or his agent to Dean, Johnson and Baty, they had had full knowledge of the rights of Wynne under the contract with Markham, I think Wynne could have recovered the timber in this suit, unless such right was defeated by the facts, not known to him, of the negotiations previous to his purchase between Howell, as the agent of Burkitt and Dean, Johnson and Baty, which afterwards eventuated in the sale to them. The letters of Burkitt, which were Markham's authority to sell, conveyed to Wynne notice that Burkitt reserved the right to sell to the first person who was ready to close the deal for the purchase of the timber, but he did not know when he brought this suit that Dean, Johnson, and Baty had closed their deal with Burkitt's agent before he bought, and were therefore entitled to the timber, or of the previous contract of sale with these parties. This was defensive matter, which, when interposed by defendants, could not defeat the venue, whatever effect it might have in defeating Wynne's right to recover anything.

I conclude that the trial court did not err in overruling the plea of privilege of defendants and proceeding to try the case. If I am correct in this conclusion, this court should have disposed of the appeal upon the merits, instead of remanding to the district court of Anderson county for trial.

As the opinion of the majority deals only with the question of venue, this dissenting opinion might properly stop here, but it may assist in a speedier disposition of the whole matter, in case the Supreme Court, upon a certificate of dissent or application for writ of error, should agree with this opinion on the issue decided, if it should be added that we all agree that upon the undisputed evidence appellee it not entitled to recover either timber or damages. The facts set out in the opinion of the court are established by the undisputed evidence, which shows that before the contract of sale by Markham to Hill for Wynne, Burkitt had become bound to sell the timber to Dean, Johnson, and Baty, which contract was afterwards fully consummated, and that in the power of attorney or authority to sell given by Burkitt to Markham he had clearly reserved this right. Hill, having knowledge of this, took the contract subject thereto.

McDONALD et al. v. DENTON et al.

(Court of Civil Appeals of Texas. Nov. 23, 1910. On Motion for Rehearing, Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 41*) — JUDGMENT APPEALABLE—CIVIL ACTION.

A suit by persons who had been arrested for crime, and who had been discharged on habeas corpus, for an injunction perpetually enjoining the prosecuting officers from prosecuting them, is a civil suit, and an appeal by the prosecuting officers lies from the judgment granting relief, though the court failed to render judgment for costs against the officers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 148-150; Dec. Dig. § 41.*]

2. CONSTITUTIONAL LAW (§ 63*)—STATUTES (§ 171*)—LEGISLATIVE POWER—SUSPENSION OF LAWS.

Under Const. 1876, art. 1, § 28, declaring that no power of suspending laws shall be exercised except by the Legislature, the Legislature has alone the power of suspending the operation of general laws, and the Legislature, in exercising the power, must make the suspension general, and cannot suspend general laws for individual cases or for particular localities, nor delegate authority to a city to suspend certain laws of the state as to certain individuals in certain localities.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 63;* Statutes, Dec.Dig. § 171.*]

3. INJUNCTION (§ 105*)—RESTRAINING ENFORCEMENT OF CRIMINAL LAWS.

It is the duty of county and precinct officers to arrest and try offenders violating the laws of the state, wherever such violation occurs within their county or precinct, and the motives for the enforcement of the law cannot be looked to in determining the validity of the enforcement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

4. MUNICIPAL CORPORATIONS (§ 592*)—LEGISLATIVE POWER.

Houston City Charter of 1903 (Sp. Acts 1903, c. 20) § 12, authorizing the city to prohibit and punish keepers and inmates of bawdy-houses, and to segregate and regulate the same, does not authorize the city to establish a reservation for lewd women, and suspend the laws punishing prostitution, and the keeping of houses of prostitution therein, and the council may not license the crime.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

5. INJUNCTION (§ 105*) — RESTRAINING ENFORCEMENT OF CRIMINAL STATUTES.

Equity deals only with civil and property rights, and an injunction will not be granted to restrain the prosecution of criminal acts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

On Motion for Rehearing.

6. MUNICIPAL CORPORATIONS (§ 592*)—LEGISLATIVE POWER — CONSTITUTIONAL PROVISIONS.

Under Const. 1876, art. 1, § 28, providing that no power of suspending laws shall be exercised except by the Legislature, Houston City Charter of 1903 (Sp. Acts 1903, c. 20) § 12, cannot authorize the city to set apart a portion of the city where lewd women may ply their vocation with immunity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

7. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—VALIDITY.

