of action to recover from them their interest burdened with the life estate so long as the latter existed.

Another objection to the judgment is that the heirs were not required to refund the purchase money paid for the property which went to discharge debts by which their title was incumbered. This equity was pleaded by the defendants, and the principle invoked is well settled by the decisions of this court. Only one need be cited. Halsey v. Jones, 86 Tex. 488, 25 S. W. 696. The Court of Civil Appeals did not apply the principle because it thought the fact relied on was not shown by the evidence. The record shows that in 1877 the administrator made an exhibit to the probate court showing the receipt of money including $150 as the purchase money of the lot in question, and showing further that, after allowing all credits to which the estate was entitled, there remained a large balance due to him. This was approved by the court. From this it plainly appears that, after the estate was credited with this purchase money, it still owed the administrator. The approval of the exhibit establishes this result and necessitates the conclusion that the money was applied to the payment of legal charges against the estate. The proof upon the subject is in the same condition as was that in Halsey v. Jones. There, the final report of the administrator showed a claim in his favor which was established by the order of the probate court, in payment of which the land in controversy was turned over to him by the order. It was held that the title did not pass, but that the action of the court showed that a debt of the estate was discharged and that the heirs, before recovering the property, must pay that debt with interest. The proceedings here show with quite as much certainty that the purchase money of this land was applied to charges allowed and established by the court. The purchase money was received by the administrator at the date of the sale, but we are of the opinion that interest upon it is chargeable to the heirs only from the time at which it was applied to the payment of charges against the estate.

The record does not show any date at which this was done earlier than that at which the exhibit was filed. Interest will therefore be calculated from that date. On the authority of the case referred to, the judgment will be reformed so as to allow the plaintiffs below to recover the interest sued for, conditioned upon the paying to the defendants within six months from the date of this judgment the sum of $25, which is one-sixth of the purchase price of the lot, $150, with interest thereon at 6 per cent. from May 24, 1877. The costs of appeal and writ of error will be adjudged against defendants in error.

Reformed and affirmed.

SCHNABEL v. McNEILL et al.

(Supreme Court of Texas. Dec. 16, 1908.)

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by James McNeill and others against F. A. Schnabel. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 110 S. W. 558.

W. W. Moores and Marshall Ferguson, for plaintiff in error. Oxford, Carlton & Jackson, for defendants in error.

WILLIAMS, J. This action was brought by the defendants in error to recover of plaintiff in error an undivided one-sixth interest in an acre of land in the town of Stephensville. The questions raised are the same as those this day decided in the case of Ira Millican et al. v. James McNeill et al., 114 S. W. 106, and we need only refer to the opinion in that case for most of the reasons upon which our judgment is based. The record in this case differs from that, however, in that there is no statement of facts, but only the findings of the trial judge, which do not show the disposition made of the purchase money of the land sold by the administrator, and the question last decided in the opinion referred to as to the duty of plaintiffs to refund it is not raised by the application for writ of error. The judgment must therefore be affirmed.

Affirmed.

HENDERSON v. CITY OF GALVESTON et al.

(Supreme Court of Texas. Dec. 9, 1908.)

1. STATUTES (§ 141*)—AMENDMENT — SETTING OUT PROVISION AS AMENDED—NECESSITY.

Const. art. 3, § 36, provides that no law shall be amended by reference to its title, but the sections amended shall be re-enacted and published at length. A statute provided that section 34 of an act, entitled "An act to amend an act to incorporate the city of Galveston, and to grant it a new charter and to repeal all pre-existing charters, approved April 18, 1901, and to repeal all laws in conflict herewith," approved March 30, 1903, should be amended by adding a provision authorizing the board of commissioners of the city to license, etc., and prescribe the location of places where liquor is sold, but section 34 was not re-enacted in the amendatory act. *Held*, that the amending act violated the constitutional provision in that it did not re-enact the amended act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 209; Dec. Dig. § 141.*]

2. STATUTES (§ 131*)—"AMENDMENTS"—NATURE.

A statute which adds a provision to a section of an existing statute is an "amendment."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 199; Dec. Dig. § 131.*

For other definitions, see Words and Phrases, vol. 1, pp. 368–370; vol. 8, pp. 7573, 7574.]

3. STATUTES (§ 171*)—SUSPENSION—LIMITS—ESTABLISHING SALOON.

A statute and an ordinance enacted thereunder, prohibiting the sale of liquors in certain parts of a city, and requiring all places for its sale to be located in a certain limited district, does not violate Const. art. 1, § 28, prohibiting the suspending of laws except by the Legislature.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 171.*]

4. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

Where a statute was invalid, whether an ordinance framed thereunder was reasonable need not be determined on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

Certified questions from Court of Civil Appeals of First Supreme Judicial District.

Mandamus by James Henderson against the City of Galveston and others. On certified questions from the Court of Civil Appeals. Questions answered.

Jas. B. & Chas. J. Stubbs and D. D. McDonald, for appellant. M. E. Kleberg, City Atty., for appellees.

WILLIAMS, J. Certified questions from the Court of Civil Appeals for the First District as follows:

"This case is pending before us on appeal. James Henderson, having obtained a license under the state law as a retail malt dealer in the city of Galveston, on July 8, 1908, applied to the city authorities of said city for a license, which they refused, as the board of commissioners had passed an ordinance prohibiting the keeping for sale of malt and other liquors in the part of the city in which plaintiff's saloon was situated. On July 10, 1908, the plaintiff Henderson brought this suit in the district court of Galveston county against the city, its mayor and tax collector, the defendants, for a mandamus to require the city collector to issue him a license as a malt liquor dealer, as authorized by his state and county license, and for an injunction to restrain the city authorities from interfering with him in carrying on said business at the place designated in his application. The defendants set up, in answer to plaintiff's demand, that under an ordinance designating places at which liquor could be sold in said city, the plaintiff was prohibited from carrying on the business as liquor dealer at the place designated in his application.

"The legislative act, under which the ordinance was passed, was challenged as unconstitutional by the third paragraph of plaintiff's original petition, which is as follows: 'And plaintiff further alleges that said ordinance and said act of the Legislature are invalid and illegal, because the latter purports to be an amendment (Sp. Laws 1907, p. 661, c. 73) of section 34 of an act entitled "An act to amend an act to incorporate the city of Galveston and to grant it a new charter and to repeal all pre-existing charters approved April 18, 1901, and to repeal all laws in conflict therewith," approved March 30, 1903 (Sp. Laws 1903, p. 262, c. 37), by adding thereto the following: "The board of commissioners of the city of Galveston are hereby authorized to license, tax, regulate and prescribe the location of all places within the corporate limits of the city of Galveston wherein spirituous, vinous, malt or medicated liquors or medicated bitters capable of producing intoxication are kept for sale." Section 34 of said act or charter contains various subdivisions, and in the purported amendment the same was not re-enacted, as required by section 36, art. 3, of the Constitution, which provides that: "No law shall be revived or amended by reference to its title but in such case the act revived or the section or sections amended shall be re-enacted and published at length." And plaintiff alleges that said law was sought to be amended by reference to its title, and the section amended was not re-enacted nor published at length, wherefore the said proposed amendment is null and void, and any ordinance founded upon it necessarily falls.'

"The eighth paragraph of the petition contains the following allegations: '(8) The said ordinance and amendment of the charter purporting to authorize it are illegal and void, because the Legislature cannot lawfully delegate its authority in a municipal charter to set aside, vacate, or suspend or repeal the general laws of the state, and the effect of said ordinance is to repeal or suspend the laws of the state of Texas with relation to the licensing of retail liquor and malt dealers to engage in business in certain territory where local option is not in force, and especially does it seek to repeal or suspend and render nugatory the act of the Legislature of the state of Texas, approved April 18, 1907, being chapter 138, Gen. Laws (Laws 1907, p. 258), passed at the regular session of the Legislature in that year, and generally known as the "Baskin-McGregor law."'

"By his original and supplemental petitions plaintiff in the following language attacked the ordinance as an unreasonable and oppressive exercise of the power attempted to be conferred by the legislative act above set out, viz.:

"'(4) That said ordinance is unreasonable and illegal, and therefore void, because it prohibits the keeping for sale of vinous, spirituous, and malt liquors or medicated bitters capable of producing intoxication, at any place or places within the limits of the city of Galveston, except within the territory prescribed by section 1 of said ordinance, and thereby undertakes to apply and enforce prohibition in the greater portion of the city of Galveston. Considered both with reference to area and population, and in prescribing where such places shall be located, the said ordinance is unreasonable and oppressive, and works a discrimination in favor of certain places, localities, blocks, and parts of blocks and outlots in said city, and allows the sale, or keeping for sale, of such liquors or bitters upon certain lots, blocks, and outlots and upon parts of certain lots, blocks, and outlots, while prohibiting it elsewhere in said city, there being no just, fair,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or reasonable ground for such discrimination, and in this connection plaintiff will offer for inspection a map of the city of Galveston, with lines thereon showing the limits sought to be established by the ordinance, and that the prohibited district constitutes by far the greater part of the settled section of said city, both with reference to territory and population.'

"'(7) Said ordinance is unreasonable, and is also unauthorized by the amendment to the charter, hereinbefore set forth, in that the latter undertakes to authorize the board of commissioners to prescribe locations where said liquors or bitters are kept for sale within the corporate limits of the city of Galveston, and it is not a reasonable or legitimate exercise of such power to prohibit such location and such selling, or keeping for sale, in the greater part of the city, considered territorially or with reference to population. The right to prescribe a location must be reasonably exercised and not converted into a denial of a location in a great or the greater part of the city.'

"'(3) And plaintiff avers that said ordinance is unreasonable, oppressive, and discrimatory, and therefore invalid, because: (a) It prohibits keeping for sale of malt and other liquors in about 700 blocks of the inhabited area of the city and permits it in about 140 blocks. It makes it unlawful for at least four-fifths of the inhabitants of the city, being those who live in the excluded district, to keep such beverages for sale, and therefore necessarily precludes them from purchasing them in such district. The territory west of Forty-Fifth street, in which, as appears from said ordinance, such keeping for sale is not prohibited, is outside of the settled part of the city, and sparsely inhabited. (b) Instead of being a fair exercise of the right sought to be conferred by the act of the Legislature, namely, the right to prescribe locations, the ordinance unreasonably prohibits such locations within nearly the whole city, and subjects at least four-fifths of its residents, and especially those at a distance from the open district, to inconvenience and loss resulting from the closing of such places of business, and from the right of dealing therewith, used and enjoyed for many years by the neighbors. The line mainly traverses alleys and cuts into many business blocks, which are also recognized as such by the state law, the ordinance allowing the keeping for sale of beer and other liquors in half the block, and denying it in the other half without any just reason for such arbitrary discrimination.

"'(4) It discriminates between individuals and others in many cases, among which may be mentioned the fact that the line which is extended from Twenty-Ninth street through the alleys between Avenues E and F takes a turn to the south so as to include the south half of block 443 and the saloon thereon, owned or controlled by the Tremont Hotel Company, while other saloons in the half blocks south and southwest are required to close. One of these latter has been in business for 30 years or more. In another case at Thirteenth street and Avenue A, a block or half block is so divided as to leave in the open district only 43 feet, which is now used and occupied by a saloon, excluding the rest of the block. And many other discriminations will be shown to the court upon the hearing of this cause. Also one or more saloons at or near the south terminus of Fifty-Third street, a place of public resort, will be closed under said ordinance.'

"The ordinance in question is as follows:

"'An ordinance to prescribe the location of all places within the corporate limits of the city of Galveston wherein vinous, spirituous, malt liquors or medicated bitters capable of producing intoxication may be kept for sale.

"'Be it ordained by the board of commissioners of the city of Galveston as follows:

"'Section 1. That hereafter any and every place within the corporate limits of the city of Galveston wherein vinous, spirituous, malt liquors or medicated bitters capable of producing intoxication are kept for sale shall be located within the following described territory or upon the following lots or blocks in said city, to wit: All that territory west of a line beginning at Avenue U and Forty-Fifth street; thence north along said Forty-Fifth street to the alley line between Avenues F and G on said Forty-Fifth street; also all that territory north and west of the following boundary line: Beginning at the intersection of Forty-Fifth street and the alley line between Avenues F and G; thence east along said alley line, or where said alley line would be if opened east and west to Twenty-Ninth street; thence north on said Twenty-Ninth street to the alley line between Avenues E and F; thence east along said alley line to Twenty-Fourth street; thence south along said Twenty-Fourth street to the center line of Avenue F; thence east on the center line of said Avenue F to Twenty-Third street; thence north on said Twenty-Third street to the alley line between Avenues E and F; thence east along said alley line to the west side of Twenty-First street; thence north on said Twenty-First street to Avenue E; thence east on said Avenue E and down the center line of said Avenue E to the west side of Nineteenth street; thence north on said west line of said Nineteenth street to the north line of Avenue B; thence on said north line of said Avenue B to the center line of Sixteenth street; thence north on said center line of said Sixteenth street to the north side of Avenue A to a point 43 feet east of the east line of Thirteenth street; thence north on said line to the channel of Galveston Bay; also the southeast quarter of outlot 8 and the east half of outlot 108, as said outlots are known and designated on the maps or

plans of the city of Galveston, and also that certain territory described by metes and bounds as follows: Beginning at the intersection of Twenty-Eighth street and the Boulevard; thence northwardly along said Twenty-Eighth street to the intersection of said street with Avenue Q; thence eastwardly along said Avenue Q to Twenty-Seventh street; thence north along said Twenty-Seventh street to the alley between Avenues P½ and Q; thence eastwardly along said alley to Twenty-First street; thence south along said Twenty-First street to the County Boulevard; thence westwardly along the north line of the County Boulevard to the place of beginning, and also the bathhouses known as "Murdock's" and "The Breakers."

"'Sec. 2. That at no other place or places within the limits of said city of Galveston except as named in the foregoing section shall vinous, spirituous, malt liquors or medicated bitters capable of producing intoxication be kept for sale.

"'Sec. 3. That any violation of the provisions of this ordinance shall be punished by a fine of not less than fifty nor more than two hundred dollars and each day that such violation shall continue shall constitute a separate offense.

"'Sec. 4. This ordinance shall take effect and be in force from and after the 1st day of August, A. D. 1908, and after publication thereof as required by the charter of the city of Galveston.'

"Upon the foregoing statement we deem it proper to certify to you the following questions:

"(1) Is the amendment to the charter of the city of Galveston, above set out, invalid because not in compliance with the requirements of section 36, art. 3, of the Constitution?

"(2) Is said amendment or ordinance invalid because violative of section 28, art. 1, of the Constitution?

"(3) Was the trial court authorized to inquire into and determine the question of the reasonableness of the ordinance?

"(4) If the last question is answered in the affirmative, then are the allegations of plaintiff's petition before set out sufficient to raise the question of the reasonableness of said ordinance?"

The act of the Legislature which is attacked is as follows (Sp. Laws 1907, p. 661, c. 73), omitting the emergency clause:

"An act to amend the charter of the city of Galveston and to authorize the board of commissioners of the city of Galveston to license, tax, regulate and prescribe the location of all places within the corporate limits of the city of Galveston wherein intoxicating liquors are kept for sale.

"Be it enacted by the Legislature of the state of Texas:

"Section 1. That section 34 of an act entitled 'An act to amend an act to incorporate the city of Galveston, and to grant it a new charter, and to repeal all pre-existing charters, approved April 18, 1901, and to repeal all laws in conflict herewith,' approved March 30, 1903, be amended by adding thereto the following: The board of commissioners of the city of Galveston are hereby authorized to license, tax, regulate, and prescribe the location of all places within the corporate limits of the city of Galveston wherein spirituous, vinous, malt liquors or medicated bitters capable of producing intoxication are kept for sale."

By referring to the charter it will be seen that section 34, the one amended, is not re-enacted in the amendatory act; the amendment being accomplished by the addition of a distinct provision conferring additional powers upon the board of commissioners. Section 36, art. 3, of the Constitution, provides: "No law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be re-enacted and published at length." In its language and structure the statute plainly violates this provision. By its very terms it undertakes to amend section 34 of the charter, and that section as amended is not re-enacted, and of course cannot be published at length in the new statute. Nor is there anything in the nature of the provision to take it out of the operation of the Constitution. It is not only named an amendment, but it is such in its character. It adds a provision to the existing section, and this, according to all authority, judicial or parliamentary, of which we know anything, is an amendment.

It is urged that it is not within the mischief against which the constitutional provision is aimed, and to sustain this contention this statement, in Snyder v. Compton, 87 Tex. 378, 28 S. W. 1062, is quoted: "The practice which it was the purpose of the provision in question to prohibit was that of amending a statute by referring to its title, and by providing that it should be amended by adding to or striking out certain words, or by omitting certain language and inserting in lieu thereof certain other words. It was not intended to prohibit the passage of a law which declared fully its provisions without direct reference to any other act, although its effect should be to enlarge or restrict the operation of some other statutes. Similar provisions in other Constitutions have been construed not to apply to implied amendments." The very language which thus took the statute there under discussion out of the scope of the Constitution brings this within it. That was an independent statute, complete within itself, not adopted as an amendment of, and, adding nothing to, and taking nothing from, the language of any other. That form of legislation does not fall within the purview of the constitutional provision, as has been held by every court that has

considered the question, because that provision applies only to attempts to amend or revive. But when the Legislature in enacting new legislation adopts the mode of amending existing laws, the Constitution speaks and prescribes a rule that must be followed. That was the mode expressly adopted here, and the amendment was attempted by "adding to" the existing section.

Quinlan v. Houston & Texas Central Railroad Co., 89 Tex. 356, 34 S. W. 738, only held that the statute there in question was what is known as a "reference statute," which extended the benefits of the previous law, without in any way revising or amending its provisions to another person besides the original beneficiaries. City of Oak Cliff v. State, 97 Tex. 383, 79 S. W. 1, and perhaps Womack v. Gardner, 10 Tex. Civ. App. 367, 30 S. W. 589, Id. (Tex.) 31 S. W. 358, hold that entirely new sections may be added to an existing law without re-enacting the entire law. Other cases so holding are Swartwout v. R. R. Co., 24 Mich. 389; Edwards v. Denver, etc., Co., 13 Colo. 59, 21 Pac. 1011; People v. Wands, 23 Mich. 385. Contra: Bridge Co. v. Olmstead, 41 Ala. 18. Nobles v. State, 38 Tex. Cr. R. 330, 42 S. W. 978, holds that, where an article of the Revised Statutes consists of numbered subdivisions, each one dealing with a judicial district, such subdivisions are sections in the sense of the Constitution, and one of them may be amended as a section by re-enacting it without setting out the whole of the article. Under this view the section there amended was "re-enacted and published at length" so as to comply with the Constitution. But no authority cited, and none that we know of, has held that a section of a statute may be amended by adding words to it, without re-enacting the entire section as amended, and such a holding would be condemned by the plain words of the Constitution. It is held in some cases that new acts may be passed merely as supplements to existing laws, where they are not in the shape of amendments. Bradley Currier Co. v. Loving, 54 N. J. Law, 227, 23 Atl. 685; Sheridan v. Salem, 14 Or. 323, 12 Pac. 926. There are likewise cases in which it is held that sections, or parts of sections, may be repealed without re-enacting the part unrepealed. Chambers v. State, 25 Tex. 312; Hearn v. State, Id. 336; Commercial Bank v. Markham, 3 La. Ann. 698. But these are based upon a distinction supposed to exist between an amendment and a repeal, and upon the view that the constitutional provision has no application to a repeal of even a part of a section. Neither in their terms, nor in the reason on which they are founded, do they control the case of a clear amendment to a section. The following authorities clearly sustain the opinion we have expressed, and some of them, perhaps, go even further than we should feel inclined to follow: Town of Matinsville v. Frieze, 33 Ind. 508; State v. Common Council, 53 N. J. Law, 566, 22 Atl. 731; Walker v. Caldwell, 4 La. Ann. 297; Bridge Co. v. Olmstead, 41 Ala. 18, 19.

It may be true that this act was and is as susceptible of as easy an understanding, in connection with that of which it is an amendment by the Legislature in its passage, by the courts and by the public as if the original section, with the new provision included, had been re-enacted and published at large. As much, perhaps, might be said in favor of many statutes which do not conform to the Constitution. It may even be doubted if the good accomplished by the constitutional provision compensates for the inconvenience it causes. But it must be remembered not only that the provision is intended to prevent the mischiefs against which it is directed, but that it seeks to accomplish this by a comprehensive and unbending rule, striking down all statutes which do not conform to it. From that rule the Constitution makes no exceptions, and neither the Legislature nor the courts have the right to make them.

The first question is answered in the affirmative. This may be sufficient to enable the Court of Civil Appeals to dispose of the case, but we cannot know from the certificate that this is true, and we think it proper to answer the second question, which is answered in the negative. All of the contentions advanced by appellant under article 1, § 28, of the Constitution, are decided correctly in Ex parte King (Tex. Cr. App.) 107 S. W. 549, and in others therein referred to. Discussion of the question is unnecessary.

The third and fourth questions, as to the reasonableness of the ordinance, are founded on the assumption that the amendment to the charter first discussed is valid. As we hold that it is invalid, the question as to the reasonableness of an ordinance depending on it cannot arise. The questions go no further.

WHITE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 25, 1908.)

CRIMINAL LAW (§ 1097*) — APPEAL — STATEMENT OF FACTS—NECESSITY.

Whether a conviction is contrary to the evidence cannot be considered, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2938; Dec. Dig. § 1097.*]

Appeal from Jefferson County Court; Jas. A. Harrison, Judge.

E. A. White was convicted of a crime, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The record is before us in this case without either statement of facts

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes