine, marine or inland insurance company, doing business in this State shall expose itself to any one risk, either upon buildings of any character, or their contents, except when insuring cotton in bales, and grain, in an amount exceeding ten per cent of the aggregate of the paid up capital stock, and surplus, unless the excess shall be reinsured by such company, in some other solvent insurance company legally authorized to do business in this State. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 20; Act May 26, 1917, 1st C. S., ch. 41, § 22.]

**Art. 7827l. Dividends; reserve.**—Every corporation organized hereunder may divide its profits among its members, in proportion to the amount of business transacted for each said member, after having paid dividends to each member, on the amount which each of said members has paid into the capital stock of the company, subject, however, to the following provisions: Twenty per cent of the net profit on each year's

business shall annually be paid into the reserve fund, hereinafter provided for, until the reserve fund shall equal twice the amount placed in the capital stock at the time the corporation was chartered; the balance of the net profits shall be divided in accordance with the by-laws of the corporation; provided, that the subscribers to the capital stock shall first be entitled to a ten per cent dividend, or such less amount as may be stated in the by-laws for each year, before the remainder thereof is divided among the members in proportion to the amount of business transacted for each member. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 21; Act May 26, 1917, 1st C. S., ch. 41, § 23.]

**Art. 7827ll. Powers as warehousemen; other powers; loaning money; priority; investment of capital, etc.; restrictions.**—Corporations chartered hereunder shall have the right to act and do, and perform, generally, all things which may be done and performed by warehousemen. Such corporations shall also have the right to sell in the market all products of the farm, ranch, or orchard, on a commission basis, or such other basis as may be agreed upon by them with their customers. Corporations chartered hereunder shall have the right to purchase, or construct, or lease, all such warehouses, landings, and buildings, as may be necessary for their business. They shall have the right to employ such other instrumentalities and agencies as may be necessary for the storage, preservation, and marketing of farm, ranch, and orchard products, to the best advantage of the members and customers; provided, that at least sixty per cent of the shareholders, engaged in such business, shall be engaged in farming, horticulture, or stockraising as a business. Corporations chartered hereunder shall have the right to loan money upon products placed in their warehouses; provided, that the amount loaned thereon shall not exceed seventy-five per cent of market value of the property so placed with them. Corporations chartered hereunder shall have the right to loan money upon chattel mortgages, to their members only, for the purpose of enabling them to make and mature their crops, but such chattel mortgages shall always be upon property of at least double the value of money loaned thereon. Corporations chartered hereunder shall have the authority to loan money on crop mortgages, but such crop mortgages must always be the first mortgage thereon, exclusive of the landlord's lien, and shall always be secured by an acreage, which, under the ordinary general conditions, would produce double the amount loaned thereon. Corporations chartered hereunder may invest their capital stock and surplus in a home office building. They may also invest such capital stock, surplus, and undivided profits, in United States bonds, Texas State bonds, county, city, district, and municipal bonds, and road bonds in the State of Texas; provided, such bonds are issued by authority of the law, and interest upon them have never been defaulted. Such corporations shall never have the right to receive deposits, nor discount commercial paper generally, but may make such character of loans and investments as are herein provided for; provided, however, such corporations shall never be permitted to loan money upon chattel mortgages, crop mortgages, or personal security, except to their members, and then only to enable them to make, mature, and gather their crops, or market their farm, ranch or orchard products. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 21; Act May 26, 1917, 1st C. S., ch. 41, § 24.]

**Art. 7827m. Contracting debts and issuing bonds; sinking fund; sinking fund bonds.**—Corporations chartered hereunder shall have authority to contract debts, as have other business corporations, and in addition thereto, may issue special bonds, to be known as "sinking fund

bonds”, as follows: They may invest all, or any part, of their capital stock in such securities as are herein designed for the payment or investment of their capital, which, when approved by the Commissioner, shall be deposited in the State Treasury. The interest on such investments shall be annually paid into the State Treasury, and be placed to the credit of the sinking fund for the liquidation of bonds of such corporations, and the interest shall be invested from time to time by the Commissioner in similar securities, which in turn shall be deposited in the State Treasury. Such securities, when so deposited in the State Treasury, shall remain there as the sinking fund out of which the principal sum of the bond hereinafter provided for shall be paid, and said securities shall not be used for any other purpose than to liquidate the bonds herein provided for, unless, and until, such sinking fund bonds have been paid; in which event, the securities herein provided for shall be returned to the corporation owning same, and shall become a part of the general assets of the corporation. After the investment in the securities herein provided for shall have been made, the Commissioner shall grant authority to the corporation to issue bonds in double the amount of such original capital stock, to bear not greater than six per cent interest, and to run for a period not exceeding thirty years. When said bonds shall have been issued and signed by the proper officers of the corporation, they shall be registered by the Commissioner. Said bonds shall show on their face that the principal thereon is secured by the securities herein required to be deposited in the State Treasury, and shall have plainly written, printed, lithographed, or engraved, on their face the words, “Sinking Fund Bonds of \_\_\_\_\_ State Bonded Warehouse,” with the postoffice address of the corporation, the blank space to be filled in with the name of the corporation. Said bonds shall show on their face, also, that the interest contracted to be paid thereon is secured to them by the general assets of the corporation. After said bonds have been issued as herein provided for, and registered by the Commissioner, they shall be returned to the proper officer of the corporation issuing them, and may then be by such corporation placed on the market and sold; but they shall never be sold at less than ninety per cent of their face value. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 22; Act May 26, 1917, 1st C. S., ch. 41, § 25.]

**Art. 7827mm. Crop statistics; appropriations.**—The Commissioner shall collect, from every source available, information concerning stocks on hand and the probable yield of farm and ranch products, and disseminate the same; and he shall establish agencies for the sale of farm, orchard, and ranch products, wherever it may be deemed advisable, in which event he is empowered to prescribe all regulations for the conduct of such agencies as may be found necessary; and the amount of five thousand (\$5,000) dollars or as much thereof as may be necessary, is hereby appropriated out of any available fund in the State Treasury, not otherwise appropriated, to carry out the provisions and purposes of this section, for the unexpired term of this fiscal year. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 23; Act May 26, 1917, 1st C. S., ch. 41, § 26.]

**Art. 7827n. General corporation laws; charter fees; Commissioner to promulgate rules.**—Every corporation organized under this Act shall be amenable to and subject to all the laws of this State governing corporations generally; provided, no charter fees shall exceed twenty-five (\$25) dollars. Warehouses operating under this Act shall be conducted under rules fixed by the Commissioner, in order to effectively carry out the provisions of this Act; and it shall be the duty of the Commissioner,

as soon as may be, after this Act takes effect, to promulgate rules and regulations by which the provisions of this Act may be effectively carried out. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 24; Act May 26, 1917, 1st C. S., ch. 41, § 27.]

**Art. 7827nn. Warehouse receipts; form; damages.**—The form of warehouse receipts shall be prescribed by the Commissioner, and must be uniform, and in accord with an Act known as the “Federal Warehouse Uniform Receipt Act,” and every receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored.
- (b) The date of issuance of the receipt.
- (c) The consecutive number of the receipt.
- (d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
- (e) The rate of storage charges.
- (f) The description of the goods or the package containing them.
- (g) The signature of the warehouseman, which may be made by his authorized agent.

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely, or jointly, or in common with others, the fact of such ownership; and

(i) A Statement of the amount of advances made, and of liabilities incurred, for which the warehouseman claims a lien. If the precise amount of such advance is made, or if such liabilities incurred is, at the time of the issuance of the receipt, unknown to the warehouseman or his agent who issues it, a statement of the fact that advances have been made, or liabilities incurred, and the purpose thereof, is sufficient.

(j) It shall also state that the corporation guarantees under its bond the rate, class and grades, within approximate limits of the products for which the receipt may be given, at the time of the issuance of such receipts, and at the elevation of the places where such warehouse is located.

(k) Said receipt shall also show the elevation, above sea level, of the warehouse.

A warehouseman, in addition to this common-law liability, shall be liable to any person damaged thereby for all damages caused by the omission from negotiable receipts of any of the terms herein required. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 25; Act May 26, 1917, 1st C. S., ch. 41, § 28.]

**Art. 7827o. Negotiability of receipts; numbering and recording; duplicates; indorsements as to incumbrances, title, etc.; change of form of receipt; delivery of goods.**—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt. A non-negotiable receipt shall have plainly placed upon its face, by the warehouseman issuing it, “non-negotiable”. A receipt in which it is stated that the goods received will be delivered to the bearer, is a negotiable receipt. All receipts shall be numbered consecutively, in the order of their issuance, and a record of such receipt shall be kept at the office of the company. No two receipts bearing the same number shall be issued from the same warehouse during the same year, nor shall any duplicate receipt be issued, except in case of a lost or destroyed receipt, in which case a new receipt shall be issued, which shall bear the same date and number as the original, and shall be plainly marked on its face “duplicate.” In addition to the other provisions, each receipt shall have a blank form

on the back thereof, to be filled in and signed by the owner of the cotton or other products for which it is issued, showing whether a preexisting and unsatisfied lien of any kind exists against it. If there be a landlord's lien, or such unsatisfied lien, or incumbrance, or lien of any kind, on said cotton, or other products, at the time of its storage, the amount of same shall be clearly set out; and it is made the duty of the manager issuing the receipt to have said blank filled in and signed by the owner of the cotton, or other product before issuing a negotiable receipt for the same; provided, however, such statement may not be made if a non-negotiable receipt is desired. When cotton grown on rented or leased premises is tendered for storage in a State warehouse, in addition to the foregoing instruments, all receipts issued therefor shall be issued jointly, in the name of the owner and the landlord, showing their respective interests in such cotton, unless the tenant or person storing the same presents authority from the landlord, or from the tenant, as the case may be requesting the issuance of a receipt in the name of the one or the other, which request shall be in writing, and filed with the manager of the warehouse. If the person holding a non-negotiable receipt shall desire to obtain a negotiable receipt in lieu thereof, he shall return the non-negotiable receipt to the warehouse issuing the same, and thereupon shall comply in every respect with the provisions of this Act, relating to negotiable receipts, and upon compliance with which a negotiable receipt shall be issued to him in lieu of the non-negotiable receipt. When the non-negotiable receipt is surrendered or cancelled, the word "cancelled" shall be plainly marked or stamped in ink, across the face thereof. No warehouse receipt shall be issued except on the actual previous delivery of the goods in the warehouse, or on the premises under the control of the manager thereof. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 26; Act May 26, 1917, 1st C. S., ch. 41, § 29.]

**Art. 782700. Delivery of goods on surrender of receipt.**—Upon the presentation and return to the warehouse of any warehouse receipt issued by its manager, and properly endorsed, and the tender of all proper warehouse charges upon the property presented by it, such property shall be delivered immediately to the holder of such receipt; but the manager of such warehouse shall not under any circumstances, or upon any order or guarantee, deliver the property upon which said receipts were issued until such receipts have been delivered and cancelled, except in case of lost receipts. Any such receipt, when returned and cancelled, shall be kept by the manager, in his office, until ordered destroyed by the directors, for one year from date of cancellation. Upon delivery of the goods in a warehouse, upon any receipt, such receipt shall be plainly marked, or stamped in ink, across its face, with the word "cancelled," together with the name of the manager cancelling the same; and shall thereafter be void, and shall not again be put into circulation. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 27; Act May 26, 1917, 1st C. S., ch. 41, § 30.]

**Art. 7827p. Transfer of receipts.**—A negotiable receipt issued against goods or products stored in a warehouse under this Act, shall be negotiable and transferable by endorsement in blank, or by special endorsement and delivery in the same manner and to the same extent as bills of exchange and promissory notes now are, without any other formality; and the transferee or holder, of such warehouse receipt shall be considered and held as actual and exclusive owner, to all intents and purposes, of the property herein described, subject only to lien and privileges of the warehouse for storage, insurance, and other warehouse

charges; provided, however, that all such warehouse receipts shall have the word "non-negotiable" plainly marked or stamped on the face thereof, shall be exempted from the provisions of this section. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 28; Act May 26, 1917, 1st C. S., ch. 41, § 31.]

**Art. 7827pp. Commissioner to prescribe forms of receipts, etc.; uniformity.**—It shall be the duty of the Commissioner to prescribe all the forms of receipts, certificates, and records, of whatsoever description necessary in the conduct of warehouses under this Act; but all such receipts, certificates and forms, shall be drawn in accordance with the terms of this Act. All warehouse receipts shall be of uniform character, in the same class as prescribed by the Commissioner. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 29; Act May 26, 1917, 1st C. S., ch. 41, § 32.]

**Art. 7827q. Rights and liabilities as warehousemen; lien.**—The liability of a corporation chartered and operating under this Act, for warehouse purposes, shall be that of a public warehouseman, and it shall have the same rights as a public warehouseman, including a lien for storage, insurance, and other warehouse charges, as well as for charges for any service performed by it; and the corporation shall also have a lien for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping, and other charges and expenses in relation to such goods; and also, all reasonable charges and expenses for notice and advertisement of sale of goods, where sale has been made in satisfaction of the warehouseman's lien. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 30; Act May 26, 1917, 1st C. S., ch. 41, § 33.]

**Art. 7827qq. Enforcement of liens.**—A warehouseman's lien for a claim which has become due may be satisfied as follows: The warehouseman shall give written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim and interest in the goods. Such notice shall be given by delivery, in person or by registered letter, addressed to the last known place of business, or at the abode of the person to be notified. The notice shall contain:

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice, and the date or dates when it became due.

(b) A brief description of the goods against which the lien exists.

(c) A demand that the amount of the claim, as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice, if it is personally delivered, or from time to time, when the notice should reach its destination, according to the due course of post, if the notice be sent by mail; and

(d) A statement that unless the claim is paid within the time specified, the goods will be delivered for sale, and sold by auction, at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien is acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place after the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale shall be published in a newspaper in the place where such sale shall be held, describing the goods to be sold, and stating the name of the owner or person on whose account the goods



are held, and the time and place of the sale. Such publication shall be for not less than two weeks prior to the date of the sale, and no publication fee shall be charged in excess of the rate now allowed by statute for the publication of legal notices. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale, at four different places in the community, and one such notice shall be placed at the courthouse of the county in which the warehouse is located. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale; the balance, if any, of such proceeds shall be held in the warehouse and delivered on demand, to the person to whom he would have been bound to deliver, or justified in delivering the goods. At any time before the goods are sold any person claiming a right of property or possession in them may pay the warehouseman the amount necessary to justify his lien, and to pay the reasonable expenses and liabilities incurred in serving notice and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment, if he is a person entitled, under the provisions of this Act, to their possession, on payment of the charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. If any such goods are so delivered to any such person, and the warehouseman desires it, he may require a bond of indemnity as protection from claims of other persons. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 31; Act May 26, 1917, 1st C. S., ch. 41, § 34.]

**Art. 7827r. Board of examiners of cotton classers; meetings.**—The Commissioner shall appoint three citizens of the State who have not less than five years' experience as graders and classers of cotton, and who are otherwise qualified, who shall constitute a Board of Examiners, whose duty it shall be to examine applicants for license as Public Cotton Classers. Said Board shall assemble at such times and places as they may be called together by the Commissioner for the purpose of examining applicants for license as Public Cotton Classers. [Act May 26, 1917, 1st C. S., ch. 41, § 35.]

**Art. 7827rr. License of cotton classers; examination; fee; compensation of board of examiners; classers shall keep record and issue certificates; federal standards.**—Applicants for license as Public Cotton Classers shall apply to said Board, through the Commissioner, in such form as may be designated by him, and shall furnish evidence of their good moral character, and of the experience they have had in the grading and classing of cotton. At a meeting of the Board, said applicants shall be examined touching their qualifications as cotton classers, and shall show such a degree of proficiency as may be required by the Board to entitle them to be appointed as Public Cotton Classers. Those successful in the examination prescribed by the Board shall be issued a license as "Public Cotton Classers," which license shall be signed by the Board, and attested by the signature and seal of the Commissioner of Markets and Warehouses. The Commissioner and the Board shall fix the amount of the examination fee to be paid by the applicants, which amount shall be retained by the Board as their compensation, regardless of the success of the applicant in his examination; and the Board shall receive no compensation from the State. All public Cotton Classers shall have the right, at any place within the State of Texas, to engage in the business of public cotton classers authorized to class cotton gen-

erally, and to charge for their services. Hereafter, no person shall be permitted to engage in the business as a public cotton classer, classing cotton for the public generally, without holding a license as a public cotton classer. \* \* \* Each public cotton classer shall keep a complete record of cotton classed, and for whom classed, in a well bound book, and shall issue a certificate to each person showing the class of cotton classed by him. He shall also keep on hand a set of the United States Standard of Cotton Grades, and his books, records and cotton standards shall be open to inspection at all reasonable hours. [Id., § 36.]

**Explanatory.**—The part omitted, as shown by asterisks, imposes a criminal penalty, and is set forth post as art. 977f, Penal Code.

**Art. 7827s. Cotton classers to give bond.**—Before a license shall issue to any person, he shall file a bond with the Commissioner, in the sum of one thousand (\$1,000) dollars, which bond shall be so conditioned as to bind its maker and his sureties to guarantee as approximately correct his work in classing and grading cotton, and the approximate correctness of each statement in every certificate of class and grade he may issue or cause to be issued. It shall also bind the maker and his sureties to fully and promptly indemnify any person who may sustain financial loss by reason of any false class or grade he may make, or by reason of any untrue or misleading certificate issued by him, or under his authority, with intent to defraud. [Id., § 37.]

**Art. 7827ss. Certificate of classer as evidence; additional boards of examiners of classers of other products.**—A certificate of classification of cotton issued by any person under authority of this Act shall be accepted in all the courts of this State as prima facie evidence of the facts stated therein. The Commissioner may appoint other Boards of Examiners to examine applicants who may desire to become classers of other farm, ranch, or orchard products, and all such boards and public classers shall be governed by this Act, insofar as it will apply. [Id., § 38.]

**Note.**—Sections 39 to 41, inclusive, create offenses for violations of the act, and are set forth post as arts. 977g and 977h of the Penal Code.

**Art. 7827t. Sureties on bonds; form of bond; suit; venue; new bond.**—Each kind of a bond required by any provisions of this Act may be made with private persons or bonding companies as sureties. All such bonds shall be filed with the Commissioner and approved by him. All such bonds shall be payable to the State of Texas for the use and benefit of any person who may be damaged by a breach of its conditions, but it shall not be necessary to join the State in any suit on any such bonds. The venue of suits on all such bonds as are provided herein shall be that of the general venue statutes of this State. Should any such bond become impaired, by suit, or otherwise, the Commissioner may, by a written notice to the maker, require such impairments to be made good. If any such impairment is not made good to the satisfaction of the Commissioner, within a reasonable time after notice, which time shall in no event exceed thirty days, the license under which the maker of such impaired bond has been acting shall then and thereafter stand revoked and cancelled. [Id., § 42.]

**Note.**—Secs. 43 to 48, inclusive, create offenses, and are set forth post as arts. 936a, 977j–977n, Penal Code.

**Art. 7827tt. All warehouses placed under control of Commissioner; existing corporations may amend their charters.**—All warehouses now or hereafter operating under an Act passed by the Thirty-third Legislature of Texas, and known as the “Public Warehouse Act,” are hereby

placed under the management and control of the Commissioner, and all chartered warehouses for the storage of farm, ranch or orchard products, not incorporated under this Act, may, by a majority vote of its stockholders, upon application to the Secretary of State, upon payment of a fee of ten (\$10) dollars, amend their charter so as to come under this Act. Such warehouses shall make such bonds as the Commissioner may require, and each such warehouse shall issue such receipts as are authorized by the Commissioner. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 42; Act May 26, 1917, 1st C. S., ch. 41, § 49.]

**Art. 7827u. Landlord's lien shall continue unless negotiable receipt is given.**—The landlord's lien on cotton or other farm products, shall continue so long as the same are on storage in any warehouse, whether the same be a warehouse operated under this Act, or a private warehouse, provided a negotiable receipt has not been issued therefor. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 42; Act May 26, 1917, 1st C. S., ch. 41, § 50.]

**Constitutionality.**—Acts 33d Leg., 2d Called Sess., c. 5, § 42, continuing a landlord's lien on cotton stored, held not to violate the obligation of contracts when construed as applicable to cotton stored before the act took effect. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**Retroactive operation.**—Act 33d Leg., 2d Called Sess., c. 5, § 42, continuing a landlord's lien on cotton stored, held applicable to cotton stored before the act took effect, where the lien on such cotton had not expired by the terms of the provision of art. 5477. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**Negotiable receipt.**—Under Acts 33d Leg. 2d Called Sess. c. 5, § 42, a simple receipt for cotton stored in a warehouse held not a "negotiable receipt." *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**Art. 7827uu. Partial invalidity of act.**—Should any part of this Act be held unconstitutional the remainder of the Act shall be and remain in full force and effect. [Act Sept. 26, 1914, 2d C. S., ch. 5, § 45; Act May 26, 1917, 1st C. S., ch. 41, § 51.]

**Art. 7827v. Repeal.**—All laws and parts of laws in conflict herewith are hereby repealed, except an Act passed at the First Called Session of the Thirty-fourth Legislature, providing for the maintenance of the Warehouse and Marketing Department, which Act shall remain in full force and effect, so far as the said Department is affected thereby. [Act May 26, 1917, 1st C. S., ch. 41, § 52.]

**Explanatory.**—The act above referred to is the general appropriation act providing for the expenses of the warehouse and marketing department.

#### DEPOSIT OF COTTON AND GRAIN IN BONDED WAREHOUSES

**Art. 7827vv. Right of producers to deposit cotton and grain; certificate of deposit.**—That each and every person, partnership or joint stock association hereafter engaged in agricultural farming shall have the right to deposit his, her or their cotton or grain by weight or in bushels of the standard weight of the United States in any bonded warehouse or elevators under the supervision and control of the Board of Supervisors of Warehouses under the laws of the State of Texas, which said cotton and grain, upon the deposit thereof in said bonded warehouse, shall be properly classed or classified by the keeper of said bonded warehouse and a certificate containing the weight, numbers of bales or packages of grain, and the classification thereof shall be written in said certificates, which said certificates shall be printed or lithographed by and under the supervision and direction of the Commissioner of Insurance and Banking of the State of Texas, and blanks thereof furnished to the keepers of said bonded warehouse to be furnished by him under

his official signature to the depositors of cotton and grain of any kind in said bonded warehouse. [Act April 2, 1915, ch. 145, § 1.]

*Note.*—The act took effect 90 days after March 20, 1915, date of adjournment. By Act May 26, 1917, 1st C. S., ch. 41, ante, arts. 7827a-7827v, amendatory of Act Sept. 14, 1914, 2nd C. S., ch. 5, the control of bonded warehouses is conferred on the Commissioner of Markets and Warehouses.

**Art. 7827vv. Pledge of certificates with state banks; negotiable notes; lien.**—And be it further enacted, that blank promissory notes of the face value of one, two, three, five, ten and twenty dollars each, made payable to bearer, shall be prepared in due form, properly lithographed, and be furnished by the Commissioner of Insurance and Banking to banks chartered under the laws of the State of Texas for the use of the depositors of said cotton and grain aforesaid, whereby the said depositors shall have the right to take their said certificates of their said cotton or grain to the said State bank or banks chartered by the State of Texas and deposit said certificates with said bank or banks, and they shall furnish said depositor with blank promissory notes of the face value aforesaid, or so much thereof as shall be equal to two-thirds of the value of each bale of cotton according to its classification, or to each parcel of grain, according to its classification in said certificates, which said promissory notes, when signed up by the depositors of said certificates, shall become negotiable paper as other promissory notes, and shall be a lien upon said cotton to the extent of their face value, for the purpose of aiding and securing their redemption by said bank as hereinafter provided. [Id., § 2.]

**Art. 7827w. Interest on notes.**—And be it further enacted, that said promissory notes shall bear interest from date at the rate of four per cent per annum until redeemed by the maker thereof or by the State bank as hereinafter provided. [Id., § 3.]

**Art. 7827ww. Maturity of notes.**—And be it further enacted, that said promissory notes provided for in this Act shall become due in six months after the date thereof. [Id., § 4.]

**Art. 7827x. Depreciation of cotton or grain; sale.**—And be it further enacted, that should said cotton or grain so stored in a bonded warehouse or elevator as herein provided depreciate in value during the period of six months from the issuance of said promissory notes based on the deposit of said cotton and grain aforesaid, the makers of said promissory notes or the bank where issued shall have the right to sell said cotton, and it shall be their duty to sell said cotton or grain for the purpose of discharging said promissory notes and interest and the storage and insurance against said cotton during said period of time. [Id., § 5.]

**Art. 7827xx. State banks to hold notes until put into circulation.**—And be it further enacted, that the State banks chartered under the laws of this State shall receive said promissory notes, lithographed and designed by and under the direction of the Commissioner of Insurance and Banking of the State of Texas, and from him, and shall hold the same subject to be called for and used and put in circulation as commercial paper by the owners of cotton and grain certificates deposited with said bank. [Id., § 6.]

*Note.*—Sec. 7 makes it an offense to unlawfully issue certificates or notes, and is set forth in Vernon's Pen. Code 1916 as art. 977c.

**Art. 7827y. Agreements as to compensation of bank.**—And be it further enacted, that the owners of said cotton and grain certificates shall have the right under this Act by private contract to arrange and have any State bank or banks aiding and assisting in the execution

and putting in circulation said promissory notes as commercial paper and keeping a record of said certificates deposited with said bank, and the said notes issued aforesaid, such compensation as may be agreed to by the depositors of said certificates and the makers of said notes. [Id., § 8.]

*Note.*—Sec. 9 makes it an offense to place certificates in bank covering cotton or grain which is subject to a prior landlord's lien or mortgage, and is set forth in Vernon's Pen. Code 1916 as art. 977e.

**Art. 7827yy. Additional security for notes; sale of cotton or grain by bank.**—And be it further enacted, that should said cotton or grain depreciate in value from its full value as agreed upon when said promissory notes as a lien thereon is made, issued and put in circulation by the holder of said cotton or grain certificate so as to depreciate the value of said promissory notes, shall have the privilege of putting up in said bank or banks holding said cotton or grain certificate or certificates such further margin as will be equal to the fixed value of the cotton or grain at the time when said promissory notes are signed by the owner of said certificate for said cotton or grain and put in circulation, and should the maker of said notes fail or refuse to put up said margin as herein provided for and said cotton or grain shall depreciate to within five dollars of the two-thirds value fixed at the time of the issuance of said notes, then and in that event the bank shall have the power to sell said cotton or grain in open market and retain sufficient moneys out of the sale thereof on deposit to pay off and discharge said notes when presented, which shall not be later than six months from their date, and apply the remainder to the payment of whatever storage and insurance and interest accruing against said cotton or grain, and the excess thereof shall be deposited to the credit of the maker of said notes. [Id., § 10.]

**Art. 7827z. Sale of cotton or grain for redemption of notes.**—And be it further enacted, that any maker of said promissory notes put in circulation as commercial paper as provided by this Act shall have the right at any time within six months to sell said cotton or grain in open market or shall direct the bank to sell the same in open market for the purpose of redeeming said promissory notes issued and put in circulation on the face of said cotton or grain certificate, and the moneys arising from said sale shall be deposited in the maker's name in said bank for the purpose of redeeming said notes, interest, insurance and storage at the end of six months, the date of their maturity, or before. [Id., § 11.]

**Art. 7827zz. Indication of bank on notes.**—And be it further enacted, that there shall be printed on the lefthand margin of each of said notes the name of the State bank and the place of its activity for the purpose of indicating the bank at which said notes are to be redeemed. [Id., § 12.]

**Art. 7827zzz. Statement on back of notes.**—And be it further enacted, that on the back of each of said series of promissory notes, the issuance of which is provided for in this Act, shall have printed thereon the following words: "This is one of a series of notes issued against and secured by two-thirds of the value of one bale of cotton, or so many bushels of grain," and said promissory notes shall be first lithographed and issued to carry out the provisions of this Act as for cotton or grain, and to carry out the purposes of this Act such blank promissory notes shall be provided by the Commissioner of Insurance and Banking to cover either cotton or a grain transaction. [Id., § 13.]

*Note.*—Sec. 14 makes an appropriation to aid the Commissioner of Insurance and Banking to carry the act into effect.

## TITLE 133

## WEIGHTS, MEASURES, GRADES AND PACKS

Art.		Art.	
7846a.	Standard containers for fruits and vegetables.		enforce act and make rules and regulations, etc.
7846b.	Grades and packs for fruits and vegetables.	7846e.	Appointment of inspectors; expense; certificate of inspection.
7846bb.	Culls.	7846f.	Commissioner of agriculture may promulgate other standards of containers, packs, and grades.
7846c.	Manufacture and sale of containers; proviso.	7846g.	Partial invalidity.
7646d.	Commissioner of agriculture shall		

**Article 7846a. Standard containers for fruits and vegetables.**—That the following standards of “containers” for the shipment of fruits and vegetables in this State are hereby established and adopted as State standards;

(a) Standard Bushel Basket. The standard bushel basket shall contain not less than 2150.4 cubic inches in the basket proper, regardless of the manner in which the lid is made.

(b) Standard Four Basket Crate. The baskets in said crates shall hold not less than three quarts dry measure, and the dimensions of such baskets shall be 5x8 inches at the bottom, 6x10 inches at the top, and 4 inches deep, and shall contain not less than 201.6 cubic inches. The heads of the crates holding said baskets shall be 4½ inches wide by 11 inches at the bottom, and 13 inches at the top in length and not less than 7/16 of an inch thick. The veneer or boards for the bottoms, sides and tops shall be not less than 4½, 4, and 5½ inches wide respectively, and not less than 1/7 of an inch thick and 22 inches long. Both crates and baskets shall be made of good, substantial material, sufficiently strong to withstand the ordinary strain incident to transposition and handling.

(c) Standard Six-basket Crate. Each basket of a six-basket crate shall contain not less than 268.8 cubic inches.

(d) Standard Folding Onion Crate. The standard folding onion crate shall not be less than 19–5/8 inches long, 11–3/16 wide, and 9–13/16 inches deep, inside measurements, containing not less than 2150.4 cubic inches.

(e) Standard Orange Box. The dimensions of the standard orange box shall be 12x12x12 inches for each one-half of box, inside measurement, and the dimensions of a one-half (or strap box) shall be 12x12x6 inches for each one-half box, inside measurement.

(f) Standard Berry Box or Crate. The standard quart berry box or crate shall contain not less than 24 quart baskets containing 67.2 cubic inches each, dry measure; and the standard pint berry box or crate shall hold not less than 24 pint baskets, containing not less than 33.6 cubic inches each, dry measure. [Act April 2, 1917, ch. 181, § 1; Act Sept. 20, 1917, ch. 6, § 1.]

The act amends sections 1 and 8 of ch. 181, general laws, regular session, 35th Legislature, and adds thereto section 2a.

**Art. 7846b. Grades and packs for fruits and vegetables.**—The following “grades and packs” are hereby established as State standards for the State of Texas.

(a) Standard Peach Grades and Packs. Standard peach grades are three in number; namely, Fancy, Choice or No. 1, and No. 2.

Fancy peaches shall be medium to large size, good color for the variety named, firm and sound, of proper maturity for shipment to distant markets, carefully picked and closely packed in bushel baskets or crates of four or six basket capacity.

Choice or No. 1 peaches shall be of average size and color for the variety named, sound, firm, practically free from blemishes and defects, of proper maturity for shipment to distant markets, carefully picked and closely packed in bushel baskets, or crates of four or six baskets capacity.

No. 2 peaches shall be all such sound fruit as is not good enough for No. 1's, such as small, slightly uneven surface, greens, ripens or slight defects of whatsoever kind, but suitable for market purposes and for reasonably distant shipments. Each and every package of fruits and vegetables offered for sale or shipment shall have plainly stamped on it the grade of such fruits or vegetables and the name and postoffice address of the person shipping the same, provided that this shall apply only to shipments of such fruits and vegetables as have grades established by law.

Culls. Any and all peaches that are too small in size, ill shaped and poor in general quality to measure up to any of the above grades shall be known as culls, unfit for market purposes, and shall not be shipped unless branded "Culls" and shipped in a separate consignment.

Texas Standard Peach Packs. The standard peach packs for six basket crate shall be eight in number; namely, 72's, 96's, 138's, 162's, 180's, 216's, 270's and 324's.

To pack 72's. (Begin at end of basket.)—Place 1 and 2 alternately in 4 rows, two layers high, 6 to the layer on end, blossom end up.

To Pack 96's. Place 2 and 2 alternately in 4 rows, 2 layers high, 8 to the layer on end, blossom end up.

To Pack 138's. Place 2 and 1, alternately in 5 rows, 3 layers high, 8 and 7 alternately to the layer, flat.

To Pack 162's. Place 2 and 1 alternately in 6 rows, 3 layers high, 9 to the layer, flat.

To Pack 180's. Place 2 and 2 alternately in 5 rows, 3 layers high, 10 to the layer, flat.

To Pack 216's. Place 2 and 2 alternately in 6 rows, 3 layers high, 12 to the layer, flat.

To Pack 270's. Place 3 and 3 alternately in 5 rows, 3 layers high, 15 to the layer, flat.

To Pack 324's. Place 3 and 3 alternately in 6 rows, 3 layers high, 18 to the layer, flat.

All packages must be filled tight, in all layers from bottom to top, and extend approximately 1 inch above the top rim or edge of the package, whether it be a bushel basket, crate basket, or box. All peaches in the same crate or package shall be as nearly as possible of a uniform degree of ripeness.

(b) Texas Standard Tomato Grades and Packs. Texas standard tomato grades may be two in number; namely, Fancy and Choice.

Texas standard tomato packs shall be seven (7) in number for the six basket crate, and nine (9) in number for the four basket crate and the manner in which tomatoes are packed will partly determine their grade.

Texas Standard Six Basket Crate. Fancy. To Pack 72's. Place 2 and 2 alternately in 3 rows, 2 layers high, 6 to layer, blossom end up, 12 to the basket.

To Pack 84's. Place 2 and 2 alternately in 4 rows on edge 8 to the layer for first layer, and 2 and 2 alternately in 3 rows, flat, blossom end

up, 6 to the layer for first layer, and 3 and 3 alternately in 3 rows, on edge, blossom end out; 9 to the layer for the second or last layer; 15 to the basket.

To Pack 108's. Place 3 and 3 alternately in 3 rows, on edge, 9 to the layer for the first layer, and 3 and 3 alternately in 3 rows on edge, blossom end out, 9 to the layer for the second or last layer, 18 to the basket.

Choice: To Pack 120's. Place 2 and 2 alternately in 4 rows, on edge, 8 to the layer for the first layer, and 3 and 3 alternately in 4 rows, on edge, blossom end out, 12 to the layer for the second or last layer, 20 to the basket.

To Pack 144's. Place 3 and 3 alternately in 4 rows, on edge, 12 to the layer for the first layer and 3 and 3 in 4 rows, on edge, blossom end out, 12 to the layer for the second or last layer, 24 to the basket.

To Pack 180's. Place 3 and 3 alternately in 5 rows, on edge, blossom end out, 15 to the layer for the second or last layer, 30 to the basket.

Texas Standard Four Basket Crate: Fancy:

To Pack 48's. Place 2 and 2 alternately in 3 rows, flat, blossom end up, 6 to the layer for the first layer and 2 and 2 alternately in 3 rows, flat, blossom end up, 6 to the layer for the second or last layer, 12 to the basket.

To Pack 56's. Place 2 and 2 alternately in 4 rows, on edge, 8 to the layer for the first layer and 2 and 2 alternately in 3 rows, flat, blossom end up, 6 to the layer for the second or last layer, 14 to the basket.

To Pack 60's. Place 2 and 2 alternately in 3 rows, flat blossom end up, 6 to the layer for the first layer, and 3 and 3 alternately in 3 rows, on edge, blossom end out, 9 to the layer for the second or last layer, 15 to the basket.

To Pack 64's. Place 2 and 2 alternately in 3 rows, flat, blossom end up, 6 to the layer for the first layer, and 1 and 2 alternately in 7 rows, on edge, blossom end out, 10 to the layer, 16 to the basket.

To Pack 72's. Place 3 and 3 alternately in 3 rows, on edge, 9 to the layer, for the first layer, and 3 and 3 alternately in 3 rows, on edge, blossom end out, 9 to the layer for the second or last layer, 18 to the basket.

Choice.

To Pack 84's. Place 3 and 3 alternately in 3 rows, on edge, 9 to the layer, for the first layer, and 3 and 3 alternately in 4 rows, on edge, blossom end out, 12 to the layer for the second or last layer, 21 to the basket.

To Pack 88's. Place 3 and 3 alternately in 3 rows, on edge, 9 to the layer for the first layer and 1 and 2 alternately in 9 rows, on edge, blossom end out, 18 to the layer, 22 to the basket.

To Pack 96's. Place 3 and 3 alternately in 4 rows, on edge, 12 to the layer for the first layer, and 3 and 3 alternately in 4 rows, on edge, blossom end out, 12 to the layer for the second or last layer, 24 to the basket.

To Pack 104's. Place 1 and 2 alternately in 9 rows, on edge, 13 to the layer for the first layer, and 1 and 2 alternately in 9 rows, on edge, 13 to the layer, blossom end out, for the second or last layer, 26 to the basket. All tomatoes in the same crate or package shall be as nearly as possible of a uniform degree of ripeness.

All fruit for both fancy and choice grades must be sound and free from undesirable scars, cat faces, and damage from insects or other causes.

(c) Texas Standard Orange Grades. Texas orange, satsuma, tangerine and grape fruit grades may be four in number, namely; Fancy Bright, Bright, Fancy Russet and Russet.

Fancy Brights shall be bright color, shapely form, practically free



from any skin defects or blemishes, fine texture, reasonably thin, heavy, juicy and free from frost damage.

Brights shall show fairly bright color, texture not as fine or smooth as Fancy Brights, skin thicker, and may have other reasonable skin defects that do not affect the merchantable quality of the fruit.

Fancy Russets shall be of same general quality as Fancy Brights, except in color, which shall be "Golden" russet.

Russets shall be same general quality as Brights, except in color, which may be rusty brown, not "Golden" enough for fancy Russets.

Texas Standard Orange Packs. The Standard orange packs shall be 8 in number; namely, 96's, 126's, 150's, 176's, 200's, 216's, 252's and 288's.

To Pack 96's. Put 3 and 3 alternately in 4 rows, 4 layers high, 12 to layer.

To Pack 126's. Put 3 and 2 alternately in 5 rows, 5 layers high 13 and 12 alternately to layer.

To Pack 150's. Put 3 and 3 alternately in 5 rows, 5 layers high, 15 to the layer.

To Pack 176's. Put 4 and 3 alternately in 5 rows, 5 layers high, 18 and 17 alternately to the layer.

To Pack 200's. Put 4 and 4 alternately in 5 rows, 5 layers high, 20 to the layer.

To Pack 216's. Put 3 and 3 alternately in 6 rows, 6 layers high, 18 to the layer.

To Pack 252's. Put 4 and 3 alternately in 6 rows, 6 layers high, 21 to the layer.

To Pack 288's. Put 4 and 4 alternately in 6 rows, 6 layers high, 24 to the layer.

The Standard Satsuma and Tangerine packs shall be 7 in number; namely, 90's, 106's, 120's, 168's, 196's, 216's and 224's.

To Pack 90's. Put 3 and 3 alternately in 5 rows, 3 layers high, 15 to the layer.

To Pack 106's. Put 4 and 3 alternately in 5 rows, 3 layers high, 18 and 17 alternately to the layer.

To Pack 120's. Put 4 and 4 alternately in 5 rows, 3 layers high, 20 to the layer.

To Pack 168's. Put 4 and 3 alternately in 6 rows, 4 layers high, 21 to the layer.

To Pack 196's. Put 4 and 3 alternately in 7 rows, 4 layers high, 25 and 24 alternately to the layer.

To Pack 216's. Put 5 and 4 alternately in 6 rows, 4 layers high, 27 to the layer.

To Pack 224's. Put 4 and 4 alternately in 7 rows, 4 layers high, 28 to the layer.

All oranges, satsumas and tangerines to conform to this standard must be packed "stem-in, twist" with blossom end down in first layer and stem end down in all other layers.

The standard grapefruit packs shall be 7 in number; namely, 28's, 36's, 46's, 54's, 64's, 80's, 96's.

To Pack 28's. Put 2 and 1 alternately in 3 rows, 3 layers high, 5 and 4 alternately to the layer.

To Pack 36's. Put 2 and 2 alternately in 3 rows, 3 layers high, 6 to the layer.

To Pack 46's. Put 3 and 2 alternately in 3 rows, 3 layers high, 8 and 7 alternately to the layer.

To Pack 54's. Put 3 and 3 alternately in 3 rows, 3 layers high, 9 to the layer.

To Pack 64's. Put 2 and 2 alternately in 4 rows, 4 layers high, 8 to the layer.

To Pack 80's. Put 2 and 2 alternately in 4 rows, 5 layers high, 8 to the layer.

To Pack 96's. Put 3 and 3 alternately in 4 rows, 4 layers high, 12 to the layer.

All grapefruit to conform to this standard must be packed on edge, except the 80 pack, which should be packed flat in same manner as oranges.

Provided that in the enforcement of the above standards of grade and and pack an allowance may be made of not exceeding ten per cent difference in size between the fruit on top and in the interior of the package. And provided further that a variation of not more than three per cent of actual count may be made in the number of any kind of fruit prescribed for each particular pack. [Act April 2, 1917, ch. 181, § 2.]

**Art. 7846bb. Culls.**—Any and all fruits and vegetables for which standard "grades and packs" are established in this Act, or for which standard grades and packs may be hereafter promulgated by the Commissioner of Agriculture under the authority of this Act, that are too small in size, ill shaped, and too poor in general quality to measure up to the grades herein established, shall be classed as "culls," and shall not be shipped, unless branded "culls" and shipped in a separate consignment. [Act Sept. 20, 1917, ch. 6, § 1.]

See note under art. 7846a.

**Art. 7846c. Manufacture and sale of containers; proviso.**—That from and after the taking effect of this Act it shall be unlawful for any manufacturer of crates, boxes or baskets for the shipment of fruits and vegetables in this State to manufacture or sell any similar crate, box or basket of different size or dimensions from the standards prescribed in this Act. Provided that all manufacturers of crates, boxes and baskets in this State shall be allowed to sell all crates, boxes or baskets of a different size which they may have on hand or in stock when this law takes effect, and the penalty hereinafter provided for the violation of this Act shall not apply to manufacturers for selling crates, boxes or baskets in stock when this Act takes effect, until January 1, 1918. [Act April 2, 1917, ch. 181, § 3.]

**Art. 7846d. Commissioner of Agriculture shall enforce act and make rules and regulations, etc.**—The Commissioner of Agriculture is hereby authorized and empowered to enforce all the provisions of this Act, and he shall promulgate and publish all necessary rules and regulations for the enforcement of this law, and such other information as will aid fruit and truck growers and the manufacturers of containers in complying with the provisions of this Act. [Id., § 4.]

**Art. 7846e. Appointment of inspectors; expense; certificate of inspection.**—It shall be the duty of the Commissioner of Agriculture to appoint inspectors to inspect fruits and vegetables at the different shipping or loading stations in this State when called upon by the growers, shippers or shippers' agents representing the growers, and the expenses of such inspectors shall be paid by said growers, shippers or shipper's agents where two or more shipper's agents are operating at the same shipping point and one of them requests a State Inspector and such inspector is appointed by the Commissioner of Agriculture, each shipping agency at said shipping point shall be required to come under the State Inspection and each shall pay his pro rata share of the expense of inspection.

The Commissioner of Agriculture shall furnish a blank form of certificate to all State Inspectors, to be filled out by them to accompany each car load of fruits and vegetables where State inspection is enforced. Said certificate shall contain the name and number of the car, the kind and grade of the fruits or vegetables, and number of packages contained, the date of shipment and name of the inspector, together with the words, "Graded and Packed under State Inspection." [Id., § 5.]

**Art. 7846f. Commissioner of Agriculture may promulgate other standards of containers, packs, and grades.**—The Commissioner of Agriculture is hereby authorized and empowered to promulgate and publish other standards of "containers, packs and grades," conform to such standards as may hereafter be promulgated and established by the Secretary of Agriculture in pursuance of act of Congress conferring such authority upon the Secretary of Agriculture. The Commissioner of Agriculture may also promulgate and publish other standards of "containers, packs and grades," when in his judgment there is a general public demand for the promulgation of such "containers, packs and grades," and the best interest of the fruit and truck growers of the State will be served by the establishment of such standards. [Id., § 6.]

**Note.**—Sections 7 and 8 impose criminal penalties for violation of the act and are set forth post as arts. 993½ and 993½a of the Penal Code.

**Art. 7846g. Partial invalidity.**—The holding of any section or any provision of this Act, void or invalid, by any court of competent jurisdiction in this State shall in no wise vitiate or invalidate any other section or provision of this Act. [Id., § 9.]

## TITLE 135

## WILLS

Art.		Art.	
7855.	Persons competent to make a will.	7874.	To be recorded, etc.
7856.	What may be devised, etc., by will.	7875.	Foreign wills.
7857.	Requisites of a will.	7877.	Shall take effect, etc.
7858.	Will wholly written by testator.	7878.	Shall operate as notice.
7859.	Revocation of written will.	7878a.	Sale by foreign executor or trustee under power in will.
7866.	Children born after making of will.	7878b.	Validation of sales previously made.
7867.	The same.		
7872.	Husband or wife may authorize sur- vivor to manage separate estate.		

**Article 7855. [5333] Persons competent to make a will.**

**Mental capacity.**—Facts which must be proved, see art. 3271 and notes.

If, at the execution of a will, testator did not have sufficient mental capacity to understand what he was doing, and the nature and extent of his property, and the objects of his bounty, it should not be allowed to stand. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Testamentary incapacity implies the want of intelligent mental power. *Scott v. Townsend*, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

That testator at the time of the execution of his will labored under the delusion of having made advancements, when he had made none, does not alone raise the issue of insane delusions. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

Instruction as to testamentary capacity held not erroneous as requiring a higher degree of mental capacity than is required by law. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

**Undue influence.**—The undue influence which will vitiate a will must be exercised at the time of the making of the will. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

"Undue influence" means substantially such power or control of the mind and conduct of one person by another as in some measure destroys the free agency of the person upon whom such influence is exercised, and prevents the exercise of that discretion which the law requires of testator when executing his will. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

The term "undue influence" means that testator's volition and free agency have been overcome by importunities and arguments of the person charged to induce testator to make the will. *Mayes v. Mayes* (Civ. App.) 159 S. W. 919.

Undue influence cannot be predicated alone upon the fact that the will is unfair or unjust, and consequently unnatural, but there must be also some evidence that some person in a position to exercise influence over the mind of testator unduly exercised it. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Undue influence held of itself to imply the existence of a mind strong enough to make a valid will, if unhindered by dominant influence, and, although the mind is not reduced to a state of incapacity, to be shown if as a result of its exertion independence of will and action are subjected and surrendered. *Scott v. Townsend*, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

Persuasion, entreaty, and the like are not alone sufficient to set aside a will on the ground of undue influence. *Rounds v. Coleman* (Civ. App.) 189 S. W. 1086.

Undue influence must be exerted at the time of making the will. *Id.*

On issue of undue influence, the physical and mental weakness of testatrix, her age, etc., might be considered in determining whether her will was of sufficient strength to make the instrument her act and deed. *Id.*

**Art. 7856. [5334] What may be devised, etc., by will.**

Cited, *Anderson v. Menefee* (Civ. App.) 174 S. W. 904.

**Art. 7857. [5335] Requisites of a will.**

Cited, *Kell v. Ross* (Civ. App.) 175 S. W. 752.

**Testamentary intent.**—Whenever a person deceased has executed a paper which does not upon its face clearly evidence a testamentary character, the courts cannot transform it into a will by the aid of parol evidence. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Parol evidence showing the situation of the testator or the surrounding circumstances at the time of executing the will is admissible only after the court has decided that the instrument was executed with a testamentary intent, and therefore constitutes a will, and is not admissible to show the character of the instrument. *Id.*

Under this article, parol evidence as to the testator's intent is not admissible, except to explain a latent ambiguity, which can never arise as to the question of testamentary intent. *Id.*

A paper asking B. and A. to accept this, and a note payable to them "15 after date," both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and

B.'s name, did not show an intent to make a testamentary disposition, the criterion of which is whether by intendment it takes effect at the maker's death, vesting no earlier interest in the beneficiary. *Id.*

**Form of instrument—Deed or will.**—An instrument purporting to transfer property from a husband to his wife held a deed and not a will. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

In case of doubt, a deed should be construed to be a conveyance, where that will make it operative, and not as a will which would avoid it. *Id.*

An instrument, in form of a deed executed, recorded, and delivered, will not be construed to be a will because of a provision that the grantors should occupy the land until their death. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Emerson v. Rice* (Civ. App.) 165 S. W. 471.

An instrument whereby a husband conveyed all his property to his wife and children with the right to control the property for his life held a deed, within Rev. St. 1911, art. 1111, and not a will. *Low v. Low* (Civ. App.) 172 S. W. 590.

The court, in determining whether an instrument disposing of property is a deed or will, will give effect to the intention of the maker. *Id.*

Instruments conveying a present interest are deeds, and not wills, and the grantor can in no way impair or destroy their effect. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

**Attestation.**—Papers alleged to constitute a testamentary disposition of property, which were not attested, were insufficient as a formal will under this article. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

**Signature of testator.**—Under this article, an instrument was not valid as a will, where it was not signed with testator's name by himself or by some one else by his direction, though his name was recited in its body. *Armendariz de Acosta v. Cadena* (Civ. App.) 165 S. W. 555.

### Art. 7858. [5336] Will wholly written by testator.

**In general.**—An envelope on which was written "Notes" and B.'s name, a paper inclosed asking B. and A. to accept this, and a note to A. and B. also inclosed, both signed by V., in whose handwriting all was written, except the printed portion of the note, did not constitute a holographic will, because not "wholly written by the testator," as required by this article. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Where a printed form is used in writing a will, so that it consists partly of the printing and partly of the clauses written by the testator, no part of it can be admitted to probate as his holographic will under this article. *Id.*

Evidence in a will contest held to show that the will propounded for probate was in the handwriting of the testatrix. *Rounds v. Coleman* (Civ. App.) 189 S. W. 1086.

### Art. 7859. [5337] Revocation of written will.

**In general.**—No valid written will can be revoked, except in one of the modes pointed out by the statute. *Evans v. Evans* (Civ. App.) 186 S. W. 815.

**Subsequent will.**—If a will leaving a certain sum to G. and the rest to testator's heirs was executed after the execution of an alleged will, consisting of a letter and a note to B. and A., both signed by testator, it had the effect of revoking such alleged will, if any there was, though it was claimed that such was not testator's intention. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

**Joint will.**—A joint will executed by husband and wife, which gives to the survivor a life estate in the entire property, is executed on a valid consideration, and the husband probating it on the death of the wife acquiescing in its provisions and taking possession of the property cannot revoke it. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

### Art. 7866. [5344] Children born after making a will.

**In general.**—Child adopted by testator under Rev. St. 1911, arts. 1, 2, subsequent to the execution of his will, was not a child within articles 7866, 7867, and not entitled to inherit any of testator's property. *Evans v. Evans* (Civ. App.) 186 S. W. 815.

### Art. 7867. [5345] The same.

**In general.**—Child adopted by testator under Rev. St. 1911, arts. 1, 2, subsequent to the execution of his will, was not a child within articles 7866, 7867, and not entitled to inherit any of testator's property. *Evans v. Evans* (Civ. App.) 186 S. W. 815.

### Art. 7872. [5350] Husband or wife may authorize survivor to manage separate estate.

See notes under title 52, chapters 12 and 14.

### Art. 7874. [5352] To be recorded, etc.

**Conclusiveness of record—Bona fide purchasers.**—Where a joint and mutual will executed by husband and wife was probated by the husband surviving and he took possession of the property given him for life, with remainder to their daughters, a woman subsequently marrying him, under an agreement by him to convey to her his interest, was

chargeable with notice of the will, and not an innocent purchaser for value. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

**Art. 7875. [5353] How foreign will may be proved.**

**Purpose of act.**—Purpose of this article and art. 7877, is to permit one owning land under will probated in sister state to preserve muniment of title without probating will, under article 3276. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**Effect of probating and recording.**—The probating and recording in Texas of a foreign will, was evidence of the death of the testator. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

**Art. 7877. [5355] Shall take effect, when.**

**In general.**—Where a foreign will properly probated has been duly recorded as required by art. 7875, the title to the property of testator passes, under this article to the devisees without proof of death, heirship, or any other thing than the identity of the devisees, except in the event of a contest within four years, under article 7875. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

**Purpose of act.**—Purpose of this article and art. 7875, is to permit one owning land under will probated in sister state to preserve muniment of title without probating will, under article 3276. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**Art. 7878. [5356] Shall operate as notice, etc.**

Cited, *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

**Art. 7878a. Sale by foreign executor or trustee under power in will.**—When any foreign will, filed and recorded in this State, as authorized by Articles 7875, 7876, 7877 and 7878, Revised Civil Statutes, 1911, power is given to an executor or trustee to sell any real or personal property situated in this state, no order of court shall be necessary to authorize such executor or trustee to make such sale and execute proper conveyance, and whenever any particular directions are given by a testator in any such will respecting the sale of any such property situated in this state, belonging to his estate, the same shall be followed unless such directions have been annulled or suspended by order of a court of competent jurisdiction. [Act March 22, 1915, ch. 69, § 1.]

**Explanatory.**—This act took effect 90 days after March 20, 1915, the date of adjournment of the legislature. The act amends "Chapter 1, Title 135, of the Revised Civil Statutes of Texas, 1911, relating to wills, by adding thereto article 7878a and 7878b," etc.

**Art. 7878b. Validation of sales previously made.**—All sales and conveyances of real and personal property within this state which have been heretofore made by executors or trustees under foreign wills, duly filed and recorded, as provided in Articles 7875, 7876, 7877, and 7878, Revised Civil Statutes, 1911, where such wills confer upon the executors or trustees the power to sell such real or personal property, be and the same are hereby validated, and the record of such conveyance or releases heretofore made shall have the same effect as if they were made and recorded after the passage of this Act, and that all laws and parts of laws in conflict herewith are hereby in all things repealed. [Id.]

DECISIONS RELATING TO TOPIC IN GENERAL

**3. Contracts to devise or bequeath.**—Under invalid deed of adoption, treated as a contract to leave property to the child attempted to be adopted, held that he was entitled to the amount of property which he would have received if he had been a coheir with the other legal heirs, plus \$1,000. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

Instrument attempting to adopt a child, but ineffective as such, held a valid contract to leave a portion of the property of the makers to such child. *Id.*

A contract by which parties agree to leave a portion of their property to another, upon compliance therewith by the beneficiary, is enforceable in equity. *Id.*

A contract upon a valuable consideration that one of the parties will, at his death, leave property to the other is valid and enforceable. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

The rights of one to whom an intestate had agreed to leave all of his property upon his death was subject to the right of administration upon the estate if necessity therefor

existed, and hence he was not entitled to possession of the Intestate's property as against the administrator. *Id.*

A valid contract to devise or bequeath property to another is enforceable. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

An agreement to make a will in return for services must be fully and satisfactorily proved. *Dyess v. Rowe* (Civ. App.) 177 S. W. 1001.

In an action for breach of an agreement to make a will in claimant's favor, evidence held insufficient to establish any agreement under which claimant rendered services. *Id.*

Where deceased breached a contract to make a will in consideration of services, suit may be maintained either for specific performance or on a quantum meruit. *Id.*

Contracts to pay for services rendered by bequest are subject to same rules of construction as contracts generally. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

Courts require more satisfactory evidence to establish agreements to devise land in consideration of personal services than usually accepted as sufficient proof of contracts generally. *Id.*

Measure of damages for breach of a contract to devise land is same as for breach of contract to convey, which ordinarily is value of land. *Id.*

In an action against the estate of a decedent, evidence held insufficient to establish an alleged express agreement of decedent to devise land to plaintiff in consideration of personal services to be rendered. *Id.*

A contract with mother that, in consideration of her surrendering custody and service of her minor child, the other will educate minor and leave him all property possessed at death, is valid, and may be specifically enforced by minor where no statute is contravened. *Cubit v. Jackson* (Civ. App.) 194 S. W. 594.

**6. Reasonableness.**—Unreasonableness of a proposed will, in view of testator's family relations, even in the absence of explanation, is insufficient to justify setting it aside. *Mayes v. Mayes* (Civ. App.) 159 S. W. 919.

When a will has been properly executed, it ought not to be set aside because the disposition made is unequal or unfair. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

**8. Validity of bequests in general.**—The right of the owner of property to dispose of it by will should be as jealously guarded as any other property right. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Invalidity of provisions of testator's will regarding his daughters as violating the rule against perpetuities held to invalidate the whole will. *Anderson v. Menefee* (Civ. App.) 174 S. W. 904.

The devise and bequest of the residue of a testatrix's estate to a college to erect a main building and dormitory, and any balance to constitute a permanent fund for the college to be used in the same manner as the present permanent fund of such institution as directed by a named will, held valid. *McKnight v. Cage* (Civ. App.) 183 S. W. 854.

A testator can dispose of his property by will in any manner he sees fit, provided he does not contravene the law of the state. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

**11. Construction—Law governing.**—In construing a will the intent of the testator as expressed in the whole instrument, when read in the light of the circumstances surrounding the testator when the will was written, must govern. *Lindsey v. Rose* (Civ. App.) 175 S. W. 829.

Intention of testator manifested by language of will as a whole controls any particular paragraph. *Johnston v. Reyes* (Civ. App.) 183 S. W. 7.

A testator's intention must be gathered from the context of the will and the language used to express his intention. *Hunting v. Jones* (Civ. App.) 183 S. W. 858.

The entire will must be looked to to ascertain the testator's intention, and, if possible, each clause must be construed so as to harmonize with all other clauses. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

**12. — Intention of testator.**—It is the duty of courts to construe a will so as to carry into effect the will of the testator. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

A cardinal rule in the interpretation of wills is that the intent of the testator is the object to be ascertained. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

**13. — Language.**—In construing an alleged will, consisting of a writing asking B. and A. to "please except this," and a note to them, both signed by V., and inclosed in a sealed envelope, the word "except" will be treated as meaning "accept." *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Language of will held assumed to have been used in usual and ordinary sense, unless a different sense clearly appears to have been intended. *Hunting v. Jones* (Civ. App.) 183 S. W. 858.

Words in a will are to be construed in their ordinary meaning, unless the context shows that a different meaning should be given. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

**15. — Instruments construed together.**—A note which was found with a letter asking the payees to accept "this," in a sealed envelope, indorsed "Notes," was not incorporated into the letter by reference, so as to constitute a will, as the reference was too indefinite and ambiguous, and required parol evidence to explain it. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

In order to incorporate a separate instrument into a will by reference, it must be in existence at the time of the execution of the will, which fact must appear upon its face, and the instrument intended must be described in clear and definite terms. *Id.*

If parol evidence was admissible to show that a writing asking B. and A. to accept this, and a note to them both signed by V., were found together in a sealed envelope, and if the note was properly incorporated into the writing by reference, then all three were

to be considered and construed together in determining whether they could be probated as a will. *Id.*

16. — **Time of speaking.**—A will speaks from the death of testator, not as of the date of its execution. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

17. — **Evidence in aid of.**—Where plaintiffs claimed that as heirs of testatrix they were entitled to her interest in a banking firm, evidence of the value of testatrix's estate held admissible to show that they were entitled to no such interest, for otherwise there would be insufficient funds to discharge specific bequests. *McKnight v. Cage* (Civ. App.) 183 S. W. 854.

19. **Devisees and legatees—Heirs.**—Under an agreement relating to the dissolution of the partnership, incorporated into a will, held, that heirs of a deceased member were not entitled to the member's interest; the agreement providing that it might go to legal representatives as well as heirs. *McKnight v. Cage* (Civ. App.) 183 S. W. 854.

Words "heirs," "heirs of the body," etc., held words of limitation with well-defined and fixed meaning and as respects real estate to be understood in a technical sense, unless explained by other words or the context. *Hunting v. Jones* (Civ. App.) 183 S. W. 858.

A clause in a will held to give each group of children by different wives one-half of testator's interest, excluding the community interest of his first wife, in order to prevent disinheritance of some of her children. *Cox v. George* (Civ. App.) 184 S. W. 326.

In a will giving the property to the daughter of testatrix in fee, but, if she should die without heirs of her own, then to another, the word "heirs" means children. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

The word "heirs" as a word of description will not always be taken in its strict legal significance, where testator's intention to use it in a different sense is shown, and it may be used to describe those who answer to the description at a specified time after testator's death. *Craig v. McFadden* (Civ. App.) 191 S. W. 203.

20. — **Classes.**—Under a will devising property to the children of testatrix's child, only the children in being or en ventre sa mere at the time of testatrix's death would take under the will. *James v. James* (Civ. App.) 164 S. W. 47.

A class in the law of wills is where several persons, answering the same description, sustain the same relation to the legacy, so that one word describes them all; each taking an equal share in the property originally and absolutely. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

Gifts to a class, as the term is used in construing wills, refers to persons in the aggregate bearing a certain relationship to testator or each other, and a devise to part of a class will not constitute the favored members a class in legal contemplation, unless the will expressly declares the individuals are to enjoy the right of survivorship. *Id.*

Where testator's will read that it devised to his brothers (naming two of them) all his property, such will did not make a devise to a class, and, where one devisee predeceased testator, the surviving brother did not take the entire property. *Id.*

24. **Survivorship.**—Where devise is made to two or more persons as class, and one or more die before testator, surviving legatee or legatees take testator's entire estate, including such part as the will bequeathed to the legatee who predeceased testator. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

25. **Description of property.**—The courts favor a construction of a general disposition of property of which the testator owns only a share which disposes of only that share. *Cox v. George* (Civ. App.) 184 S. W. 326.

27. — **Community property.**—Where a will is uncertain as to whether testator disposed only of his own property or included that which belonged to his wife, the will will be construed to simply dispose of his estate, and the wife, taking under the will, does not thereby relinquish her fee-simple title to her community share. *Gulf, C. & S. F. Ry. Co. v. Brandenburg* (Civ. App.) 167 S. W. 170.

A will whereby testator "lent" unto his wife for life all of his estate, and after her death all his property should be divided among his legal heirs, disposed only of his community interest in the estate, and the wife, electing to take under the will, did not relinquish her fee-simple title to her community share. *Id.*

Will, though disposing of community interest of both husband and wife in other property, held to dispose of only testator's one-half of "my personal property not appropriated or described" and "my money on deposit." *Payne v. Farley* (Civ. App.) 178 S. W. 793.

A devise by husband, as "my real estate," of community lands previously devised by wife, held to be a devise of his own interest only under rule that court will lean as far as possible in favor of construction which shows intention to convey only testator's interest. *Avery v. Johnson* (Sup.) 192 S. W. 542.

28. **Estates created—Limitation over.**—A bequest to the husband of testator's incompetent daughter, M., should there be one, held not a condition, on the happening of which the estate in remainder was to vest in the children of testator's brother, but a limitation so that, on the daughter dying without husband and without issue, there was no intestacy as to the remainder of the estate. *Lewis v. Walker* (Civ. App.) 162 S. W. 30.

A will, which, after creating trust for particular purpose, gave residuary estate to wife for life, with remainder to children, the wife having power to sell or incur it with consent of majority of children held to create a remainder in the children. *Ward v. Caples* (Civ. App.) 170 S. W. 816, judgment affirmed *Caples v. Ward* (Sup.) 179 S. W. 856.

A will giving property in fee with a conditional gift to another, held to give property to the other on condition the former left no surviving children. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

The absolute estate in fee granted by one clause of a will, held limited by a following clause granting the property to another, on death without issue of first taker. *Id.*



29. — **Fee simple.**—A will giving testator's entire property to his wife in the first clause, and thereafter providing that whatever might be left at her death should be equally divided between testator's and her relatives, but that she should have free power of disposition, did not limit her rights in the property to a life estate, and the relatives could not pursue the proceeds of the property sold by the wife. *Feebles v. Slaughter* (Civ. App.) 182 S. W. 10.

A will leaving property to a legatee and "in case she dies" to others held to give a fee to the legatee where she survives testator. *Johnston v. Reyes* (Civ. App.) 183 S. W. 7.

A will giving property to testatrix's daughter, with a conditional gift of the property or "the residue of the same" to another, held to give the daughter the absolute power to dispose of the property in her lifetime. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

The estate created by a will giving the property to a daughter and her heirs in fee, with a provision that, if she die without children, it or the residue shall go to another, is a qualified fee. *Id.*

30. — **Rule in Shelley's Case.**—Where the testator devises a life estate in lands to his son and the remainder to his heirs, and his heirs predecease the devisee, the life tenant takes the fee under the rule in Shelley's Case. *Reeves v. Simpson* (Civ. App.) 182 S. W. 68.

Will devising land to testator's son during his lifetime and at his death to revert to "his heirs by his present wife," held under the rule in Shelley's Case to give the son a fee-simple title. *Hunting v. Jones* (Civ. App.) 183 S. W. 858.

Devise for life with remainder to heirs whether to heirs generally or to heirs of the body general or special, held to vest fee-simple title in the first taker. *Id.*

31. — **Life estate.**—Will construed, and held to vest in testatrix's stepson an estate for life in her homestead not confined to his personal use, so that on his abandonment of the property as a home it was subject to his debts. *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458.

31½. **Use and Occupation.**—A devise of the use and occupation of land passes an estate therein not confined to the devisee's personal use unless the context requires it. *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458.

32. **Vested and contingent estates.**—Where a will leaves in doubt whether a devise or bequest is so remote as to violate the rule against perpetuities, the doubt will be resolved to vest the title at the earliest possible moment so as to uphold the will. *Anderson v. Menefee* (Civ. App.) 174 S. W. 904.

General devise to a wife for life with full power of disposition held to render remaindermen's interests contingent and subject to defeasance. *Young v. Campbell* (Civ. App.) 175 S. W. 1100.

A remainder is vested where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate. *Caples v. Ward* (Sup.) 179 S. W. 856, affirming judgment *Ward v. Caples* (Civ. App.) 170 S. W. 816.

Where testator bequeathed his residuary estate for life, with remainder over to his children, directing that the descendants of any remainderman dying before the life tenant should succeed to the remainderman's share, such direction will be construed to prevent lapsing of the remaindermen's legacies, and not affecting the vested character of the remainders. *Id.*

Where testator bequeathed his residuary estate for life, with remainder over to his five children, the life tenant being granted power of disposition with the consent of the children, the remainder of a child was nevertheless vested. *Id.*

The law will not construe a remainder as contingent, where it can reasonably be taken as vested. *Id.*

The contingency that the death of a remainderman before the life tenant may prevent such remainderman from coming into possession of his interest does not render the remainder contingent. *Id.*

38. **Testamentary trusts—Creation.**—Under will giving residuary estate to wife for life, with remainder to children, and providing that wife should manage the property, and might sell or encumber it with the consent of a majority of the children, held, that there was no trust relation preventing the sale of a child's interest under execution. *Ward v. Caples* (Civ. App.) 170 S. W. 816, judgment affirmed *Caples v. Ward* (Sup.) 179 S. W. 856.

A will and codicil held to create a spendthrift trust in favor of plaintiff's son, which was inalienable and not liable for his debts. *Lindsey v. Rose* (Civ. App.) 175 S. W. 829.

40. — **Construction.**—A will and codicil creating a spendthrift trust for the benefit of testator's son for life held, under the circumstances, to give the property after the termination of the trust to testator's collateral relatives. *Lindsey v. Rose* (Civ. App.) 175 S. W. 829.

A codicil to a will, creating a spendthrift trust for a period of 25 years, which continued the "trusts herein created" for the life of the beneficiary of the spendthrift trust, applied to that trust. *Id.*

A will and codicil, creating a spendthrift trust for testator's son, held to show an intent to give the property thereafter undiminished by any act of the son, so that the son's creditors could not levy thereon, though the property was to go to the son's heirs. *Id.*

Where a will devised property in trust for the benefit of all children lawfully born to testator's son, the trust was not executed; no time being stated for the ascertainment of the children of the class. *Reeves v. Simpson* (Civ. App.) 182 S. W. 68.

A will devising lands to trustees to control and manage the property and to pay the income for the support of a son and his family, the remainder on his death to the son's heirs, does not create a life estate in the son, but he is only a beneficiary of the trust. *Id.*

Will giving property in fee to heirs of testator's son, and other property to granddaughter and in case she dies to others, and placing "this property bequeathed" in trust, creates trust only as to property left to granddaughter in case of her death before testator. *Johnston v. Reyes* (Civ. App.) 183 S. W. 7.

40½. — **Rights and duties of trustee.**—Where a will expressly or by necessary implication creates trusts and imposes on the executor duties performed by trustee, he takes such title as is requisite. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

Will duly probated in a sister state held to vest title to real estate in executor, as trustee, and he could, as trustee, maintain trespass to try title and for damages. *Id.*

Under will devising all estate of testatrix in trust to apply net income for maintenance of a sister during her natural life, and for the payment of expenses of her last illness, trustee held liable for the reasonable expenses during the sister's last illness, to be paid out of estate before vesting remainder in residuary legatee. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

41. **Powers—Alienation.**—Where testator's will gave his wife a life estate, with remainder to their relatives, and full power to control and dispose of the property, the wife's acts of disposition during her life by gift cut off the remaindermen's contingent right. *Feegles v. Slaughter* (Civ. App.) 182 S. W. 10.

Under a will authorizing trustees to sell either for yearly rent or a gross sum, or partly for each, the trust estate cannot be conveyed except for a consideration reasonably proportional to its value. *Slade & Bassett v. Crum* (Civ. App.) 193 S. W. 723.

A vendor's title was defective where the abstract showed a prior conveyance from testamentary trustees for a \$1 consideration and a supplementary conveyance for further unnamed considerations where such trustees could only sell for the property's reasonable value. *Id.*

Clauses of will granting estate to wife, with remainder should property be undisposed of on her death, held to empower wife to sell or transfer all notes and other property of the estate. *Johnson v. Kirby* (Civ. App.) 193 S. W. 1074.

48. **Rights of devisees and legatees.**—Where decedent, after having converted V.'s interest in testatrix's estate, himself bequeathed a legacy to V. from his own estate more than sufficient to satisfy his indebtedness to her, but also made bequests to others to whom he was neither related nor indebted, the bequest should be regarded as satisfying the debt. *Pitts v. Van Orden* (Civ. App.) 158 S. W. 1043.

51. **Specific bequest or devise.**—If there is insufficient land to satisfy both general and specific devises, the former is subject to abatement for satisfaction of the latter. *Avery v. Johnson* (Sup.) 192 S. W. 542.

52. **Lapse of legacy.**—Wills of husband and wife killed in a common catastrophe made each the primary beneficiary of the other, and their foster son the secondary beneficiary. There being no evidence as to which died first, held, that the son would take as primary beneficiary to give effect to the wills. *Fitzgerald v. Ayres* (Civ. App.) 179 S. W. 289.

55. **Election—Acts constituting.**—Wife held not to have elected to take life interest in less than one-half of land given her by will in lieu of her community interest. *Payne v. Farley* (Civ. App.) 178 S. W. 793.

Whether widow given rent of community property for life and furniture in hotel had elected to take under the will, where she and devisee continued to live on the property, held for the jury. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

An election by a widow to take under her husband's will in lieu of her community and homestead rights must be unequivocal and with the intention to make an election. *Id.*

59. **Lapsed devises and bequests.**—Where devise is made to two or more persons, and one or more die before testator, there being no words of survivorship in will, property going by will to deceased person or persons becomes part of testator's undevisee estate and goes to his heirs. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

61. **Mutual wills.**—A husband and wife may make a joint and mutual will containing reciprocal obligations. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

A joint and mutual will executed by a husband and wife in consummation of an oral agreement between them for the equitable disposition of their property, which gives to the survivor their property for life with remainder to their daughters, is not void if regarded as a contract between husband and wife, but is enforceable after the death of the wife acquiescing therein, on principles of equity. *Id.*

Where a joint and mutual will executed by husband and wife, which gave to the survivor all their property for life with remainder to their daughters, was executed in consummation of a parol agreement between them to make an equitable disposition of their property, and the husband on the death of the wife probated the will and took possession of the property devised thereby, he was estopped from thereafter disregarding the will. *Id.*

## TITLE 136

## WOOL GROWING INTERESTS

## Articles 7878a-7886g. Vernon's Sayles' Civ. St. 1914.

Act March 23, 1915, c. 111, p. 167 (set forth ante as art. 7314), in its title purports to repeal "the law passed by the Thirty-second Legislature relative to appointing inspectors, and the eradication of scab," but the enacting part contains no more than a general repeal of all laws and parts of laws in conflict. It would seem, however, that the above sections and the subsequent acts amendatory thereof were superseded.

The legislature, in the 1915 session, created two new sections to be appended to the preceding title, to be designated as articles 7878a and 7878b.

## FINAL TITLE

## GENERAL PROVISIONS

Sec.	Sec.
2. Revised Civil Statutes, how known and cited.	16. Shall be construed as continuation of former laws, etc.
3. To be liberally construed.	17. Laws of the thirty-second legislature not affected.
4. Repealing clause.	19. Take effect, when.
7. Validating and legalizing statutes not repealed.	

## Section 2. Revised Civil Statutes, how known and cited.

**Mode of amendment.**—Article of Revised Statutes referred to by number and amended to read as set forth in amendatory act held to take the place in the Revised Statutes of the superseded article. *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504.

## Sec. 3. To be liberally construed.

Cited, *International & G. N. R. Co. v. Boles* (Civ. App.) 161 S. W. 914; *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508; *Ogburn Gravel Co. v. Waterson Co.* (Civ. App.) 190 S. W. 205.

**Mechanics' liens.**—Rev. St. 1911, arts. 5621, 5622, giving a mechanic's lien upon the improvements precedence over prior liens on the land, and authorizing the removal of such improvements, are in derogation of the common law, but, being intended to secure mechanics and materialmen in their pay, and under this article, should be liberally construed to effect the purpose. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

**Municipal charter.**—Notwithstanding this article, power of municipality to enact ordinance is to be strictly construed, especially where object may work deprivation of citizens' life, liberty, property, privileges, or immunities. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

## Sec. 4. Repealing clause.

**In general.**—Where Revised Statutes of 1895 and 1911 each contained a repealing clause, a law enacted in 1884 (*Gammel's Laws Tex.*, vol. 9, pp. 600-602), which was not carried into either Code or in either case among the exceptions to the repealing clause, was repealed. *Anderson v. Engler* (Civ. App.) 184 S. W. 309.

## Sec. 7. Validating and legalizing statutes not repealed.

Cited, *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

**Acts enumerated.**—Act 1871, ch. 56, validating surveys made under land certificates (*Paschel's Dig.* art. 7089). See *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

## Sec. 16. Shall be construed as continuation of former law, etc.

Cited, *Moore v. State* (Sup.) 181 S. W. 438 (in dissenting opinion).

**Continuation of acts.**—Acts 31st Leg. (2d Called Sess.) c. 14, relative to the improvement of streets, alleys, etc., was in full force after the adoption of the Revised

Statutes, and the submission of the question of adopting its provisions was properly had under section 11 thereof instead of under articles 1006-1017 of the Revised Statutes. *Lindsey v. City of Nacogdoches* (Civ. App.) 169 S. W. 1126.

This article, under Const. art. 3, §§ 35, 36, 43, held not to enact or re-enact Acts 31st Leg. c. 108, § 55 (Rev. St. 1911, art. 4955), so as to make it effectual as to all insurance companies. *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

**Effect as to construction.**—When the meaning and intent of a revision or codification of the statutes is not plain, resort may be had to the original acts in order to arrive at a correct construction of the provisions. *Stevens v. State*, 70 Cr. R. 565, 159 S. W. 505.

Where the Legislature does not change a statute in enacting the Revised Statutes, it is presumed that it acquiesced in the construction of the statute by existing decisions of the appellate courts. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

**Sec. 17. Laws of the thirty-second legislature not affected.**

Cited, *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

**Sec. 19. When to take effect.**

Cited, *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

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# APPENDIX

- I. County courts.
- II. Local road laws.
- III. Land laws.  
Decisions relating to old land laws.
- IV. Laws of the United States concern-  
ing citizens.
- V. Laws of the United States concern-  
ing naturalization.
- VI. Laws of the United States relating  
to removal of causes from state  
to federal courts.
- VIII. Boundaries of Texas.

## I. COUNTY COURTS

### AN ALPHABETICAL LIST OF COUNTIES WHOSE COURTS ARE ACTING UNDER SPECIAL LAWS ENACTED SINCE PUBLICATION OF VERNON'S SAYLES' CIVIL STATUTES 1914

- Atascosa**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Bexar**—*County Court for criminal cases created*: Act March 5, 1915, p. 78.  
See Vernon's Code Cr. Proc. 1916, arts. 104f-104r.
- Brazos**—*Jurisdiction diminished*: Act March 26, 1917, c. 96, §§ 11-14.
- Dallas**—See Arts. 1787, 1788, 1798a-1798l, Civil Statutes, ante.
- Dawson**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Dickens**—*Jurisdiction increased*: Act March 15, 1915, c. 59, p. 108.
- El Paso**—See Arts. 1811-133 to 1811-145, Civil Statutes, ante.
- Falls**—*Jurisdiction diminished*: Act March 20, 1917, c. 89, p. 243.
- Gaines**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Garza**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Hansford**—*Jurisdiction restored*: Act Feb. 13, 1917, c. 19, p. 31.
- Harris**—See Arts. 1811-53a to 1811-53p, Civil Statutes, ante; Vernon's Code  
Cr. Proc. 1916, arts. 104u-104yy.
- Hemphill**—*Jurisdiction increased*: Act March 22, 1915, c. 125, p. 192.
- Irion**—*Jurisdiction diminished*: Act March 22, 1915, c. 87, p. 139; Act March  
23, 1915, c. 115, p. 172.
- Jefferson**—See Arts. 1811-119 to 1811-132, Civil Statutes, ante; Vernon's  
Code Cr. Proc. 1916, arts. 104yyy-104zzz.
- Kendall**—*Jurisdiction restored*: Act June 4, 1915, 1st C. S., c. 27, p. 55.
- Kerr**—*Jurisdiction restored*: Act March 28, 1917, c. 107, p. 296.
- Lynn**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- McMullen**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Real**—*Jurisdiction diminished*: Act March 1, 1917, c. 53, p. 92.
- Robertson**—*Jurisdiction diminished*: Act March 26, 1917, c. 96, §§ 15-18.
- Schleicher**—*Jurisdiction diminished*: Act March 1, 1915, c. 32, p. 57.
- Sterling**—*Jurisdiction diminished*: Act March 1, 1915, c. 31, p. 56; Act March  
23, 1915, c. 116, p. 174.
- Terry**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.
- Wheeler**—*Jurisdiction increased*: Act March 22, 1915, c. 125, p. 192.
- Yoakum**—*Jurisdiction increased*: Act March 22, 1915, c. 88, p. 141.

## II. LOCAL ROAD LAWS

- Anderson**—Sp. Acts 1917, p. 78.  
**Angelina**—Sp. Acts 1915, p. 133; Sp. Acts 1917, p. 274.  
**Atascosa**—Sp. Acts 1915, p. 17.  
**Bastrop**—Acts 1917, 1st C. S., p. 301.  
**Bee**—Sp. Acts 1915, pp. 17, 158.  
**Bell**—Sp. Acts 1915, p. 132.  
**Bexar**—Sp. Acts 1917, p. 356.  
**Bosque**—Acts 1917, 1st C. S., p. 328.  
**Bowie**—Sp. Acts 1917, p. 533; Acts 1917, 1st C. S., p. 302.  
**Brazoria**—Sp. Acts 1915, pp. 61, 72.  
**Brewster**—Acts 1917, 3d C. S., p. 186.  
**Brown**—Sp. Acts 1917, p. 467.  
**Caldwell**—Sp. Acts 1915, p. 158.  
**Calhoun**—Sp. Acts 1917, p. 208.  
**Callahan**—Sp. Acts 1917, p. 247.  
**Camp**—Sp. Acts 1915, p. 140.  
**Cass**—Sp. Acts 1917, p. 451; Acts 1917, 3d C. S., p. 127.  
**Cherokee**—Sp. Acts 1917, p. 479.  
**Clay**—Sp. Acts 1915, p. 128.  
**Coleman**—Acts 1915, 1st C. S., p. 191; Acts 1917, 3d C. S., p. 176.  
**Collin**—Sp. Acts 1915, pp. 31, 127.  
**Colorado**—Sp. Acts 1915, p. 158; Sp. Acts 1917, p. 556.  
**Comal**—Sp. Acts 1915, p. 158.  
**Comanche**—Acts 1915, 1st C. S., p. 176; Acts 1917, 1st C. S., p. 390.  
**Coryell**—Sp. Acts 1915, p. 207; Sp. Acts 1917, p. 125.  
**Dallas**—Sp. Acts 1915, p. 183.  
**Denton**—Acts 1917, 1st C. S., p. 307.  
**Dickens**—Sp. Acts 1917, p. 388.  
**Duval**—Sp. Acts 1917, p. 469.  
**Eastland**—Sp. Acts 1915, pp. 29, 182; Sp. Acts 1917, p. 427.  
**Ellis**—Sp. Acts 1917, p. 532.  
**El Paso**—Sp. Acts 1915, p. 204.  
**Erath**—Sp. Acts 1917, p. 474.  
**Fannin**—Acts 1917, 1st C. S., p. 372.  
**Fayette**—Sp. Acts 1915, p. 17; Sp. Acts 1917, pp. 272, 308.  
**Franklin**—Sp. Acts 1915, p. 18.  
**Freestone**—Sp. Acts 1915, p. 274.  
**Frio**—Sp. Acts 1915, p. 17.  
**Gillespie**—Sp. Acts 1915, pp. 158, 210; Sp. Acts 1917, p. 133.  
**Grayson**—Sp. Acts 1915, pp. 73, 159; Sp. Acts 1917, p. 112.  
**Gregg**—Acts 1915, 1st C. S., p. 202.  
**Grimes**—Sp. Acts 1915, pp. 80, 158; Sp. Acts 1917, p. 313.  
**Guadalupe**—Sp. Acts 1915, p. 158.  
**Hall**—Sp. Acts 1915, p. 17.  
**Harrison**—Sp. Acts 1915, p. 25.  
**Haskell**—Sp. Acts 1917, p. 620.  
**Henderson**—Sp. Acts 1915, pp. 5, 180; Sp. Acts 1917, p. 345.  
**Hidalgo**—Sp. Acts 1915, p. 58.  
**Hill**—Sp. Acts 1915, p. 273.  
**Hopkins**—Sp. Acts 1915, pp. 28, 212; Sp. Acts 1917, p. 144.  
**Houston**—Sp. Acts 1915, p. 149; Sp. Acts 1917, p. 175; Acts 1917, 1st C. S., p. 325.  
**Hunt**—Sp. Acts 1917, p. 33.  
**Jackson**—Sp. Acts 1915, p. 158.  
**Jasper**—Sp. Acts 1917, p. 439.  
**Jim Wells**—Sp. Acts 1917, p. 253.  
**Johnson**—Sp. Acts 1915, p. 237; Sp. Acts 1917, p. 264.

- Jones**—Sp. Acts 1917, p. 620.  
**Karnes**—Sp. Acts 1917, p. 519.  
**Kent**—Sp. Acts 1917, p. 352.  
**Lamar**—Sp. Acts 1915, p. 254; Sp. Acts 1917, p. 36.  
**Lampasas**—Sp. Acts 1917, p. 312.  
**Lavaca**—Sp. Acts 1915, p. 247.  
**Lee**—Sp. Acts 1917, p. 188.  
**Leon**—Sp. Acts 1915, p. 289.  
**Live Oak**—Sp. Acts 1917, p. 93.  
**Llano**—Sp. Acts 1917, p. 12; Acts 1917, 3d C. S., p. 165.  
**McCulloch**—Sp. Acts 1917, p. 127.  
**McLennan**—Sp. Acts 1917, p. 304.  
**McMullen**—Sp. Acts 1915, p. 17.  
**Madison**—Acts 1917, 3d C. S., p. 142.  
**Marion**—Sp. Acts 1915, p. 129.  
**Mason**—Sp. Acts 1917, p. 385.  
**Maverick**—Sp. Acts 1915, p. 158.  
**Medina**—Sp. Acts 1915, p. 300.  
**Milam**—Sp. Acts 1915, p. 231; Sp. Acts 1917, p. 495.  
**Mills**—Sp. Acts 1915, p. 150.  
**Montague**—Acts 1915, 1st C. S., p. 184.  
**Morris**—Sp. Acts 1915, p. 168; Sp. Acts 1917, p. 326.  
**Newton**—Sp. Acts 1917, p. 417; Acts 1917, 3d C. S., p. 168.  
**Nolan**—Acts 1917, 1st C. S., p. 364.  
**Nueces**—Sp. Acts 1917, p. 242.  
**Rains**—Sp. Acts 1917, p. 525.  
**Red River**—Sp. Acts 1915, p. 91; Acts 1917, 3d C. S., p. 156.  
**Robertson**—Acts 1917, 1st C. S., pp. 362, 379.  
**Runnels**—Sp. Acts 1917, p. 493.  
**San Augustine**—Sp. Acts 1915, p. 69.  
**San Jacinto**—Sp. Acts 1915, p. 255.  
**San Saba**—Sp. Acts 1915, p. 131.  
**San Patricion**—Acts 1917, 3d C. S., p. 120.  
**Shelby**—Sp. Acts 1915, p. 3.  
**Smith**—Sp. Acts 1915, pp. 27, 245.  
**Stephens**—Sp. Acts 1917, p. 423.  
**Tarrant**—Sp. Acts 1915, p. 62; Sp. Acts 1917, p. 478.  
**Taylor**—Sp. Acts 1917, p. 620.  
**Titus**—Acts 1917, 3d C. S., p. 141.  
**Travis**—Acts 1915, 1st C. S., p. 195; Sp. Acts 1917, p. 369.  
**Trinity**—Sp. Acts 1917, p. 601; Acts 1917, 3d C. S., p. 178.  
**Uvalde**—Sp. Acts 1915, p. 17.  
**Van Zandt**—Sp. Acts 1915, p. 138; Sp. Acts 1917, p. 505.  
**Walker**—Acts 1915, 1st C. S., p. 182.  
**Wichita**—Sp. Acts 1917, p. 403.  
**Williamson**—Sp. Acts 1915, p. 219.  
**Wilson**—Acts 1915, 1st C. S., p. 204; Sp. Acts 1917, p. 507.  
**Wise**—Sp. Acts 1915, p. 199.  
**Wood**—Sp. Acts 1915, pp. 22, 158; Sp. Acts 1917, p. 234; Acts 1917, 1st C. S., p. 370.  
**Young**—Sp. Acts 1915, p. 266.  
**Zavala**—Sp. Acts 1917, p. 468.



## III. LAND LAWS

## Decisions Relating to Old Land Laws

Const. of Republic 1836, General Provisions, § 10, cited, *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011; *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924. Paschal's Dig. art. 7089, cited, *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

Act March 26, 1881 (Acts 17th Leg. c. 61), when construed in connection with Const. 1876, art. 7, § 6, as amended August 14, 1883, relating to school lands, held a grant in present to the unorganized counties of 300 leagues of land. *Yoakum County v. Slaughter* (Civ. App.) 160 S. W. 1175.

That a county, though created, was unorganized at the time of the passage of Act March 26, 1881 (Acts 17th Leg. c. 61), providing for the survey of school lands to be donated to unorganized counties, did not preclude its becoming a beneficiary under the grant. *Id.*

Act April 7, 1883 (Acts 18th Leg. c. 55), in so far as it attempts to grant to organized counties an interest in the original 300 leagues surveyed under Act March 26, 1881 (Acts 17th Leg. c. 61), held in violation of Const. 1876, art. 7, § 6, as amended August 14, 1883; and hence should be construed as only applicable to the 25 additional leagues surveyed under the act of 1881, but not within its terms. *Id.*

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#### IV. LAWS OF THE UNITED STATES CONCERNING CITIZENS

In addition to the laws set forth in the appendix to Vernon's Sayles' Civil Statutes 1914, the following laws have been enacted by Congress, and are set forth as they appear in the United States Compiled Statutes 1916:

**§ 3954. (R. S. § 1998, as amended, Act Aug. 22, 1912, c. 336, § 1.) Rights as citizens forfeited for desertion, or for avoiding a draft; provisions not to apply to desertions in time of peace; remission of forfeiture of rights; restrictions on enlistment in Army of deserters modified.**—Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: Provided, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: And provided further, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests: And provided further, That the provisions of section eleven hundred and eighteen of the Revised Statutes of the United States that no deserter from the military service of the United States shall be enlisted or mustered into the military service, and the provisions of section two of the act of Congress approved August first, eighteen hundred and ninety-four, entitled "An Act to regulate enlistments in the Army of the United States," shall not be construed to preclude the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, whenever the reenlistment or muster into the military service of such person or soldier shall, in view of the good conduct of such person or soldier subsequent to such desertion or service, be authorized by the Secretary of War.

Act March 3, 1865, c. 79, § 21, 13 Stat. 490. Act Aug. 22, 1912, c. 336, § 1, 37 Stat. 356. This section, as enacted in the Revised Statutes, contained only the provision preceding the provisos. Said three provisos were added, making the section read as set forth here, by amendment by Act Aug. 22, 1912, c. 336, § 1, cited above.

**§ 3958. (Act March 2, 1907, c. 2534, § 1.) Issue of passports to and protection of persons having made declaration of intention to become citizens.**—The Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: Provided, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention. (34 Stat. 1228.)

This section and the six sections next following constituted the Expatriation Act of March 2, 1907, entitled "An act in reference to the expatriation of citizens and their protection abroad."

**§ 3959. (Act March 2, 1907, c. 2534, § 2.) Expatriation of citizens; presumption as to naturalized citizens residing in foreign state.**—Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war. (34 Stat. 1228.)

See note to preceding section of this act, ante, § 3958.

**§ 3960. (Act March 2, 1907, c. 2534, § 3.) Citizenship of American women marrying foreigners.**—Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein. (34 Stat. 1228.)

See note to section 1 of this act, ante, § 3958.

**§ 3961. (Act March 2, 1907, c. 2534, § 4.) Citizenship of foreign women marrying citizens.**—Any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation. (34 Stat. 1229.)

See note to section 1 of this act, ante, § 3958.

**§ 3962. (Act March 2, 1907, c. 2534, § 5.) Citizenship of children born abroad, of alien parents, by naturalization, etc., of parent during minority of child.**—A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child: And provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States. (34 Stat. 1229.)

**§ 3963. (Act March 2, 1907, c. 2534, § 6.) Citizenship of children of citizens, born abroad, and continuing to reside abroad.**—All children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in

order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority. (34 Stat. 1229.)

See note to section 1 of this act, ante. § 3958.

§ 3964. (Act March 2, 1907, c. 2534, § 7.) **Duplicates of evidence, registration, etc., required by act, to be filed with Department of State.**—Duplicates of any evidence, registration, or other acts required by this Act shall be filed with the Department of State for record. (34 Stat. 1229.)

See note to section 1 of this act, ante. § 3958.

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## V. LAWS OF THE UNITED STATES CONCERNING NATURALIZATION

In addition to the laws set forth, in the appendix to Vernon's Sayles' Civil Statutes 1914, the following laws have been enacted by Congress, and are set forth as they appear in the United States Compiled Statutes 1916:

§ 3959a. (Act Oct. 5, 1917, c. 68.) **Repatriation of certain citizens; procedure.**—Any person formerly an American citizen, who may be deemed to have expatriated himself under the provisions of the first paragraph of section two of the act approved March second, nineteen hundred and seven, entitled "An Act in reference to the expatriation of citizens and their protection abroad," by taking, since August first, nineteen hundred and fourteen, an oath of allegiance to any foreign State engaged in war with a country with which the United States is at war, and who took such oath in order to be enabled to enlist in the armed forces of such foreign State, and who actually enlisted in such armed forces, and who has been or may be duly and honorably discharged from such armed forces, may, upon complying with the provisions of this Act, reassume and acquire the character and privileges of a citizen of the United States: Provided, however, That no obligation in the way of pensions or other grants because of service in the army or navy of any other country, or disabilities incident thereto, shall accrue to the United States.

Any such person who desires so to reacquire and reassume the character and privileges of a citizen of the United States shall, if abroad, present himself before a consular officer of the United States, or, if in the United States, before any court authorized by law to confer American citizenship upon aliens, shall offer satisfactory evidence that he comes within the terms of this Act, and shall take an oath declaring his allegiance to the United States and agreeing to support the Constitution thereof and abjuring and disclaiming allegiance to such foreign State and to every foreign prince, potentate, State, or sovereignty. The consular officer or court officer having jurisdiction shall thereupon issue in triplicate a certificate of American citizenship, giving one copy to the applicant, retaining one copy for his files, and forwarding one copy to the Secretary of Labor. Thereafter such person shall in all respects be deemed to have acquired the character and privileges of a citizen of the United States. The Secretary of State and the Secretary of Labor shall jointly issue regulations for the proper administration of this Act.

§ 4356a. (Act June 30, 1914, c. 130.) **Aliens honorably discharged from service in Navy or Marine Corps or in Revenue-Cutter Service.**—Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy or Marine Corps, and who has received therefrom an honorable discharge or an ordinary discharge, with recommendation for reenlistment, or who has completed four years in the Revenue-Cutter Service and received therefrom an honorable discharge or an ordinary discharge with recommendation for reenlistment, or who has completed four years of honorable service in the naval auxiliary service, shall be admitted to become

a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval or revenue-cutter sources of such service: Provided, That an honorable discharge from the Navy, Marine Corps, Revenue-Cutter Service, or the naval auxiliary service, or an ordinary discharge with recommendation for reenlistment, shall be accepted as proof of good moral character: Provided further, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions. (38 Stat. 392.)

§ 4361. (Act April 30, 1900, c. 339, § 100, as amended, Act May 27, 1910, c. 258, § 9.) **Residence in Hawaiian Islands equivalent to residence in United States.**—For the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

All records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the taking effect of the naturalization Act of June twenty-ninth, nineteen hundred and six, in or from any circuit court of the Territory of Hawaii, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized. (31 Stat. 161. 36 Stat. 448.)

§ 4372a. (Act June 12, 1917, c. 27, § 1.) **Amount allowed to clerk of court.**—The whole amount allowed for a fiscal year to the clerk of a court and his assistants from naturalization fees and this appropriation or any similar appropriation made hereafter shall be based upon and not exceed the one-half of the gross receipts of said clerk from naturalization fees during the fiscal year immediately preceding, unless the naturalization business of the clerk of any court during the year shall be in excess of the naturalization business of the preceding year, in which event the amount allowed may be increased to an amount equal to one-half the estimated gross receipts of the said clerk from naturalization fees during the current fiscal year.

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## VI. LAWS OF THE UNITED STATES RELATING TO REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS

The following changes have occurred in the laws on this subject since the publication of Vernon's Sayles' Civil Statutes 1914, and are set forth as they appear in the United States Compiled Statutes 1916:

§ 1010. (Jud. Code, § 28, as amended, Act Jan. 20, 1914, c. 11.) **Removal of suits from State to United States district courts.**—Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that

State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States. And provided further, That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

Act March 3, 1875, c. 137, § 2, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, 25 Stat. 433. Act April 5, 1910, c. 143, § 1, 36 Stat. 291. Act March 3, 1911, c. 231, § 28, 36 Stat. 1094. Act Jan. 20, 1914, c. 11, 38 Stat. 278.

This section, as enacted in the Judicial Code, was amended by Act Jan. 20, 1914, c. 11, cited above, by adding thereto the last proviso as set forth above.

**§ 1015. (Jud. Code, § 33, as amended, Act Aug. 23, 1916, c. 399.) Suits and prosecutions against revenue officers, etc.**—When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such

officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or any other process except *capias*, the clerk of the district court shall issue a writ of *certiorari* to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by *capias* or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on *mesne process* therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosecution may be rendered against him, with costs for the defendant.

R. S. § 643. Act March 3, 1875, c. 130, § 8, 18 Stat. 401. Act Feb. 8, 1894, c. 25, § 1, 28 Stat. 36. Act March 3, 1911, c. 231, § 33, 36 Stat. 1097. Act Aug. 23, 1916, c. 399, 39 Stat. 532.

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## VIII. BOUNDARIES OF TEXAS

### Change of Boundary

Where a dam built from the New Mexico side caused the current of the Rio Grande to shift to the Texas side, the boundary between New Mexico and Texas was not changed so as to affect the jurisdiction of the Texas courts. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.



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