A municipal ordinance making it unlawful for any person to rent any house to any lewd woman outside of prescribed limits impliedly makes it lawful to rent houses to such persons within the prescribed limits, and is invalid as suspending the laws of the state punishing prostitution and the keeping of houses of prostitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. APPEAL AND ERROR (§ 934*) — PRESUMPTIONS — REGULARITY OF PROCEEDINGS IN TRIAL COURT.

The court on appeal will presume that the trial court would not render judgment against all of the defendants in the action if all had not been cited or had not appeared and answered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

9. APPEAL AND ERROR (§ 327*)—PARTIES ENTITLED TO APPEAL.

Where there was no adverse interest between the defendants in the trial court, any one of them could appeal from an adverse judgment without making the other defendants parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1835; Dec. Dig. § 327.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Thelma Denton and others against M. McDonald and others. From a judgment for plaintiffs, defendants appeal. Reversed, and cause dismissed.

Brockman, Kahn & Williams, for appellants. John Lovejoy, W. H. Wilson, and C. E. & A. E. Heidingsfelder, for appellees.

FLY, J. This is an appeal from a judgment of the district court perpetuating a writ of injunction enjoining M. McDonald, justice of the peace, Frank S. Smith, constable, and A. R. Anderson, sheriff of Harris county, and Tom Wilson, Rufe Daniels, and C. E. Horton, from issuing, serving, and executing any writ or process against appellees herein, being 26 women, on charges of vagrancy arising from being prostitutes or conducting houses of prostitution within the limits of a certain portion of the city of Houston known as the "Reservation" "now or hereafter."

It appears from the pleadings and evidence that the women had been arrested by the county officers on charges of vagrancy growing out of their being prostitutes, or engaged in keeping houses for the purposes of prostitution. They lived in a portion of the city of Houston set apart and designated by the city authorities for the plying of their vicious vocations. They applied for and obtained a writ of habeas corpus from the judge of the Sixty-First judicial district, and they were released by him. The appellees thereafter failing to make their appearance in the justice's court, their bonds were forfeited and the writ of injunction was applied for in the same court by the women and two men associated with them, and was granted temporarily and on final hearing perpetuated. There is no attempt to disguise the fact that appellees are prostitutes or engaged in conducting houses of prostitution; the claim being that they have the right and authority to engage in such practice under the authority of the charter of Houston and an ordinance of its government in designating and setting apart a certain portion of the city where the same shall be legal and proper. This suit was one seeking for an injunction, and clearly one separate and apart from the application for a writ of habeas corpus, and no action of the court, if such action was taken in giving this case the same number as the application for habeas corpus and attaching the judgment in that case, rendered on June 26, 1909, to the one rendered herein, for whatever reason it may have been done, can make this a habeas corpus case, and deprive appellants of the right to appeal from the judgment on the injunction. It might be, although we do not think so, that the court could enjoin the officers in order to prevent them from interfering with its judgment on habeas corpus. Although the more summary manner would have been contempt proceedings, still the object of the suit was not alone to prevent prosecution under the charges already made, but to permanently prevent the county and precinct officers from enforcing certain criminal laws enacted by the Legislature in certain portions of the city of Houston. Appellants were not parties to the habeas corpus proceedings and had nothing to do therewith, and have only appealed from the judgment in the injunction proceedings, and their appeal is a civil case of which this court has jurisdiction under the laws and Constitution of Texas. The failure to render judgment for the costs against appellants would not have the effect, as seems to be the contention of appellees, to change a case from one of a civil to one of a criminal character, and thereby defeat the jurisdiction of this court. The district judge may have been of opinion that he could not assess the costs against any one because it was a criminal case, but neither could that affect the jurisdiction of this court. The clerk seemed to have no doubt about the costs, for he has appended to the record a bill of costs for all of his services in connection with the case.

