western boundary of the East Texas Railroad block was the eastern boundary of the Morris and Cummins block, plaintiffs had no right, for there was no vacant land subject to location under their certificates, while if the blocks were not contiguous they were entitled to land between the blocks covered by their locations. Where the rights of parties to an action involving the title to land depend solely on location, which must be determined by the boundaries of different tracts of land, then we have what the law designates as a "case of boundary." The law provides that "the judgments of the courts of civil appeals shall be conclusive in all cases upon the facts of the case, and a judgment of such courts shall be conclusive on facts and law in the following cases, nor shall a writ of error be allowed thereto from the supreme court, to wit: * * * (2) All cases of boundary." This court has no jurisdiction to grant the writ prayed for, nor to revise, through any process, the decision of the court of civil appeals in this cause, and the application must be dismissed.

It is so ordered.

NALLE v. CITY OF AUSTIN et al.[1]

(Supreme Court of Texas. May 25, 1893.)

SUPREME COURT — JURISDICTION OF ERROR TO COURT OF CIVIL APPEALS—CONSTITUTIONAL LAW —QUORUM—DISQUALIFICATION OF JUDGE — "INTERESTED" — SPECIAL JUDGE — MUNICIPAL INDEBTEDNESS—ISSUE OF BONDS.

1. The question whether a lawful quorum of the court of civil appeals participated in the reversal and remand of a case involves the construction of the constitution of the state, within the meaning of Act April 13, 1892, (Rev. Civil St. art. 1011a, subd. 2,) conferring on the supreme court jurisdiction of error to the court of civil appeals in such cases.

2. The judge of a court, who owns taxable property in a city, is "interested" in an action against such city to cancel bonds issued thereby, within the meaning of Const. art. 5, § 11, disqualifying a judge to sit in certain cases.

3. Laws 1892, p. 32, § 40, defining the jurisdiction of the courts of civil appeals, which provides that a majority of the members of such court "shall constitute a quorum for the transaction of business," is valid, though Const. art. 5, § 6, as amended in 1892, authorizing the establishment of such courts, does not prescribe the number requisite to constitute a quorum.

4. Const. art. 5, § 11, as amended in 1892, provides that when the court of civil appeals, "or any member" thereof, shall be disqualified to try a case, that fact shall be certified to the governor, who shall appoint the requisite number of special judges to determine the case. *Held* that, as under the original section there was no provision for the appointment of a special judge except when two were disqualified, the purpose of the amendment was to meet the emergency of one judge being disqualified, and the remaining two unable to concur. The fact, therefore, that one member is disqualified to try a case does not prevent the other members from proceeding therewith.

5. Under Rev. St. art. 1043, as amended by Act April 13, 1892, providing that "in each case the supreme court shall affirm the judgment, reverse, and render the judgment which the court of civil appeals ought to have rendered, or reverse the judgment, and remand the cause to the lower court, if it appears that justice demands another trial," on error to the court of civil appeals it is the duty of the supreme court to dispose of the whole case, and reverse or affirm the judgment of the trial court, as the law may demand.

6. City Charter Austin, § 1, authorizes an annual tax, not exceeding 1 per cent., on the taxable property for the "current expenses, and for the general improvement, of the city." Section 2 authorizes the raising of money on the credit of the city, "for a specified and definite purpose, by issuing bonds or otherwise," provided that the bonded debt shall be increased beyond a certain sum only by a vote of the people. *Held* that, as section 2 confers the power to issue interest-bearing bonds, which would require an annual payment of interest, and installments to the sinking fund, the taxing power is not confined to the 1 per cent. authorized in section 1. 21 S. W. Rep. 375, affirmed.

7. City Charter Austin, § 2, which authorizes the raising of money "by issuing bonds of the city," implies the issue of bonds having the commercial quality of negotiability.

8. Where the proposition to issue city bonds submitted to a vote of the electors did not limit the rate of interest the bonds were to bear, the bonds are not invalid, because sold below par, if the discount, added to the interest expressed, does not make the rate usurious.

9. Where a city has power to create a bonded indebtedness for the construction and operation of a system to supply the city with water and light, in the absence of a clear abuse of authority, the issue of such bonds will not be restrained because the system proposed is greater than the immediate needs of the city demand.

10. The fact that a city is already supplied with water and light under an existing contract does not affect the right of the council to judge of the necessity for a new system. 21 S. W. Rep. 375, affirmed.

Error to court of civil appeals of third supreme judicial district.

Action by Joseph Nalle, for himself and others, as taxpayers, against the city of Austin and others, to cancel certain bonds, to restrain the issue of other bonds, and for other relief. A judgment sustaining a demurrer to the petition was reversed by the court of civil appeals, (21 S. W. Rep. 375,) and defendants bring error. Reversed.

Geo. F. Pendexter, D. W. Doom, Fisher & Townes, W. M. Walton, and R. H. Ward, for plaintiffs in error. O. T. Holt, Goldthwaite Ewing, and H. F. Ring, for defendant in error.

GAINES, J. This case comes to us upon a writ of error to the court of civil appeals of the third supreme judicial district, by which it is sought to review a judgment of that court reversing the judgment of the trial court, and remanding the cause for a new trial. Mr. Justice Key held himself disqualified to sit in the cause, and the judgment which is here sought to be reversed was rendered by the two other members of the court. After that judgment was rendered, the appellees, who are plaintiffs in error in this court, filed a motion for a rehearing, upon the ground, among others, that the two judges who sat in the case did not constitute a legal court, and that their action was therefore coram non judice and void. In the motion for a rehearing it was also urged that the court erred in its ruling upon the merits of the cause. The errors

[1] For opinion on rehearing, see 22 S. W. Rep. 960.

alleged in the motion for a rehearing are made the basis of the application for the writ of error.

We have first to determine whether or not we have jurisdiction of the cause. The judgment of the court of civil appeals being one which reversed the judgment of the trial court, and remanded the cause, this court has no power to review it unless the case come under some one of the eight exceptions specified in article 1011a,[1] which was made a part of the Revised Civil Statutes by the act approved April 13, 1892, which defined the jurisdiction of the supreme court. Laws 1892, p. 20. It is not claimed that the case, as originally presented in the court of civil appeals, comes under any one of the first seven exceptions, or that the disposition of it in that court "practically settled the case." But it is insisted that the questions which arose in the case after it reached the appellate court, and which grew out of the supposed disqualification of one of the judges, involve the construction of the constitution of the state, and that, therefore, this court has jurisdiction to review the entire case upon a writ of error. That the question of the legality of the court, as constituted by two of its members only, involves the construction of the constitution as well as the validity of a statute of the state, there can be no doubt. But whether the legislature intended to confer jurisdiction upon this court, when the constitutional question does not arise upon the merits of the case, but grows out of some matter of procedure in the court of civil appeals, is not so easy to determine. But from the commencement of every suit until its final termination, questions of procedure may arise, which may materially affect the result of the suit, but which are in no way involved in the intrinsic merits of the case. When such a question has been erroneously decided in the trial court the decision may be reviewed in the court of appeals, and the error may demand a reversal of the judgment. If, however, that court should affirm the judgment notwithstanding such error, this court, in a case in which that court's judgment is not made final by statute, would have jurisdiction to revise such error, and to render such judgment as that court ought to have rendered. For example, the question whether a charge is upon the weight of the evidence is not one involved in the issues made by the pleadings in the case, but it is one that affects the legal right of the parties, and, if answered in the affirmative, might be a ground for a reversal of the judgment in any court to which the case should be appealed. So, also, a question of procedure may spring up in a court of civil appeals. For example, the point may be there made that an alleged error of the trial court has not been properly assigned. Is it to be doubted that the court would have the power, in a proper case, to revise the decision by that tribunal of such a question, and to reverse its ruling, if found erroneous? If not, can such a question be distinguished from that now under consideration? Neither arises in the trial court; and if the question of a legal assignment of error be important the question of a legally-constituted tribunal to pass upon the appeal must be more so, because it affects the very life of any judgment that the court may render. If the judgment had been affirmed by the court of civil appeals, and the question whether or not a lawful quorum participated in the decision had been presented to this court in a proper manner, we could not have evaded the responsibility of deciding the question. The pleadings and the evidence and the proceedings, as they are all evolved in the progress of the cause from its commencement until its determination in the court of last resort, become a part of the case, and questions arising upon either may call for determination upon the final appeal. It follows that the case we have involves the construction of the constitution of the state, and that it comes literally within the second exception to the article of the statute above cited.

Having determined that we have jurisdiction, we come, next in order, to the question of Judge Key's disqualification. It was made a ground of the motion for rehearing filed in the court of civil appeals that Judge Key was qualified, and should have participated in the decision of the cause. In passing upon that motion the court, as constituted by the other two judges, held the contrary, upon the ground that he owned property in the city of Austin subject to taxation, and was therefore interested in the question of the legality of the tax, to be determined by the suit. This conclusion involves the further holding that section 27 of the act to define the jurisdiction of the courts of civil appeals, approved April 13, 1892, which prescribed an interest in the question as an additional ground of disqualification of a judge, was not in conflict with section 11, art. 5, of the constitution, as recently amended, which did not prescribe such interest as a disqualification. Judge Key was undoubtedly interested in the question at issue before the court. But whether section 11 of the article of the constitution just mentioned was not intended fully to define every ground of disqualification of a judge, and to take from the legisla-

[1]Art. 1011a. All causes shall be carried up to the supreme court by writs of error issuing from the supreme court to the courts of civil appeals upon final judgment, and not on judgments reversing and remanding causes except in the following cases, to wit: (1) Where the state is a party, or where the railroad commissioners are parties; (2) cases which involve the construction and application of the constitution of the United States, or of the state of Texas, or of an act of congress; (3) cases which involve the validity of a statute of the state; (4) cases involving the title to a state office; (5) cases in which a civil court of appeals overrules its own decisions, or the decision of another court of civil appeals or of the supreme court; (6) cases in which the judges of any court of civil appeals may disagree; (7) cases in which any two of the courts of civil appeals may hold differently on the same question of law; (8) when the judgment of the court of civil appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error.

ture all power to prescribe additional grounds, is a grave question. It is one, however, which we do not deem it necessary to determine.

This suit was brought by a property holder and taxpayer in the city of Austin to enjoin the collection of certain taxes for the years 1891 and 1892, which had been assessed for the purpose of paying the interest and sinking funds upon certain bonds, which it was claimed had been issued by the city for an illegal purpose. But, in addition to the injunction against the taxes, the plaintiff also sought to cancel the bonds so issued, and to restrain the issue of other bonds for the same purpose. The bonds already issued were alleged to amount to the sum of $900,000. The sum of the bonds, the issue of which was sought to be enjoined, was $500,000. If the latter obligations should be issued, they would, prima facie at least, authorize the assessment and collection of a tax upon all taxable values in the city for their payment. If their issue should be restrained, no such tax could be levied. It follows, therefore, as we think, that every holder of property in the city which is subject to taxation has not only an interest in the question to be determined by the suit, but also a direct pecuniary interest in the result. Judge Key, being the owner of taxable property in the city, was, in our opinion, disqualified to sit in the case. He was "interested" in the case, and was prohibited from sitting by section 11, art. 5, of the constitution. Without expressing either our concurrence or our disapproval of the ground upon which the court of civil appeals placed their ruling, we conclude that their decision of the question was correct.

But it is further insisted on behalf of plaintiff in error that if Judge Key was disqualified the two remaining judges did not constitute a lawful court. The contention of counsel is that under the provisions of the amended section 11, art. 5, of the constitution, when one member of the court of civil appeals is disqualified to sit in a cause, the fact should be certified to the governor, and that he shall then appoint a special judge to aid in its disposition, and that until this is done the other two members of the court have no power to proceed with the case. Still another reason for holding that two judges of the court of civil appeals cannot constitute a court for the transaction of its business has suggested itself to our minds, and, though not urged by counsel, in view of the importance of the matter, we deem it proper to dispose of it. It is involved in the main question immediately under consideration, and affects the right of any two members of any court of civil appeals in this state to hold a session of the court when the other is absent, from any cause whatever. We shall dispose of the latter question first.

Section 2 of amended article 5 of the constitution contains this provision: "The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of a case." Section 4 reads, in part, as follows: "The court of criminal appeals shall consist of three judges, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of said court." Section 6, however, simply declares that the legislature shall divide the state into districts, "and shall establish a court of civil appeals in each of said districts, which shall consist of a chief justice and two associate justices," etc., and does not prescribe the number requisite to constitute a quorum. The provision as to a quorum in the supreme court and in the court of criminal appeals, and the absence of a similar provision with reference to the courts of civil appeals, is, to say the least of it, remarkable. The sections referred to were parts of an amendment to the constitution, which was passed by the two branches of the legislature, and submitted to the people as a whole. Under these circumstances the failure to provide that two members of a court of civil appeals should make a quorum strongly tends to evince the intention that every case in that court should be decided by a full bench. There are authorities which hold, as to special tribunals, at least, that when a court is created, composed of more than one judge, and the law creating it does not prescribe that any number less than the whole may constitute a quorum, all must act in making a decision. Whether this rule should apply to superior courts may well be doubted. Section 40 of the act defining the jurisdiction of the courts of civil appeals, approved April 13, 1892, does provide that "a majority of the several courts of civil appeals shall constitute a quorum for the transaction of business." Laws 1892, p. 32. If this provision was not prohibited by the constitution, it settles the question; and notwithstanding the considerations which indicate that it was the purpose of section 6, art. 5, as amended, to require all the members of each court of civil appeals to act together in the transaction of its business, we feel constrained to hold that it was not intended to deprive the legislature of the power of establishing a different rule. The amended article 5 was adopted in order to secure a prompt disposition of causes which had been, and which should be, appealed from the trial courts. It had been found wholly impracticable to accomplish this under the original article 5 of the constitution. To secure this end the courts of civil appeals were established. It was evidently contemplated that as many as three might be necessary at the time of its adoption, and that even the three first established might be found inadequate. The great number of cases now pending in the three courts already created, and the recent legislation providing for the establishment of two in addition to those now existing, indicate that it required no great powers of prophecy to foresee the probable contingency that the new courts would be burdened with more labor than they would be able to perform. Looking, then, to the result of a rule which would require the presence of all the judges to constitute a court upon the dispatch of its

business, we cannot believe that such was the intention of the legislature which passed the amendment, or of the people who voted for its adoption. It is to be borne in mind that no provision is made for the appointment of a special judge when one of the judges is merely absent. Hence, if it should be held that a full bench is necessary to make a quorum, the result would be that in the event of the absence of one of the judges by reason of sickness, or from any other cause, the business of the court would remain in suspense until the absent member should be present. Such a rule would be fraught with mischief, and would tend to obstruct the accomplishment of the very purpose for which the courts of civil appeals were created. In this connection it is to be noted that the same legislature which passed the amendment passed the act providing that two members of the court should be a quorum. Their construction of the constitutional question, unless clearly erroneous, should be upheld.

We recur, then, to the ground on which counsel for plaintiffs in error base their argument, that the two members of the court of civil appeals who rendered the judgment here sought to be set aside were not a lawfully-constituted court. They maintain that amended section 11, art. 5, of the constitution, imperatively requires that when one of the judges of any one of the higher courts is disqualified the fact shall be certified, and the governor shall appoint a special judge in his stead; and they further contend that the intent becomes more manifest when that section is construed in connection with the section for which it was substituted. The following is a copy of so much of the original section 11, art. 5, of the constitution of 1876, as applies to the judges of the supreme court and of the court of civil appeals: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, by affinity or consanguinity, within such degree as may be prescribed by law; or where he shall have been counsel in the case. When the supreme court or appellate court, or any two of the members of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of said cause or causes." Const. 1876, art. 5, § 11; Sayles' Const. Hist. The section, as now amended, reads in part as follows: "No judge shall sit in any case wherein he may be interested, or when either of the parties may be connected with him, either by affinity or consanguinity, within such degree as may be prescribed by law, or when he shall have been counsel in the case. When the supreme court, a court of criminal appeals, the court of civil appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes." In brief, the former says that when any two members of the court are disqualified the governor shall commission the requisite number of lawyers to try and determine the cause. The latter provides that he shall appoint the requisite number if but one member of the court be disqualified. Upon first blush the literal terms of the amendment would seem to demand, and the fact of the change would indicate, that in every case in which a judge was recused a special judge should be appointed. But this construction, when the section in question is compared with other provisions in the amendment, leads to a manifest incongruity. We should bear in mind that section 11 applies, in express terms, to the supreme court and to the court of criminal appeals. The amendment, in terms equally clear, provides that two members of either of these courts shall constitute a quorum. So that if it should be held that the governor should appoint a special judge in every case in which a member of either of these two courts should be disqualified, the remaining two could not act, although they could make a decision if that member was merely absent, or saw fit, from any cause, not to take part in the decision of the case. No reason suggests itself to us for such a distinction. Why, if two members of the court make a quorum, should a third be appointed in a case in which the two may concur in a decision? There can be none. But there is a necessity for an appointment when the two judges who are qualified may disagree. This suggests the consideration which, as we think, led to the change in the section under consideration. Under the original section a special judge could be appointed only when two members of a court were disqualified; and hence there was no provision to meet the case when one was disqualified, and the other two failed to concur as to the decision of the case. The amended section obviates this difficulty by providing for an appointment when one only is disqualified. It does not follow that an appointment is to be made in every such case. The requirement is that the governor "shall commission the requisite number * * * for the trial and determination of such cause." If three were required to make a quorum, then, one being disqualified, another would be necessary to make the requisite number to decide the cause. So, also, if one be disqualified, and the other two disagree, the appointment of a special judge is requisite to enable the court to make a decision, although two may constitute a quorum. But if two be a quorum, and two be qualified, and able to agree, no additional judge is requisite to a decision of the case, although the third member of the court be recused. So construed, we see a satisfactory and sufficient reason for the change made by the amendment. Construed as requiring the appointment of a special judge in every case in which one member of either of the courts is disqualified, we perceive no sound reason for the departure from the previous law.

Though not strictly repugnant to those provisions which make two members either of the supreme court or of the court of criminal appeals a quorum to transact business, such a construction does not accord with their spirit. We conclude, therefore, that the disqualification of Judge Key did not make requisite the appointment of a special judge, and that the court composed of his two associates constituted a lawful tribunal for the trial and determination of the case.

Having acquired jurisdiction of the case by reason of the constitutional question which involves the power of two members of the court of civil appeals to render a judgment, the further question arises, whether we should retain jurisdiction for the purpose of disposing of the case upon its merits. Article 1043 of the Revised Statutes, as amended by the act approved April 13, 1892, provides that "in each case the supreme court shall affirm the judgment, reverse, and render the judgment which the court of civil appeals ought to have rendered, or reverse the judgment, and remand the cause to the lower court, if it appears that the justice of the case demands another trial." Laws 1892, p. 22. Article 1050 also provides that "all mandates from the said court shall issue to the court in which the original judgment was entered." Laws 1892, p. 23. It is evident from these provisions that it was the intention of the legislature that when a case should be brought to the court by a writ of error all questions material to the determination of the case, which should be raised upon the appeal, and properly presented to this court, should be decided by it; and that it should make such disposition of the appeal as the court of civil appeals ought to have made. There is no express provision in the statute which authorizes this court to send its mandate to the intermediate court, in any case brought here by a writ of error; and it could not have been contemplated that we should issue such writ to the trial court, with instructions to follow the opinion of the court of civil appeals, unless we should concur in their opinion upon the meritorious questions in the case. The purpose of the legislature in restricting the right to a writ of error to this court in cases which should be remanded by the courts of civil appeals, was mainly to enable this court to make a prompt disposition of the business which should be brought before it. It is not more difficult to decide a case of that class than to determine one in which the judgment has been affirmed, and it is certainly expedient that the court should decide every question properly raised in every case which reaches it by a writ of error. We therefore conclude that it is our duty to consider the whole case, to dispose of every question which has been presented to us, and to render a judgment either reversing or affirming the judgment of the trial court, as the law may demand.

The district court sustained a demurrer to the petition, and, the plaintiff declining to amend, the judgment was made final against him. From this judgment he appealed to the court of civil appeals, and assigned the ruling of the court upon the demurrers as error. There are sundry grounds set forth in the petition, upon which it is claimed that the bonds in controversy are not authorized by the charter of the city, and are therefore void. Such as are urged in the brief of the appellant in the court of civil appeals, we shall dispose of in the order in which they are there presented.

The allegations in the petition show that in order to meet the current expenses of the city government, and the interest and the 2 per cent. for the sinking fund of the existing bonded indebtedness, and in like manner to pay the interest and 2 per cent. upon the bonds in controversy, will require a tax upon the taxable values of the city of more than 1 per cent.; and it is insisted that 1 per cent. is the limit of taxation authorized by the city charter. If this proposition can be maintained it is decisive of the case in the plaintiff's favor. In order for a city in this state to create a bonded indebtedness, the power must be conferred by statute. Section 5, art. 11, of the constitution, empowers the legislature to confer authority upon a city having more than 10,000 inhabitants to levy and collect a tax not to exceed 2½ per cent. of the taxable property of the city, and provides, also, that "no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and create a sinking fund of at least two per cent. thereon." This does not confer authority upon a city to create a bonded indebtedness. It merely authorizes the legislature to grant the power, and prescribes a limitation upon the grant. Its purpose was to fix a limit upon the power of taxation for municipal purposes, and to hedge it about with salutary restrictions. At the time the city council passed the ordinance which provided for the issue of the bonds in controversy, the city was governed by virtue of a special charter. Its charter was amended by an act approved April 17, 1883. This amendment contained the following provisions: "The mayor and city council shall have power within the city, by ordinance: First. To levy and collect an annual tax not exceeding one per centum upon all property within the limits of the city, made taxable by law for state and county purposes; the money raised by said tax to be used for the current expenses and for the general improvement of the city. Second. To raise money on the credit of the city, for a special and definite purpose, by issuing bonds of the city or otherwise: provided, the bonded debt of the city shall not at any time exceed one hundred and twenty-five thousand dollars, and the interest due on bonds and interest-bearing warrants issued by the city of Austin, with the interest accrued thereon, shall be at all times considered a part of the bonded debt of the city. To extend the bonded debt of the city beyond one hundred and twenty-five thousand dollars shall only be done by a special act of the legislature, or by the consent of two-thirds of the taxpaying citizens vot-

ing at an election ordered for the purpose, after thirty days' notice by the mayor, by the authority of, and in the method that may be prescribed by, the city council. All bonds shall specify for what purpose they were issued, and when any bonds are issued by the city a fund shall be provided to pay the interest, and two per cent. per annum on the principal, as a sinking fund to redeem the bonds, or pay them at maturity; and said sinking fund shall not be diverted to or drawn for any other purpose, and the city treasurer shall honor no draft drawn on said sinking fund, except to pay the interest, or redeem the bonds for which said fund was provided. The sinking fund for the redemption of any bonds, and the payment of the interest thereon, shall be invested, as fast as the same accumulates, in interest-bearing bonds of the United States or of the state of Texas or of the city of Austin, as the city council may deem most advantageous; and such bonds, and the interest thereon, shall be sold when necessary to pay or redeem the bonds for which the sinking fund was established. * * * Seventh. To construct water works, gas works, and street railroads within or beyond the city limits, or both; to provide the city with water and gas, and to erect hydrants, fire plugs, and pumps in the streets; to erect the necessary machinery, lamp posts, etc., for lighting the city, within or beyond the limits of the city, for the convenience of the inhabitants of the city and environs. * * * Tenth. To provide for the lighting of the streets and erecting lamps thereon." It is insisted that the words "general improvements" were intended to include all improvements of every character, and that, therefore, the tax of 1 per cent. was intended to cover the expenses of the city for every purpose whatever. But we do not concur in this construction. The second section clearly confers the power to issue interest-bearing bonds, which would require an annual outlay to pay interest and installments applicable to a sinking fund. That the money to be raised by the 1 per cent. tax was not to be appropriated to such a purpose is made clear by the distinct statement of the definite objects to which it should be applied. It is to be used "for the current expenses and general improvement of the city." The meaning is that the money is to be directly applied to these purposes, and it does not mean that it is to be appropriated to the payment of the interest and sinking fund of a bonded indebtedness, although such indebtedness may have been created for the improvement of the city. In our opinion the words "general improvement" mean ordinary improvement; that is, the improvement which ordinarily recurs, and which may be paid for out of the revenue which was authorized to be raised for general purposes. This is made more manifest by the second provision. It authorizes the city to raise money by the issue of bonds "for a special and definite purpose." The words quoted are clearly used in contradistinction to the words, "current expenses and general improvement," in the first provision. The meaning is that for any special object for which the city is authorized to expend money, such as the supplying of inhabitants with water, or lighting its streets, money may be raised by the sale of bonds. Now, it may be conceded that the power of levying a tax must be given either expressly or by necessary implication, and that every reasonable doubt as to the grant should be resolved in favor of the taxpayer. But we have seen that the only tax which was expressly authorized was, by express direction, to be applied to other purposes. We have also seen that the constitution requires that, whenever a bonded indebtedness is created by a city, provision must be made by taxation for the payment of the annual interest, and an annual installment of a sinking fund. Therefore, the power to issue bonds given by the city's charter implies the power to levy a tax to discharge the debt. It has been so held by the supreme court of the United States. Ralls County Court v. U. S., 105 U. S. 733; U. S. v. New Orleans, 99 U. S. 582. The legislature not having placed a limit on the tax, that fixed by the constitution is to be applied. The constitution forbids the legislature from granting the power to levy a tax of more than 2½ per cent., but does not require that the limit shall be named. As to the limit of the taxation, the constitution executes itself, with or without legislation. We think, therefore, that the second provision in the section quoted from the city's charter is to be construed as if it had expressly authorized a tax to pay the interest and sinking fund of the bonds, without naming the per centum to be levied, and that it conferred power upon the city to levy, for the purposes indicated, any tax within the limits fixed by the constitution.

But it is also urged that the city was not authorized to issue negotiable bonds, and that, for the reason that the bonds in controversy are negotiable in form, they are therefore without authority and void. Does the charter of the city confer authority upon the council to issue negotiable securities? It clearly has the power to raise money by issuing bonds. In Amey v. Mayor, etc., 24 How. 364, the legislature of Pennsylvania had authorized Allegheny City to subscribe to the stock of a certain railroad company, and to issue "certificates of loan" therefor. The city subscribed to the stock, and issued in payment what is now known as negotiable bonds. The court held that the bonds were valid, and were not subject to be attacked for irregularity in the hands of a bona fide transferee. Speaking of the certificates of loan, the court say: "Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as 'certificates of loan,' with certificates of interest attached, payable to bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be pre-

sented for payment. But now, in their use, they are called 'bonds with coupons for interest,'—a coupon bond; coupons being interest payable separably from the certificate of loan, for the purpose of receiving it. But neither the instrument nor the coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of debt." There, although the authority given was merely to issue "certificates of loan," the court assumed to know that negotiable certificates, such as are now known as "negotiable bonds," were meant, and held them binding obligations. In Hackett v. Ottawa, 99 U. S. 86, the power delegated to the council of the city was "to borrow money on the credit of the city, and to issue bonds therefor, and to pledge the revenues of the city for the payment thereof." Bonds of the city, negotiable in form, were issued, really to aid in the development of manufacturing enterprises; but they appeared upon their face to have been issued for lawful municipal purposes. The court, all the judges concurring, held that an innocent holder was entitled to recover upon the bonds. In Ottawa v. Bank, 105 U. S. 342, other bonds of the same issue came in question, and the ruling in the previous case was adhered to, without dissent. In Ottawa v. Carey, 108 U. S. 110, 2 Sup. Ct. Rep. 361, there was an attempt to recover on still other bonds of the same series. It was held unanimously that the plaintiff was a mala fide holder, and could not recover. The opinion in neither case discusses the question whether the power "to issue bonds" authorized an issue of negotiable bonds. But the decision in two former cases necessarily rests upon the affirmation of the proposition, namely, that the word "bonds" means negotiable securities. In Hackett v. Ottawa the power of the council to make the bonds negotiable is expressly recognized, while in Ottawa v. Bank the court say that they had decided in Hackett's Case that "the city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes." A "municipal bond," in its ordinary commercial sense, means a negotiable bond. Hence, if the legislature intended to authorize the city council of Austin to issue mere evidences of debt, why did they use the word "bonds?" The word implies something more than a mere promise to pay; that is to say, it implies bonds having the commercial quality of negotiability. Money may be borrowed by a city upon a nonnegotiable instrument, but in order to obtain advantageous terms, and to enter the markets of the world in fair competition for the use of money, it must issue commercial paper. The power to issue bonds was granted to the city of Austin for the purpose of enabling it to raise money, and it is not to be presumed that it was intended to restrict the power to the issuing of obligations that would not be effective for the purpose, and advantageous to the city. In Brenham v. Bank, 144 U. S. 173, 12 Sup. Ct. Rep. 559, the supreme court of the United States has recently held that the mere power to borrow money does not authorize a municipal corporation to issue negotiable bonds in payment therefor. In that case the court say: "The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation, and the presumption is that the grant of the power was intended to confer the right to borrow in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at ten per centum per annum, semiannually, for at least ten years." But the correctness of the conclusion in that case we need neither affirm nor deny. The case is distinguishable from this in two important particulars: Here the power to issue bonds is expressly conferred, and, as we have seen, the bonds could not be made a charge upon the revenues collected for general purposes. It was clearly contemplated that a special tax should be levied for their payment. In the opinion in the case cited the court also use this language: "Although the authority for such bodies to issue negotiable paper might be implied in some cases from other and express powers granted, these implications should not be extended beyond the fair inferences to be gathered from the circumstances of each case." From the powers granted to the city of Austin, and the circumstances of the case, we think it fairly inferable that the legislature intended to give it authority to issue negotiable bonds, and we are of opinion that it should be so held.

As averred in the petition, by virtue of an ordinance of the city council the question of issuing bonds to the amount of $1,400,000 was submitted to the taxpayers of the city at an election, and the proposition was carried by the requisite two-thirds vote. It is alleged, however, that between the date of the ordinance ordering the election, and the election itself, the city council passed another ordinance, creating a board of public works, in which it was provided that the bonds which were proposed to be issued should not be sold at less than par. It is also averred, in effect, that after the election this provision was repealed, and that the bonds were placed upon the market at 95 cents on the dollar, and that such of the bonds as were actually sold, if any, were sold at that price. It is also alleged, in substance, that the vote in favor of the bonds was induced mainly by representations made to the voters that none of the bonds should be sold below par. It is now insisted that by reason of these facts it was illegal to repeal the provision, and to sell the bonds at less than their face value. The proposition submitted at the election contained no condition limiting the price at which the bonds should be disposed of; and the citizens who voted at the election must be held to have known that the ordinance which had been passed, limiting the price, was subject to repeal by the council which passed it, or by any future council. Conceding for the sake of the argument that we could inquire into an election held

strictly according to the terms of the law, we are of opinion that we could not set it aside by reason of any fraudulent representations that may have been made to the electors in order to procure their votes. Having a plain proposition submitted to them, the voters must be presumed to know its meaning and effect, and to act at their peril; and in the absence of bribery, or other like corrupt influence, in a proceeding affecting the validity of the election, no inquiry as to their motives can be permitted. The proposition submitted at the election did not limit the rate of interest the bonds were to bear. The question of discount, in such a case, in its final analysis, is a mere matter of interest, and ought in no respect to affect the validity of the bonds, provided the discount and the interest expressed do not make the rate usurious. In this case the bonds bore interest at the low rate of only 5 per cent. per annum, and the discount was only 5 per cent. of their face value. Therefore the bonds are not invalid on that account.

We come now to what we conceive to be the gravamen of the complaint in this case. It is contained in the eleventh and twelfth paragraphs of the petition. They are as follows: "(11) And your petitioner further shows that the aforesaid bonds, while apparently for a lawful purpose, upon the face thereof, and upon the face of the proceedings of record which relate to them, were and are, in truth and in fact, as petitioner is informed and believes, and therefore charges, unlawful, among other things, in this: That the said bonds provided for, issued, and proposed to be issued, were so provided for, issued, and proposed to be issued under the mere semblance and fraudulent pretense of lawful power for the ostensible purpose as therein set forth, but, in reality, in pursuance of a fraudulent scheme participated in by all the defendants in reckless defiance of law, and their duties in that behalf, of embarking said city in the visionary and chimerical enterprise or venture, wholly outside of and beyond any power or authority conferred upon it by the aforesaid acts, which constitute its charter, of damming the Colorado river to obtain water power to sell or lease for speculative or commercial purposes, and in connection therewith for the construction and operation of a steam railroad,—another act for the doing of which the said city is utterly without power or authority under its aforesaid charter; that the main and real purpose of the issue and proposed issue of said bonds, and of the passage of the aforesaid ordinances, was to obtain water power to operate manufactories and machineries,—the power to be leased or sold as commerce for gain; that the providing of waterworks for said city, as contemplated by the charter thereof, and of lighting the said city, was a mere incidental result of the said unlawful scheme, and, if it was lawful to exercise the latter power by the means and in the manner attempted, yet in the exercise thereof the lawful and the unlawful are so intermixed and interwoven that the one is inseparable from the other, and the whole vitiated, and rendered invalid. (12) And your petitioner further represents that in the latter part of the year 1889 certain persons conceived the idea of making the said city of Austin a great and populous commercial and manufacturing center, by means of the construction of a dam across the Colorado river, above the city, of such proportions as would result in the production * * * of vast waterpower, as a motive power to be applied to manufacturing enterprises; that private capitalists refused to invest in the enterprise, or embark their means in so reckless a venture; that the scheme was then concocted by the said defendants for the city of Austin, in her municipal corporate capacity, to undertake the enterprise; that one J. P. Frizell, a scientific hydraulic civil engineer, made the surveys and soundings, and reported to said mayor and city council that the cost of the undertaking would approximate $1,358,550, and that a motive power would be secured by the dam equivalent to fourteen thousand horse power, of which two thousand horse power would be sufficient to operate a system of waterworks and electric lights, and suggesting that the said city would have a surplus or excess of twelve thousand horse power, to be operated, rented, and leased by the said city for manufacturing purposes, for profit, of the estimated commercial annual value of $200,000 to the city; that all proceedings subsequently had, as herein shown, were to carry out the scheme suggested by said report, which was taken by said council as a basis of subsequent action by the said city council, which report is made a part hereof; that the said city, not having authority to engage in the private business of damming the Colorado river to secure vast water power, to be operated, rented, or leased for profit for manufacturing purposes, and to induce population and capital to come to the said city, the said mayor and city council, aided and assisted by the other defendants, under color of the authority vested in said city by its charter, attempted, by the several proceedings hereinbefore shown, to have the said city undertake the said unlawful enterprise, under the false and fraudulent pretense of merely constructing and operating water and light systems, as authorized by the aforesaid charter." The engineer's report, which is made a part of the petition, is omitted, on account of its length. We presume that the purpose of inserting the engineer's report was not to plead the evidence, but presume it was to show, definitely and precisely, in what the alleged fraud consists.

The eleventh and twelfth paragraphs of the petition were excepted to, specially, for indefiniteness; and we are of opinion that unless the report is to be considered as a part of the petition, and as setting out in detail the character of the work that was to be performed, the exception was well taken. It is not good pleading to allege that an act has been fraudulently done, or is about to be fraudulently done, but the particular means by which the fraud is to be accomplished must be alleged. This rule applies with peculiar force when the

court is asked to interfere with the exercise of the legislative discretion devolved upon a municipal council, and to enjoin their action upon the ground that they are about to do an act in excess of their authority. So, in this case, it is not sufficient, as against a special exception, to aver in a general way that the city, under the pretense of establishing waterworks, proposes to dam a river to create water power, and thereby to encourage the establishment of manufacturing enterprises. The petition should allege specifically what is proposed to be done, so that the court may draw the legal conclusion from the facts stated, or it should appear that the specific facts were not within the knowledge of the plaintiff. The averment in the twelfth paragraph that all the proceedings subsequent to the report of the engineer "were to carry out the scheme suggested by said report, which was taken by said council as a basis of subsequent action by said city, which report is made a part hereof," is sufficient to show, we think, that the object of the pleader was to allege that the work recommended by the engineer was the work which the council was about to perform. Proceeding, then, upon this assumption, and disregarding vague and indefinite allegations, the question arises whether the undertaking of the city council to carry out the recommendations of the engineer, as shown in his report, shows such a clear abuse of the powers conferred upon the council as will justify the court in restraining their action.

We shall not undertake to give even a synposis of the very elaborate report made by the engineer to the city council. It shows, we think, that the engineer understood that it was at least the main purpose of the city to construct a dam to supply itself with water and with electric lights. The estimates, with one exception, to be hereafter noted, are made upon that basis. The total estimated cost of the entire work is $1,358,550. The estimated cost of the dam alone is $461,325. The remainder, $897,225, is allowed as the probable expense of the necessary machinery and constructions to put in operation the system for supplying the city with water and lights. These latter works the city is authorized by its charter to construct. It also has the power to construct a dam of sufficient capacity to supply the power necessary to operate the system. It is, however, to be inferred from the report that a lower and less expensive dam than that which the city proposed to build would be capable of furnishing the necessary power for the purpose indicated,—at least, so far as the present wants of the city are concerned. What the difference between the cost of the proposed dam, and one which, in the opinion of the engineer, would have been sufficient, under existing circumstances, to operate the works for supplying water and lights, does not appear. If, however, the facts alleged in the petition had shown definitely what the probable difference is, could the court restrain the action of the council without interfering with a lawful discretion confided to them by the legislature? When a municipal body undertakes the construction of a public building they must consider the present and prospective wants of the municipality, and determine its dimensions and capacity. Has a court the right to interpose to determine these questions for them, and restrain their action, when, in its judgment, the capacity is greater than the necessities of the immediate situation may demand? Could the building of a courthouse be enjoined merely because the proposed structure was intended to contain more rooms than would be required to accommodate the courts, and to provide the necessary offices for the county? Can the purchase of a farm for the maintenance of the paupers of a county be restrained merely by showing that it embraced more acres than could be cultivated by the labor at the county's disposal, although it should be made to appear that it was contemplated that the excess might be leased for the purpose of bringing in a revenue to the county? These questions must, as a general rule, be answered in the negative. There may be exceptional cases, but only when there is an undoubted excess of authority, and the abuse of the discretion is palpable. We are of opinion that the petition before us does not make such a case. In the first place, the engineer's estimate is based largely upon data of an uncertain character. The extent of the containing reservoir to be created by the dam and the probable flow of the river are principal elements in the calculation, and are, in their nature, practically indeterminate. The latter, especially, depends upon the rainfall in a region noted for the irregularity of its seasons. Under such circumstances, would prudent management dictate that the engineer's estimate should be closely followed, and a dam constructed which in his opinion is barely sufficient to meet the existing wants of the city? Or would it demand that the construction should be of sufficient height to furnish the necessary power under all circumstances, and to meet any probable contingency? Would it be wise economy to risk a failure of a water supply, and the consequent danger to the property of the city, and to the health of its inhabitants, or to so construct the work, at an increased expense, as to provide against future conditions dependent upon facts of an indeterminate character? Again, a dam of the character indicated in the report is not a work for a few years, but it is one which may be expected to stand as long as the city itself. The city, the capital of the state, will hardly remain stationary at a time when all other cities in the country are growing with great rapidity. Was it, under the circumstances, an exercise of a provident discretion to disregard the future, and provide only for existing necessities? Or was it an act of prudence to look to the future, and to make provision for prospective wants? These are not questions for the courts to answer. They were all to be considered and determined by the city council, in passing upon the proposition to construct the dam. If they have determined that a dam of the dimensions specified in the engineer's report is requisite in

order to secure the power necessary to provide water in any probable contingency resulting from drought, or to meet in future the wants of an increased population, can it be said that they have clearly exceeded their authority, even though they may have contemplated that for a time, at least, there may be an excess of water power, which may be available for other purposes, and may bring a revenue to the city. If the general charge which is preferred in the eleventh and twelfth paragraphs of the petition—that the supply of water and lights was a mere guise and pretense for constructing the dam, and that its main purpose was to promote manufacturing enterprises, and the providing of water and lights a mere incident—had been borne out by the detail of the work as developed in the engineer's report, we would have a very different case. But the works which are there recommended, and which, the petition alleges, are about to be constructed, show that the principal object was to supply the city with water and lights. The use of any excess of power which might be developed was merely a probable and contingent result. Under such circumstances it would seem that the proposed constructions must speak for themselves, and that any inquiry from other sources as to the hidden motives of the city council is not to be permitted. We think the demurrers to the paragraphs of the petition under consideration were properly sustained.

It is further alleged that at the time of the passage of the ordinances for the election and the issue of bonds the city had a contract with a certain company, by which it was provided with an adequate supply of light and water, and that that company was still able and willing to carry out its contract, and to supply all the light and water which the necessities of the city required, and it is insisted that by such contract the city had exhausted its power to procure water and light from any other source. It seems to us the statement of the proposition carries with it its own refutation. In this state no city can grant the exclusive right to furnish either water or lights. City of Brenham v. Water Co., 67 Tex. 544, 4 S. W. Rep 143. The argument comes down to this: That whenever a city has made a contract with a company able and willing to supply it with the necessary water and lights—terminable, it may be, at the city's option, and burdensome in its terms—its power is exhausted, and any attempt to procure water and light by other means is ultra vires and void. Such an argument cannot be maintained.

There are other grounds set forth in the petition for holding the bonds invalid, but they are not insisted upon in the brief of counsel for appellant. We regard the questions presented as being raised by the assignment of error, and have therefore considered them, and are of opinion that as to these grounds, also, the demurrers were properly sustained. Not having been urged in the brief, we deem it unnecessary to discuss them. For the reasons given we are of the opinion that the judgment of the court of civil appeals should be reversed, and that of the district court of Travis county should be affirmed; and it is so ordered.

POWELL v. STATE.

(Court of Criminal Appeals of Texas. May 31, 1893.)

ASSAULT AND BATTERY—WHAT CONSTITUTES.

Under Pen. Code, art. 486, providing that an assault and battery may be committed though the person actually injured was not the person intended to be injured, where defendant began a quarrel, and, in order to prevent the person he was quarreling with from picking up an axe helve, struck at him, and accidentally hit a bystander, he is guilty of an assault and battery upon the latter.

Appeal from Victoria county court; J. L. Dupree, Judge.

John Powell appeals from a conviction for aggravated assault and battery. Affirmed.

W. L. Davidson, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of aggravated assault and battery, and his punishment fixed at one month in the county jail, from which he appeals.

The agreed statement of facts shows that appellant and one Bob Blanchard got into an altercation, in which axe helves were used, appellant bringing on the difficulty by slapping Blanchard in the mouth. Blanchard seized an axe helve, which was taken from him by appellant, and, while trying to get another, appellant, to prevent him, struck at him, when the blow glanced, and accidentally struck one Lagus. Appellant and Blanchard were both robust young men; Lagus, an old decrepit man. The fight occurred in front of Lagus' store. The question is whether appellant can be guilty of an aggravated assault. He pleaded guilty to the assault on Blanchard, and was fined. Article 486, Pen. Code, declares that an assault or an assault and battery may be committed though the person actually injured was not the person intended to be injured; but it is well settled, if appellant was acting in self-defense when he accidentally struck Lagus, he is not responsible. In the Plummer Case, where defendant, in defending against an unlawful attack upon himself, accidentally shot the wife of his assailant, this court held that the trial court erred in instructing the jury that defendant could be convicted of an aggravated assault under such circumstances, but stated the law to be that where, in the justifiable defense of himself against apparent danger of death or serious bodily injury, a party unintentionally or accidentally injures a bystander, he is guilty of no offense. Plummer's Case, 4 Tex. App. 310; Clark's Case, 19 Tex. App. 495. In the case at bar it does not appear that appellant was acting in self-defense. He provoked the contest by slapping Blanchard in the mouth, and brought on the necessity, if any existed, of striking at Blanchard with the axe helve. In striking at Blanchard with the axe helve he was in the wrong, and could not justify