In the state Constitutions of 1845, 1861, 1866, and 1869 (article 1, § 20), it is provided: "No power of suspending laws in this state shall be exercised, except by the Legislature, or its authority." Quite significantly in the Constitution of 1876, the words, "or its authority," are omitted. Article 1, § 28, Const. 1876. If the change had any significance, it evinced a desire upon the part of the makers of our present Constitution to restrict the power to suspend laws to direct action upon the part of the Legislature. It is the general rule that the Legislature, although given the power of suspending the operation of the general laws of the state, must make the suspension general, and cannot suspend them for individual cases or for particular localities (Cooley, Const. Lim.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

p. 558), for it is a maxim of constitutional law that legislative bodies "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." Judge Cooley says this is the test for the authority and binding force of legislative enactments. Under that test, the Legislature would not have the authority to do directly what appellees contend it has attempted to do by delegating authority to the city of Houston to suspend certain laws of Texas as to certain individuals in certain localities.

In the charter granted by the Legislature to the city of Houston it is provided: "To prohibit and punish keepers and inmates of bawdyhouses and variety shows, and to segregate and regulate the same, and to determine such inmates and keepers to be vagrants and provide the punishment of such persons." Sp. Acts 1903, c. 20, § 12. This is the authority upon which the city of Houston has established its "Reservation" for lewd women and the keepers of houses of prostitution, and has suspended and set aside the laws of the state as to one class of vagrants, and annulled the statutes punishing the keeping of houses of prostitution. The Legislature of Texas itself could not have suspended such laws in a part or the whole of the city of Houston, and, of course, it cannot empower the municipal government to do so. It may be doubted that the Legislature intended to delegate any such authority. It was the duty of the county and precinct officers to arrest and try offenders violating the laws of the state, wherever such violations might occur within their county or precinct, and what their reasons may have been in this instance for endeavoring to enforce the law cannot have the effect of nullifying their efforts. The motives for enforcement of a law cannot be looked to in determining the validity of the enforcement. Under the laws of Texas prostitution and the keeping of houses of prostitution are crimes, and it is almost inconceivable that a Texas Legislature would confer upon a municipal government the right, not only to regulate, but to license, crime and give it in certain locations approbation and approval. As said by Justice Neill for this court in the case of the City of San Antonio v. Schneider, 37 S. W. 767: "We cannot believe that the Legislature of this state ever intended to authorize the city council to license and tax what its statutes denounce as a crime against society; for to license, tax, or even regulate crime is something unknown to civilization." Crime is defined and punished, and it would be monstrous to allow the license or regulation of a thing expressly prohibited by law. Regulation implies a right to perform or do certain acts, and cannot be applied to matters inhibited by law and good morals. The toleration and regulation of crime is giving it at least qualified approval, and is more disastrous in its effect upon the minds of the young than if no effort was made to denounce, control, or prohibit it. Better far that the crimes under discussion were not denounced by the law than that they should be denounced and then licensed, and it is an anomalous, an incongruous proceeding, that, so far as we know, has never been sanctioned. We learn that in ancient times cities of refuge were erected to which those who had committed certain crimes could flee and obtain immunity and protection, but it remained for this age to erect places where vicious persons shall have the right to continually commit certain crimes and continually obtain immunity from punishment.

In the case of Ex parte Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845, it appeared that the city of San Antonio was given by its charter the power to "restrain and punish vagrants, mendicants, street beggars, and prostitutes," and "to prevent and punish the keeping of houses of prostitution within the city or within such limits therein as may be defined by ordinance, and to adopt summary measures for the removal or suppression, or regulation and inspection of all such establishments." That language is as full and more explicit and comprehensive than the language in the charter of Houston, and yet the Court of Appeals held that it was not the intention of the Legislature to repeal penal laws of the state aimed at prostitution, and that the provisions did not confer, and were not intended by the Legislature to confer, upon the municipal authorities the power to license persons to violate laws of the state. The ordinance licensing the crime was held to be without authority of law, repugnant to a valid general law, and therefore null and void.

The question herein involved is directly passed upon by the Court of Civil Appeals of the Third District, and, after quoting section 28, art. 1, Const. 1876, it was said: "This section restricts the power to suspend laws to the Legislature, and expressly prohibits the exercise of such power by any other body. In view of this provision of the Constitution, it must be held (whatever may have been the power of the Legislature under former constitutions) that that body cannot now delegate to a municipality, or to any one else, authority to suspend the statute law of the state." Burton v. Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272. It was a similar case to this, and it was held that the city of Waco could not set apart a certain portion of its territory and exempt from punishment offenders against articles 359-361 of the Penal Code of 1895 of Texas. So in the case of Coombs v. State, 38 Tex. Cr. R. 648, 44 S. W. 854, decided by the Court of Criminal Appeals, the matter is discussed, and it was held that the power to suspend the laws of this state could not be delegated by the Legislature to a municipal corporation.

Not only do we conclude that the officers of Harris county should not have been interfered with in their duty of suppressing an act defined as a crime because it was their duty to take such action, but, even though the city of Houston had the right under the Constitution to license crime, which is a monstrous proposition, and had done so, the trial court had no authority to issue a writ of injunction to prevent the officers from ever arresting the licensees; for it is a generally accepted rule that courts of equity deal only with civil and property rights, and that an injunction will not be granted to restrain the prosecution of criminal proceedings, or the commission of a criminal act. State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478. The rule applies, even though the statute or ordinance under which the prosecution is threatened is null and void. Joyce, Ing. §§ 59, 60; Chisholm v. Adams, 71 Tex. 678, 10 S. W. 336. The rule as stated is well fortified by numerous authorities, a few of which will be reviewed.

In the case of Brown v. Birmingham, 140 Ala. 590, 37 South. 173, the appellant sought to enjoin the mayor and aldermen of the city of Birmingham from enforcing or attempting to enforce by quasi criminal prosecutions a certain ordinance of the municipality which was alleged to be void. The Supreme Court of Alabama held: "We discover nothing in the case made by the bill to take it out of the well-settled general doctrine that the jurisdiction of courts of equity is purely and exclusively civil; that, of consequence, they are without power to enjoin the commission of threatened crime on the one hand, and to enjoin threatened prosecutions for the commission of alleged crimes on the other; that violations of state laws and violations of penal municipal ordinances, and prosecutions for both, stand upon the same footing in this connection; and that it is wholly immaterial that the statute or ordinance for an alleged violation of which prosecution is threatened is absolutely void. * * * The administration of state and municipal governments in the prosecution of alleged violators of their penal laws or of violators of their supposed criminal laws must be left to take their own course in the courts ordained to administer those laws, unhindered by courts of equity, whose activities are, in general, strictly confined to matters of a purely civil nature; and this though such administration may wrongfully entail damages upon the citizen, which are grievous indeed, and beyond all remedy, either because in their nature irreparable, or because he is balked of their recovery by the insolvency of those responsible for the prosecutions."

The case of Levy v. Kansas City, 74 Kan. 861, 86 Pac. 149, is quite similar to the one at bar. In that case an ordinance had been passed to permit gambling in certain portions of the city, and Levy had paid a license of $5,000 to run a gambling house in the "Reservation," and he was arrested and fined, and he procured a writ of injunction to prevent the officers from arresting him again, and the injunction seems to have been placed on Levy, instead, and to prevent the opening of his gambling house. The Supreme Court of Kansas said: "This is probably the first instance in the history of the state that a professional criminal, confessing to a daily violation of the law, has had the effrontery to apply to a court of equity for protection from arrest and public prosecution while he pursues his criminal vocation. It would indeed be a sad commentary on our jurisprudence if a justification could be found for holding that a license to commit crime, issued by a city administration, could be made the basis of equitable interference for the protection of the holder from public prosecution while he continues to violate the law."

In the case of Ex parte Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, a number of cases are reviewed, and the Supreme Court held: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of courts of common law or the executive and administrative department of the government." See, also, Littleton v. Burgess, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631, where the authorities are fully collated in the notes and several discussed in the opinion, and the well-digested case of Kelly v. Conner, 122 Tenn. 339, 123 S. W. 622, 25 L. R. A. (N. S.) 201.

The decisions reviewed herein place their action on the broad ground that courts of equity have no authority or power to interfere with purely criminal proceedings, but there are other decisions which deny relief upon the ground that adequate remedies exist at law. Tyler v. Story, 44 Tex. Civ. App. 250, 97 S. W. 856; Kissinger v. Hay, 113 S. W. 1005; Kelley Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4.

In the case of State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478, it is said: "It is only when property or civil rights are involved and irreparable injury to such rights is threatened or is about to be committed for which no adequate remedy exists at law that courts of equity will interfere by injunction for the purpose of protecting such rights." That language was used in a case in which it was sought to restrain persons from conducting and maintaining a gambling house, and, if an injunction cannot be issued to prevent crime, surely the beneficent powers of a court operated under the guidance of equity and good conscience cannot be in-

voked to permit a certain class of persons to live in shameless disregard and open violation of the laws of the state of Texas. "A court of equity is never active in relief against conscience or public convenience" was said by an English jurist in Smith v. Clay, and quoted in Johnson v. Railways, 227 Mo. 423, 127 S. W. 63, and that axiom applies with vigor in this case.

No question of property rights is involved in this suit, but it is an open attempt to gain the assistance of a court of equity to grant criminals the power and authority to ply their infamous vocations in disregard and contempt of the laws of the state. "Without doubt courts of equity have no jurisdiction to entertain a bill to construe a valid criminal statute, and pending the proceeding, or at its termination, enjoin prosecutions for violations of it." Kelly v. Conner, herein cited. As said by the Supreme Court of Texas in the case of Greiner-Kelley Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4: "Now the law itself gives the definition of the offenses which it intends shall be punished, and prescribes the courts in which and the procedure through which it is to be applied, and the guilt or innocence of persons prosecuted under it is to be determined. In our opinion it would be little short of usurpation for a court of equity to take hold of the officers and substitute, in advance for the definitions of the law, its own, and enforce by the writ of injunction conformity to the rule prescribed. Especially is this true where the final construction of the penal laws is intrusted to the Court of Criminal Appeals, and not to the courts administering civil remedies." The courts and other agencies intrusted with the enforcement of the criminal laws of the state have the right to pursue their course in performance of their duties unhampered and unrestrained by courts of equity, whose assistance, advice, or commands are not needed to guide those agencies in the discharge of their duties.

The judgment of the district court, enjoining the peace officers of Harris county from enforcing certain laws of the state of Texas in certain localities in the city of Houston, and from the performance of their duties in forfeiting the bonds of criminals, is reversed, and the cause dismissed at the cost of appellees.

On Motion for Rehearing.

It is claimed that in quoting the provision of the charter of the city of Houston in which the authority is granted to set apart a portion of the city where lewd women can with immunity ply their vocation this court copied the provision of 1903, instead of that of 1905, which is now in effect. The language of the charter of 1905 is perhaps a little stronger and wider in its sweep, but is just as much opposed to the Constitution as the other, and it can make no difference in the decision of the case.

It is seriously argued that "there is not a line in the ordinance which undertakes to exempt from criminal prosecution of any such person or establishment. The sole and only effect of the ordinance is to colonize and segregate such persons and establishments so as to effectually exclude them from other portions of the city." The ordinance makes it unlawful for any person to rent any house to any lewd woman outside of the prescribed limits. The implication from that is irresistible that inside those limits it shall be lawful to rent houses to the persons for the purposes named. The same provisions appear in regard to conducting such houses. Clearly they are legalized within the limits denominated the "Reservation," the very name of which indicates a setting apart for particular purposes. The "Reservation" is clearly a place of refuge for lewd women, and the trial court in its judgment recognizes it as such in the recitation: "And the court being further of the opinion that the Legislature of the state of Texas had authorized the existence of houses of prostitution within the limits of the Reservation, and had therefore exempted such persons from prosecution when living within the Reservation, and that the plaintiffs were therefore guilty of no offense against the laws of Texas, and ought not to be repeatedly arrested because of matters which did not constitute a crime." The trial court evidently thought that the laws of the state on the subject of prostitution were set aside in the "Reservation," and any other view of the matter is utterly untenable. It took the joint action of the Legislature and city to bring about the desired result, which is colonization of criminals with a grant of immunity from punishment.

The petition was directed against McDonald, justice of the peace, Frank S. Smith, constable, and his deputies, A. R. Anderson, sheriff, and his deputies, and Tom Wilson, Rufe Daniels, and C. E. Horton, and an answer is filed in the name of the defendants and signed by the attorneys for the defendants. It is true the answer is sworn to by only two of the defendants, but that does not alter the fact that all of them answered, and, when judgment was rendered, it was against McDonald, justice of the peace, Frank S. Smith, constable, and his deputies, A. R. Anderson, sheriff of Harris county, and his deputies, and Tom Wilson, Rufe Daniels, and C. E. Horton. Still, in the face of this record, it is asserted in the motion that "none of these five persons were cited and none of them have appeared or answered in the case." This court will presume that the trial court would not have rendered judgment against all of the defendants if all had not been cited, or had not appeared and answered.

There was no adverse interest between the defendants in the lower court, and any one of them had the power and authority to appeal without making the others parties. It was therefore unnecessary for the parties ap-

pealing in this case to make their codefendants parties to whom the appeal bond is payable. It is stated in the motion that "when the Legislature by the act defining crime declares that the act denounced, when done in a certain place and under certain conditions, shall be regulated and not suppressed, this not only impliedly, but expressly, declares that the act shall be permitted in that place." The case of City of Austin v. Cemetery Association, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, is cited as authority to sustain that proposition. In that case there was no discussion of the question as to the power of the Legislature to delegate authority to a city to set aside state laws as to a certain class of criminals, but the whole matter in that case was as to the right of the city of Austin to pass ordinances to determine the location of cemeteries within its boundaries. There is nothing in that decision that sustains the proposition of appellees. No state law was involved in that case, but only an ordinance of the city prohibiting the burial of the dead in certain places, and prescribing a penalty for its violation. It was a matter not wrong in itself, but merely because it was prohibited. The crime of prostitution is an offense against public decency and good morals, and would be wrong whether prohibited by statute or not. Theft could with as much propriety be licensed by law, or have a reservation set apart within whose bounds its votaries and disciples could find shelter, protection, and immunity.

The motion is overruled.

WINFIELD et al. v. RILLING et al.

(Court of Civil Appeals of Texas. Dec. 8, 1910.)

HUSBAND AND WIFE (§ 262*) — COMMUNITY PROPERTY—EVIDENCE AS TO CHARACTER OF PROPERTY.

The presumption that property acquired during the existence of the relation of husband and wife was community property is rebuttable, and may be overcome by a showing that the consideration was from the separate means of one of the spouses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

Error from District Court, Bowie County; P. A. Turner, Judge.

Action by Mrs. Minerva Winfield and others against Mrs. Estella Rilling and others. From a judgment in favor of defendants, plaintiffs bring error. Affirmed.

Thos. N. Graham and Saner & Saner, for plaintiffs in error. Hart, Mahaffey & Thomas, for defendants in error.

HODGES, J. This suit was instituted by the plaintiffs in error to recover an undivided one-half interest in a block of land situated within the limits of the city of Texarkana, Tex. They claim the property by inheritance from their deceased mother, Mary Moores, who was the first wife of T. B. Moores, also now deceased.

The petition alleges that the plaintiffs in error are the children and only surviving heirs of Mary Moores, and that the lot sued for was the community property of their mother and her husband, T. B. Moores, having been acquired by them during the time they were living together as husband and wife. The defendant in error, Mrs. Estella Rilling, claimed title to all of the property through a deed from T. B. Moores conveying the entire lot to her in consideration of love and affection. We infer from the record that she was the last wife of Moores. The rights of the parties turn upon whether the property was the community property of Moores and his first wife, or his separate property. It was acquired by purchase during the time T. B. Moores and Mary Moores were living together as husband and wife. The conveyance was to Moores, and the recited consideration was $700 cash paid by him. It is conceded that the plaintiffs in error are entitled to recover, unless the evidence was sufficient to show that the lot was purchased with the separate means of T. B. Moores. That question was the only material issue involved. The case was submitted to the court without a jury, and a judgment rendered against the plaintiffs in error.

The contention made on appeal is that the evidence was insufficient to sustain the judgment. The principal evidence relied on to show that the property belonged to the community was the fact that it was purchased during the time that Moores and the mother of plaintiffs in error were husband and wife. It requires no citation of authorities to support the proposition that the presumption of community rights thus created is rebuttable, and may be overcome by a showing that the consideration was from the separate means of one of the spouses. We think the evidence was sufficient in this case to justify the court in finding that this had been done.

There are several assignments attacking various rulings of the court in admitting testimony. But no bills of exception have been incorporated in the record, and we are unable to consider the objections urged in briefs of counsel.

The judgment of the district court is affirmed.

AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., v. OWENS.

(Court of Civil Appeals of Texas. Dec. 17, 1910.)

1. INSURANCE (§ 323*) — FIRE INSURANCE — OCCUPANCY OF DWELLING—"VACANT."

Where, after the tenant of an insured house moved out, another person moved in at the request of the owner, so as to preserve the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes