cent purchaser. Such a discussion would profit no one, and would still leave the question unsettled; for, it not being involved, what we might say would not be binding here, nor a precedent for later cases. But it has been held by this court in the case of Link v. Page, 72 Tex. 596, 10 S. W. 699, that:

"* * * Where the owner of real property negligently clothes another with the apparent title to it, although the execution of the instrument which purports to convey the title may be obtained by fraud, and third parties, being misled thereby, innocently purchase and pay value for the property, he should be held estopped to deny the validity of the conveyance."

See also Steffian v. Bank, 69 Tex. 513, 6 S. W. 823; Loan Association v. Biard & Scales, 171 S. W. 1200.

[9] The plaintiff in error Boswell is in a different attitude. He did not plead any special defense. His answer consisted of a general denial, and a special denial of participation in, or knowledge of, any of the alleged fraudulent acts of codefendants. He rested entirely on this, without pleading any affirmative defense in answer to the plaintiff's alleged cause of action. This called for no charge upon any defense, except the negative of the plaintiff's case. In this state of the record the court charged, as follows:

"(11) If the jury find from a preponderance of the evidence that there was an agreement between plaintiff and defendant Boatwright as set out in paragraph 5 of this charge, and further find from a preponderance of the evidence that the defendant Boswell had no knowledge of said agreement and did not agree to hold said deeds and note as alleged by plaintiff, then the jury will find for the defendant Boswell as to the plaintiff's cause of action against him."

We think the latter portion of the charge by implication shifts the burden of proof and places it upon Boswell to disprove the identical facts which the plaintiff was required to prove by a preponderance of the evidence in order to recover. That which the plaintiff had assumed the burden to prove under this charge by implication became the burden of Boswell to disprove. At least we think that was the probable impression it made upon the jury, though it may not, and indeed should not, convey such meaning to persons trained in the analysis of court charges, as indicated by us in the above discussion of a similar charge as applied to the plaintiff in error Barrow. We think the charge as applied to Boswell was misleading in its nature, and, while the court's general charge in another section placed the burden of proof upon the plaintiff in proper form, and may have prevented the jury from being misled, yet it was calculated to mislead them, and we think for this error the case should be reversed as to the plaintiff in error Boswell.

We have examined the other questions presented, in which we sustain the holdings of the Court of Civil Appeals.

We conclude the judgments of the Court of Civil Appeals and the district court should be reversed as to Boswell, for the error indicated, and should be affirmed as to the plaintiff in error Barrow, and as to the defendants Boatwright and Shofner; and it is accordingly so ordered.

SPENCE et al. v. FENCHLER et al.
(No. 2559.)

(Supreme Court of Texas. Dec. 8, 1915.)

1. APPEAL AND ERROR ⟸71—INTERLOCUTORY APPEALS—WHAT ARE.

An appeal from an order denying a temporary injunction is interlocutory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 386–401; Dec. Dig. ⟸71.]

2. APPEAL AND ERROR ⟸2—APPELLATE JURISDICTION—STATUTES.

Statutes relating to appellate jurisdiction do not affect a cause wherein writ of error had been applied for before such statutes became operative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3–7, 1882, 2421; Dec. Dig. ⟸2.]

3. COURTS ⟸1—JURISDICTION—STATUTES.

Jurisdiction may be conferred on a court by necessary implication as effectually as by express terms.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–4, 6–9, 91–106; Dec. Dig. ⟸1.]

4. STATUTES ⟸206—CONSTRUCTION.

When possible, effect should be given to every portion of a statute; the whole being construed together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. ⟸206.]

5. STATUTES ⟸185—CONSTRUCTION.

That which is implied in a statute is as much a part of it as that which is expressed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 264; Dec. Dig. ⟸185.]

6. COURTS ⟸247—TEXAS SUPREME COURT—JURISDICTION.

Rev. St. 1911, arts. 4644–4646, providing that any party or parties to any civil suit wherein a temporary injunction is granted, refused, or dissolved may appeal therefrom, that it shall not be necessary to brief the case in the Court of Civil Appeals or the Supreme Court, and that such case shall be advanced in the Court of Civil Appeals or Supreme Court on motion of either party, though not so expressly providing, confers upon the Supreme Court jurisdiction to entertain a writ of error to review a judgment of the Court of Civil Appeals affirming or reversing the granting or denial of a temporary injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 749, 751–754, 757, 759, 760, 762–764; Dec. Dig. ⟸247.]

7. COURTS ⟸247—TEXAS—SUPREME COURT—JURISDICTION.

The jurisdiction conferred upon the Supreme Court by Rev. St. 1911, arts. 4644–4646, over appeals and writs of error from orders relating to temporary injunctions, is not in conflict with article 1521, declaring that the jurisdiction of the Supreme Court shall extend to all civil cases of which the Courts of Civil Appeals have appellate, but not final, jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 749, 751–754, 757, 759, 760, 762–764; Dec. Dig. ⟸247.]

8. APPEAL AND ERROR ⊂=742—ASSIGNMENTS —CONSIDERATION.

Where no statements follow propositions subjoined to assignments of error, such assignments need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. ⊂=742.]

9. TRIAL ⊂=396—FINDINGS OF FACT—MATERIALITY.

Findings of fact not responsive to any material issue in the case are immaterial, as are conclusions of law based thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. ⊂=396.]

10. APPEAL AND ERROR ⊂=659 — RECORD—PERFECTION—CERTIORARI.

The refusal of a writ of certiorari by the appellate court to include in the record findings of fact not material to any material issue in the case, as well as conclusions of law based thereon, is not an abuse of discretion, as such findings were wholly immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834–2843; Dec. Dig. ⊂=659.]

11. APPEAL AND ERROR ⊂=684—RIGHT TO INJUNCTION—TEMPORARY INJUNCTION.

Where the record contains nothing but the pleadings and the order denying the injunction, there being no statement of facts, etc., the question whether the denial of a temporary injunction was warranted must be determined on the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2887–2890; Dec. Dig. ⊂=684.]

12. APPEAL AND ERROR ⊂=1082—JUDGMENTS —DETERMINATION.

Where the judgment of the Court of Civil Appeals seems correct, it should be affirmed on writ of error to the Supreme Court, though insufficient reasons are assigned therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1133–1136, 4270, 4281–4284, 4289–4292; Dec. Dig. ⊂=1082.]

13. INJUNCTION ⊂=134—TEMPORARY INJUNCTION—RIGHT TO.

Where a party has complied with all the requirements of law for the issuance of an injunction, he is entitled to its issuance as a matter of right.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 303; Dec. Dig. ⊂=134.]

14. NUISANCE ⊂=72—INJUNCTION — DISORDERLY HOUSE.

Under Rev. St. 1911, arts. 4689, 4690, declaring that the use of any premises for the keeping of a disorderly or bawdy house shall be enjoined at the suit of the state or any person, and that nothing shall prevent such injunction from issuing at the suit of any citizen who may sue in his own name, and such citizen shall not be required to show that he is personally injured, a citizen may maintain an action to enjoin a bawdy or disorderly house without proving personal damage.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164–169; Dec. Dig. ⊂=72.]

15. NUISANCE ⊂=75—INJUNCTION—PETITION.

A petition averring that defendants were in possession of described realty and through their agents and lessees maintained bawdy and disorderly houses, wherein intoxicating liquors were sold without a license, that such bawdy and disorderly houses constituted nuisances injurious to the neighborhood and caused a depreciation of plaintiffs' property, and praying for an injunction to restrain the maintenance of such nuisances, is sufficient to bring the case within Rev. St. 1911, arts. 4689, 4690, providing for the enjoining of bawdy and disorderly houses.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176–184; Dec. Dig. ⊂=75.]

16. NUISANCE ⊂=75 — DISORDERLY HOUSE—PROCEEDINGS TO ENJOIN—ANSWER.

In such case, where that part of the answer containing a general denial was not verified, though the petition and the remainder of the answer was, and the principal defense set up was that the houses were within a locality designated by the municipality for the maintenance of such places, the answer admitted that defendants were maintaining bawdy and disorderly houses, and warranted the court, in ruling on a prayer for temporary injunction, in assuming that fact.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176–184; Dec. Dig. ⊂=75.]

17. NUISANCE ⊂=75 — DISORDERLY HOUSE — PROCEEDINGS—PETITION.

Where the petition averred that plaintiffs were all of the city and county of El Paso, state of Texas, and were suing for themselves and other citizens, it sufficiently showed that they were citizens to entitle them to sue under Rev. St. 1911, arts. 4689, 4690, providing for enjoining bawdy houses.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176–184; Dec. Dig. ⊂=75.]

18. MUNICIPAL CORPORATIONS ⊂=592—POWER OF MUNICIPALITY.

As Pen. Code 1911, arts. 496, 500, denounces the maintenance of bawdy and disorderly houses wherein liquor is sold without a license, while Rev. St. 1911, arts. 4674, 4689, 4690, provide for enjoining such places, a municipality, though authorized by its charter to suppress disorderly houses and to restrain them into designated localities, is without power to license them to continue in such localities.

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

19. CONSTITUTIONAL LAW ⊂=63 — LEGISLATIVE AUTHORITY — UNWARRANTED DELEGATION.

As Pen. Code 1911, art. 500, denounces bawdyhouses of any sort, and Const. art. 1, § 28, declares that in no case can laws be suspended save by the Legislature, the proviso in Rev. St. 1911, art. 4689, which, with article 4690, provides for enjoining the maintenance of bawdy and disorderly houses, that the two articles shall not be construed so as to interfere with the control and regulation of bawdy houses by incorporated towns and cities which acting, under their charters, have confined them to designated localities, is void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. ⊂=63.]

20. STATUTES ⊂=64—PARTIAL INVALIDITY.

In view of the fact that such proviso was inserted because the Legislature deemed it had no authority to interfere with home rule cities, the invalidity of that provision does not carry with it the entire act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊂=64.]

21. STATUTES ⊂=279—PROVISO—NEGATIVING.

A proviso contained in a statute need not be negatived by a party seeking relief thereunder.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. ⊂=279.]

22. NUISANCE ⊂=65 — DISORDERLY HOUSE — PROCEEDINGS TO ENJOIN—STATUTES.

As the proviso in Rev. St. 1911, art. 4689, authorizing enjoining the maintenance of bawdy

and disorderly houses, applies only to bawdy-houses, regulated by home rule cities, maintenance of a house used as a bawdyhouse and as a disorderly house where intoxicants were sold without a license may be enjoined, regardless of the proviso.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 158–160, 170, 171; Dec. Dig. ⟸ 65.]

23. NUISANCE ⟸75—INJUNCTION—RIGHT TO ENJOIN.

Where a statute authorizes the enjoining of disorderly houses by citizens, delay in seeking relief will not preclude an injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176–184; Dec. Dig. ⟸75.]

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

Action by Frank A. Spence and others against W. H. Fenchler and another. An order denying plaintiffs a temporary injunction was affirmed by the Court of Civil Appeals (151 S. W. 1094), and plaintiffs bring error. Reversed and remanded.

Gunther R. Lessing, of El Paso, for plaintiffs in error. Turney & Burges, Beall, Kemp & Parker, T. A. Falvey, and J. U. Sweeney, all of El Paso, for defendants in error.

HAWKINS, J. Plaintiffs in error, hereinafter called plaintiffs, brought suit in the district court of El Paso county, Forty-First judicial district, against defendants in error, hereinafter called defendants, seeking a temporary, and also a permanent, injunction to restrain the maintenance of certain alleged bawdyhouses and disorderly houses in the city of El Paso, standing near real property of plaintiffs, respectively, alleged to have been rented by defendant Fenchler to his codefendant, Bess Montell, and others, respectively, constituting nuisances resulting in damages to property of plaintiffs and of others similarly situated, and to enjoin the sale and keeping for sale of intoxicating liquors at a certain one of said houses without a license therefor.

Plaintiffs' petition alleges, in substance, among other things:

That each of the plaintiffs owns and is in possession of certain described real estate in the city of El Paso, Tex.; that the defendant Fenchler owns and, through his tenants, agents, and lessees, is in possession of certain other described real properties in said city, including a certain building known as "the Palace," at No. 214 Broadway street; that defendant Fenchler, by himself, his agent or lessee, sublets or rents said building at 214 Broadway to his codefendant, Bess Montell, who is now in possession thereof and interested therein as tenant or lessee; "that the said Bess Montell is knowingly keeping and running a bawdy and disorderly house on said property and premises owned by the said Wm. H. Fenchler at No. 214 Broadway street, and is knowingly permitting, aiding, and abetting and interested in the same and the houses, buildings, and structures thereon situated, and the said defendants have been informed, are advised, and know that said premises, to wit, said Palace, No. 214 Broadway street, are being kept, used, and occupied as such bawdy and disorderly house, or houses;" that among the said properties of the defendant Fenchler is one in block 151 of Campbell's addition, and that said Fenchler "is also permitting and aiding and abetting in keeping nuisances and illegal houses and places on the said last-described property, either through his agents, sublessees, or tenants, as hereinafter stated"; "that the balance of said property hereinafter described owned by said William H. Fenchler, and the structures or houses located on the said property [describing it], and the other property hereinabove described which is not being occupied, and is not in the possession of said Bess Montell, is being occupied, leased, and used by certain women, whose names are unknown to these plaintiffs, as bawdy and disorderly houses;" "that at the time said William H. Fenchler purchased the said property, and at the time he subleased and entered into contracts with the said Bess Montell, and the other parties hereinbefore referred to, he and the said Bess Montell, and the other people occupying said property, knew that the said property was being used, has been used in the past, and would in future be used for such illegal purposes. These plaintiffs say that, although the said defendants have often been notified that their said property is being used, rented, and kept for such illegal purposes, they have nevertheless failed and refused to prevent the said keeping, renting, using and occupation of such property, premises, houses, and structures so owned by them, or in their possession, for such purposes. These plaintiffs further allege that the said premises, property, houses, and buildings of the said defendants are being actually and habitually used for the purposes of keeping bawdy and disorderly house, or houses, and the said defendants, and each of them, are aiding and abetting, and are interested in the same, and the maintenance and keeping thereof. Plaintiffs further aver that prostitutes are permitted to resort and reside in and on the said premises for the purpose of plying their vocation, and that the said lewd women and women of bad reputation for chastity are employed and permitted to display and conduct themselves in a lewd, lascivious, and indecent manner on the said premises; that spirituous, vinous, and malt liquors are kept for sale on the said property, at 214 Broadway street without the said defendant, or any one holding under them, having obtained a license."

The petition also alleges:

"That the keeping and maintaining of said bawdy and disorderly house, or houses, upon said premises of the defendants or any of them is a nuisance, and seriously damages and depreciates the rental value and market value of plaintiffs' property hereinbefore described, which said property is situated in close proximity and near to the said property so owned by said defendants, as hereinbefore stated; that said nuisances make the dwelling houses, buildings, edifices, and tenements of these plaintiffs, and others similarly situated, unfitted for the occupancy of respectable people, and destroy the moral of these and of the neighborhood of the city, and the said immoral and illegal places drive out and turn away the respectable citizens from that vicinity, and dedicate the same to immoral and criminal purposes, and greatly reduce and decrease, and will continue to so greatly reduce and decrease, the rental value and market value thereof, unless the said nuisance is abated."

The petition also alleges:

That said bawdy and disorderly houses are located in close proximity to the principal and most frequented business section of said city and of various described buildings, and that, "in utter disregard of the laws of the state of Texas providing against the maintenance of such nuisances, the said defendants are maintaining, permitting to be maintained, aiding and abetting

the maintenance on their said premises said bawdy and disorderly house, or houses, although they well knew the existence of said laws," and that "the said illegal and immoral houses are injurious to the public health, public peace, public safety, and public morals, and are in other ways, as aforesaid, irreparably damaging the property of these plaintiffs, as well as the property of other citizens and taxpayers in the city of El Paso, Tex."

The petition further alleges:

"That the said defendants, and each of them, by the maintenance, permission to maintain, renting, aiding, and abetting in maintenance of such bawdy ad disorderly house, or houses, and by wrongfully and unlawfully setting apart and dedicating the same for such unlawful and wrongful purposes, are guilty of maintaining public, as well as private nuisances, and should be enjoined and restrained from maintaining, keeping, aiding, and abetting in so keeping the same," and that the location of said disorderly and bawdy houses as aforesaid "renders the property of these plaintiffs, as well as the property of other citizens and taxpayers, unfit for occupation by respectable families as tenants, and prevent these plaintiffs, and others similarly situated, from improving their property and building thereon because of the impossibility of securing good tenants; that said bawdy and disorderly house, or houses, prevent these plaintiffs, and others similarly situated, from maintaining and running business houses, stores, and rooming houses for decent and first-class trade and patronage, and hamper them in securing decent and respectable girls, men, and women to enter their employ and work for them in such stores, business houses, and rooming houses, and prevent the wives and daughters of the citizens of El Paso from visiting their stores and business houses owned by plaintiffs, and other citizens of El Paso, Tex., similarly situated to the great and irreparable injury and damage of these plaintiffs and others similarly situated."

The petition contains other allegations of present and prospective depreciation in value of and damage to said property of plaintiffs and of others similarly situated, and closes with prayer:

"That a temporary writ of injunction be granted by this court restraining and prohibiting the defendants, their heirs and assigns, and each of them, and any and all persons holding under them, from further maintaining, using, aiding and abetting, renting, or occupying their said property, and the buildings or building houses, tenement or tenements thereon situated for such illegal, wrongful, and immoral purposes, and from permitting said prostitutes and women of bad reputation for chastity to display and conduct themselves thereupon in an indecent manner; that the said defendants, their heirs and assigns, their tenants and agents, be restrained from further selling and keeping for sale spirituous, vinous, and malt liquors on their said premises, and that they be restrained from further maintaining and permitting to be maintained on their said property said nuisances, and that the said defendants and each of them be duly cited to answer herein, and that upon a hearing hereof said injunction be made permanent and perpetual, and that these plaintiffs have judgment for all costs of suit, and for such other and further relief, general and special, in equity and in law, as to the court may seem fit and proper."

Defendants' amended answer embraced the following pleas: (1) General demurrer; (2) special exception that plaintiffs had not alleged that they had been "personally injured"; (3) general denial; (4) acquisition by plaintiffs of their properties, and long acquiescence by them, with knowledge of the facts; (5) denial of any damage to the plaintiffs' property; and (6) that bawds and bawdy-houses in the city of El Paso were being regulated by an ordinance, under a special charter, which ordinance actually confines them within a certain district in said city designated in said ordinance, within which district said houses are situate.

The petition was sworn to, as was said answer, with the exception of the general denial. By supplemental petition plaintiffs excepted specially to the sufficiency of said ordinance, denied that it had been duly adopted, and alleged that, if adopted, it was adopted pending this suit, and therefore was ex post facto. The hearing upon the application for temporary injunction was upon notice, but in chambers, "defendants appearing in person and by counsel," and the district judge made an order denying the temporary writ, from which order plaintiffs appealed to the Court of Civil Appeals, which affirmed said order. 151 S. W. 1094.

Before entering upon a discussion of the merits of this appeal, we will consider, briefly, the grounds of our jurisdiction herein, as urged by plaintiffs and as combated by defendants.

[1, 2] Essentially, this appeal is interlocutory. Linn v. Arambould, 55 Tex. 611; Waters-Pierce Oil Co. v. State (decided by this court December 23, 1907) 106 S. W. 326; Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth (decided June 13, 1913) 158 S. W. 164, 48 L. R. A. (N. S.) 994. Manifestly, the issue as to our jurisdiction herein is unaffected by the provisions of chapter 55 of the Acts of 1913 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1521, 1522, 1526, 1543, 1544), prescribing the jurisdiction of this court, the application for writ of error herein having been filed prior to July 1, 1913, when that statute became operative; consequently that issue is controlled by pre-existing statutes.

[3-6] Passing over, as unnecessary for discussion, several alleged grounds of jurisdiction, we come to plaintiffs' proposition that this court has jurisdiction over this appeal by virtue of articles 4644–4646, R. S. 1911. Thereon defendants join issue, insisting: (1) That those articles, even when considered by themselves alone and without reference to article 1591, R. S. 1911, do not confer upon this court appellate jurisdiction in the case at bar; and (2) that articles 4644–4646 should be construed in connection with and are controlled by that portion of article 1591 (6) wherein it is provided that:

"The judgments of said Courts of Civil Appeals shall be final in all * * * such * * * interlocutory appeals as may be allowed by law."

As to the first point:

The first statute of this state which conferred upon litigants the right of appeal from

an order or judgment "refusing" a temporary injunction was chapter 34, p. 354, of the Acts of 1909, amending chapter 107 of Acts of 1907, which earlier statute conferred a similar right of appeal from orders or judgments "granting or dissolving" a temporary injunction. Perry v. Turner (Civ. App.) 108 S. W. 192.

The applicable portions of both of those statutes appear in R. S. 1911, as follows:

"Art. 4644. Any party or parties to any civil suit wherein a temporary injunction may be granted, refused or dissolved, under any of the provisions of this title, in term time or in vacation, may appeal from the order or judgment granting, refusing or dissolving such injunction, to the Court of Civil Appeals having jurisdiction of the case; but such appeal shall not have the effect to suspend the enforcement of the order appealed from, unless it shall be so ordered by the court or judge who enters the order: Provided, the transcript in such case shall be filed with the clerk of the Court of Civil Appeals not later than fifteen days after the entry of record of such order or judgment granting, refusing or dissolving such injunction.

"Art. 4645. It shall not be necessary to brief such case in the Court of Civil Appeals or Supreme Court, and the case may be heard in the said courts on the bill and answer, and such affidavits and evidence as may have been admitted by the judge granting, refusing or dissolving such injunction; provided, the appellant may file a brief in the Court of Civil Appeals or Supreme Court upon the furnishing the appellee with a copy thereof not later than two days before the case is called for submission in such court, and the appellee shall have until the day the case is called for submission to answer such brief.

"Art. 4646. Such case shall be advanced in the Court of Civil Appeals or Supreme Court on motion of either party, and shall have priority over other cases pending in such courts."

Those three articles are taken substantially from one act, and obviously are related and interdependent. We have therefore to consider their joint legal effect upon our own jurisdiction in the case before us: First, without reference to article 1591; and, second, in conjunction with that article, which has been upon our statute books since 1892.

It is true that article 4644, which expressly authorizes an appeal in such cases to the Court of Civil Appeals, does not mention this court; but article 4645 declares that "it shall not be necessary to brief such case in the Court of Civil Appeals or Supreme Court, and the case may be heard in the said courts," etc., and that language well might be construed as expressly conferring appellate jurisdiction upon this court.

However, jurisdiction may be conferred upon a court by necessary implication as effectually as by express terms. It is an elementary rule of construction that, when possible to do so, effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous or inoperative. Crary v. Dock Co., 92 Tex. 275, 47 S. W. 967; Railway v. Railway, 86 Tex. 545, 26 S. W. 54; Michie's Ency. Dig. Tex. Rep. vol. 15, p. 965; 1 Kent, § 462. Every portion of a statute should be construed in connection with every other portion to produce a harmonious whole. Lewis' Suth. Stat. Const. vol. 2, § 368, and cases cited.

Another well-settled rule of construction is:

"That which is implied in a statute is as much a part of it as that which is expressed." Lewis' Suth. Stat. Const. vol. 2, § 500, and cases cited; Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742.

The above-quoted excerpt from art. 4645, in conjunction with the reference in that article to the calling of the case in the Supreme Court, and the filing of the reply brief in that court, and the specific provisions of article 4646 for advancing the case in that court, indicate, unmistakably we think, at least by necessary implication, the legislative purpose to confer appellate jurisdiction upon this court. Those references to the Supreme Court must be given some meaning and legal effect. They cannot be treated as mere surplusage. Yet to deny that their effect is to confer jurisdiction upon this court is to render them utterly meaningless. Only upon the theory that the statute was meant to confer appellate jurisdiction upon this court was it at all reasonable for the Legislature to insert therein said provisions relating to briefing, advancing, calling, and hearing such cases in the Supreme Court. Our conclusion is well supported by authorities in addition to those already cited.

In a somewhat similar case, wherein it was contended that, in the absence of language expressly and specifically conferring upon a court the jurisdiction in question such jurisdiction did not exist, the Supreme Court of Missouri said:

"We regard this contention as extremely hypercritical verbal criticism. There is no set form of words required to confer jurisdiction. To hold that this act was not a grant of jurisdiction because formal words such as those above indicated were omitted would be sacrificing substance to form. * * * Our imperative duty is to ascertain, if possible, the intention of the Legislature from the language employed."

And the questioned jurisdiction was upheld. State v. Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; Lewis' Suth. Stat. Const. vol. 2, § 717.

[7] Articles 4644–4646 are not in conflict, but are in harmony, with article 1521, R. S. 1911, which is as follows:

"The Supreme Court shall have appellate jurisdiction coextensive with the limits of the state, which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate but not final jurisdiction."

Construing them together, we hold that, unquestionably, we have jurisdiction over this appeal.

As to the second point:

As compared with article 1591, articles 4644–4646 are not only the later expressions of the legislative will concerning final appellate jurisdiction in cases of this character, but they deal more specifically therewith, relating narrowly to interlocutory appeals in injunction cases, whereas the quoted provisions of article 1591 relate to interlocutory

appeals generally. We are unanimously of the opinion that the question of our jurisdiction herein is not controlled by article 1591.

[8-10] By five propositions under two assignments of error plaintiffs complain of the action of the Court of Civil Appeals in overruling their motion for a writ of certiorari to perfect the record by bringing up the "findings of fact and of law" made by the trial judge and filed after briefs for all parties had been filed in the Court of Civil Appeals, but before judgment there, said motion averring that for a special reason stated said findings were not filed until after expiration of the 15 days allowed by law for the filing of the transcript, and that the attention of counsel had not previously been called to the omission by motion or otherwise.

Inasmuch as none of the propositions is followed by a "statement," as is required by our rule 1 (142 S. W. vii) said assignments are not entitled to further consideration. However, if that were waived, and if it were conceded that the motion for writ of certiorari was seasonably made in due form, it would appear that the omitted findings, which are set out as an exhibit to said motion, which we find among the papers, were, in substance: (a) That no evidence was introduced, "except possibly the exhibit to the defendants' answer setting up an ordinance of the city of El Paso," and that "said ordinance was duly passed and at the time of the hearing was an ordinance of said city"; and (b) that the ordinance "destroyed the equity in plaintiffs' bill," and it would further appear that, for reasons hereinafter stated, said findings of fact were not material, because they were not responsive to any material issue in the case, and that, for the latter reason, said conclusion of law was likewise immaterial, and, moreover, said conclusion of law inhered in the trial judge's order denying the writ; consequently such "findings," even though brought up and incorporated in the record, could not operate to change the result of the case; wherefore denial of the writ of certiorari was not an abuse of discretion and did not constitute error. Railway v. Cannon, 88 Tex. 312, 31 S. W. 498; Brewster v. State, 40 Tex. Civ. App. 1, 88 S. W. 858.

[11, 12] In considering this appeal upon its merits, we find that, as is stated in the brief of defendants in error:

> The record shows "no statement of facts, no bills of exception, no conclusions of law or of fact, no order of court showing what was done with the demurrers, nothing showing what took place in the court below relevant to this appeal, except the above-mentioned pleadings and the order of court aforesaid refusing the injunction, but not disclosing whether such refusal was based on the law or the facts, or both combined."

Under such circumstances, this appeal relating solely to a temporary injunction, the equities of the parties should be tested and compared by their pleadings and the law of the case; and, unless the judgment rendered by the Court of Civil Appeals is one which that court could not properly render, in that state of the record, we must affirm it, even though the opinion of that court may assign insufficient or erroneous reasons in support of such judgment. Love v. Powell, 67 Tex. 15, 2 S. W. 456; Hoyt v. McLaughlin, 250 Ill. 442, 95 N. E. 464; Bank v. King County (C. C.) 57 Fed. 433. See, also, article 4645, R. S. 1911; Daniels v. Daniels (Civ. App.) 127 S. W. 569; Lodge v. Cole (Civ. App.) 131 S. W. 1180; Eason v. Killough, 1 White & W. Civ. Cas. Ct. App. § 604.

[13, 14] "Where the case made out by the complainant is perfectly clear, and he has complied with all the requirements of law for the issuance of an injunction, he is entitled to the injunction as a matter of right." Cyc. vol. 22, p. 748; Beebe v. Guinault, 29 La. Ann. 795.

Applicable portions of our Penal Code (R. S. 1911) relating to bawdyhouses and disorderly houses are as follows:

"Art. 496 (359). A 'bawdyhouse' is one kept for prostitution or where prostitutes are permitted to resort or reside for the purpose of plying their vocation. A 'disorderly house' is any assignation house or any theater, playhouse or house where spirituous, vinous or malt liquors are kept for sale, and prostitutes, lewd women or women of bad reputation for chastity are employed, kept in service or permitted to display or conduct themselves in a lewd, lascivious or indecent manner, or to which persons resort for the purpose of smoking or in any manner using opium, or any house in which spirituous, vinous or malt liquors are sold or kept for sale, without first having obtained a license under the laws of this state to retail such liquors."

"Art. 500 (361). Any person who shall, directly or as agent for another, or through any agent, keep or be concerned in keeping, or aid or assist or abet in keeping, a bawdyhouse or a disorderly house, in any house, building, edifice or tenement, or shall knowingly permit the keeping of a bawdyhouse or a disorderly house in any house, building, edifice or tenement owned, leased, occupied or controlled by him, directly as agent for another, or through any agent, shall be deemed guilty of keeping, or being concerned in keeping, or knowingly permitted to be kept, as the case may be, a bawdyhouse or a disorderly house, as the case may be, and, on conviction, shall be punished by a fine of two hundred dollars, and by confinement in the county jail for twenty days for each day he shall keep, be concerned in keeping or knowingly permit to be kept, such bawdy or disorderly house."

Articles 4689, 4690, R. S. 1911, are as follows:

"Art. 4689. The habitual, actual, threatened or contemplated use of any premises, place, building or part thereof, for the purpose of keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, shall be enjoined at the suit of either the state or any citizen thereof. Any person who may use, or who may be about to use, or who may aid or abet any other person in the use of any premises, place or building or part thereof, may be made a party defendant in such suit: Provided, that the provisions of this and the succeeding article shall not apply to nor be so construed as to interfere with the control and regulation of bawds and bawdyhouses by ordinances of incorporated towns and cities acting under special charters and where the same are actually confined by ordinance of such city within a designated district of such city." See P. C. 1911, art. 503 (362a), and article 504.

"Art. 4690. The Attorney General and the several district and county attorneys shall institute and prosecute all suits that said attorney general or such district or county attorney may deem necessary to enjoin such use: Provided, that such suit may be brought and prosecuted by any one of such officers: And provided, further, that nothing in the above proviso contained shall prevent such injunction from issuing at the suit of any citizen of this state who may sue in his own name; and such citizen shall not be required to show that he is personally injured by the acts complained of; and the procedure in all cases brought hereunder shall be the same as in other suits for injunction, as near as may be: Provided, that, when the suit is brought in the name of the state by any of the officers aforesaid, the petition for injunction need not be verified." See P. C. 1911, art. 505.

The applicable portion of article 4674, R. S. 1911, relating to the illicit sale, etc., of intoxicating liquors, is as follows:

"Any person, firm or corporation in this state who may engage in, pursue, carry on, or maintain, any of the following described occupations or callings under the circumstances and conditions herein described, are hereby declared to be the creators and promoters of a public nuisance, and may be enjoined at the suit either of the county or district attorney in behalf of the state, or of any private citizen thereof.

"1. Any person, firm or corporation who may engage in or pursue the business of selling intoxicating liquor without having first procured the necessary license and paid the taxes required by law." Acts 1907, p. 166.

The contention of plaintiffs here is, in substance, that they are entitled: First, under (a) articles 4689, 4690, R. S. 1911, and (b) under the general equity powers of the chancellor, said statute aside, to an injunction against defendant Fenchler, as owner of the properties alleged to belong to him, restraining the further maintenance of said bawdyhouses and disorderly houses upon any of said properties, and against his codefendant, Bess Montell, as lessee or tenant, restraining the further maintenance of said bawdyhouse and disorderly house at No. 214 Broadway; and, second, under article 4674, R. S. 1911, to an injunction against both said defendants restraining the further "keeping for sale" of intoxicating liquor at No. 214 Broadway without either of said defendants having obtained a license therefor.

In treating of plaintiffs' rights to have the maintenance of said bawdyhouses enjoined under articles 4689, 4690, we call attention to that portion thereof which provides that in suits like this, by a citizen to enjoin the maintenance of bawdyhouses and disorderly houses, "such citizen shall not be required to show that he is personally injured by the acts complained of," which language supplies, in so far as said action is based upon said statute alone, a sufficient answer to the above-mentioned special exception, and to the corresponding contention that the record fails to disclose any evidence showing damage to plaintiffs or their properties by reason of the maintenance of said bawdyhouses and disorderly houses. There the word "injured" should be construed as embracing damages to property belonging to the complaining citizen.

[15] Upon careful consideration of all the pleadings, we have reached the following conclusions as to their effect upon so much of the case as pertains to the maintenance of "bawdyhouses" and "disorderly houses," apart from the charge relating to intoxicating liquors:

(1) The petition is sufficient to show that, upon its face, if articles 4689, 4690, excepting the proviso in article 4689, are constitutional, plaintiffs in error are entitled, under that statute, to: (a) A temporary writ of injunction restraining further maintenance of the alleged bawdyhouses, unless said proviso is valid, and its legal effect, when considered in connection with defendants' allegations relating to said special charter and ordinance, is to deprive plaintiffs of the benefits of those articles; and (b) to a temporary injunction against said disorderly houses, regardless of said proviso, and whether it be valid or not.

[16] (2) Defendants' pleadings, aside from those relating to said special charter and ordinance by which they seek to show that under said proviso plaintiffs are not entitled to the benefits of articles 4689, 4690, are not sufficient to meet and overcome the allegations of plaintiffs relative to the existence and further maintenance of said bawdyhouses and said disorderly houses. The answer of defendants amounts, practically, to a plea of confession and avoidance upon that branch of the case. The general denial, as we have seen, is not supported by oath, and said answer does not specifically traverse the allegations: (a) That the houses and places in question are bawdyhouses and disorderly houses; or (b) that defendants, respectively, are responsible for the maintenance thereof, respectively.

On the contrary, the answer avers:

"That for more than 20 years last past that portion of the city of El Paso, El Paso county, Tex., specifically described in the copy of an ordinance of the city council of said city, marked 'Exhibit A' and made a part hereof, has been continuously used as a place of residence for bawds and as a site of bawdyhouses, and was so used at the time plaintiffs and each of them acquired the premises which they claim in their petition, and plaintiffs and each of them acquired the premises claimed by them in said petition with the full knowledge of such use, and acquiesced in such use with full knowledge thereof down to the institution of said suit."

And it also avers, substantially, that said houses and premises of defendants are within said city, which is a municipal corporation acting under a special charter, and that said city by ordinance controls and regulates bawds and bawdyhouses within its limits, and thereby actually confines them within the designated district shown by said ordinance, "and that the said property set out in plaintiffs' petition as owned or controlled by defendants is situated within the designated district as described in said ordinance."

In that state of the pleading we think the district judge and the Court of Civil Appeals were justified in finding and holding, as we

presume they did, that said places and houses are in fact "bawdyhouses" and "disorderly houses," and that defendants are responsible therefor, as charged.

In avoidance of said admission and said holdings, defendants in error contend, substantially:

[17] First. That plaintiffs are not entitled to an injunction under articles 4689, 4690, because the petition does not sufficiently aver that plaintiffs are citizens of this state. Conceding that, in the absence of proof in the record to the effect that plaintiffs are citizens of this state, a distinct allegation of such citizenship in the petition was essential to support plaintiffs' cause of action, when considered as based solely on articles 4689, 4690, and 4674, the fact remains that the petition substantially complies with that requirement of the statute. There is, indeed, eminent authority for the proposition that, if standing by itself, alone, the allegation therein that the plaintiffs are "all of the city and county of El Paso, state of Texas," is insufficient; but said allegation was immediately followed by the words "suing for themselves and other citizens and taxpayers of the city and county of El Paso, Tex." The necessary implication of the latter clause is that plaintiffs are citizens of this state. Neither Wood v. Wagnon, 2 Cranch, 9, 2 L. Ed. 191, nor Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078, to which we are cited by defendants, sustains their proposition. The objection that upon that ground the judgment is unwarranted is without merit.

[18] Second. That plaintiffs are not entitled to an injunction under articles 4689, 4690, because, under the facts pleaded and said proviso in article 4689, articles 4689, 4690, do not authorize any injunction to restrain the maintenance of said bawdyhouses or of said disorderly houses; the effect of such injunction being to interfere with the operation of said city ordinance.

In reply plaintiffs contend that said ordinance is not within the scope or meaning of said proviso, and therefore cannot circumscribe or limit the operation and effect of articles 4689, 4690, because:

(a) Said ordinance is ultra vires, not being authorized by the city's special charter, and is therefore void; and, if the charter is intended to authorize such regulation or control of bawdyhouses, the charter itself is void, because in conflict with a general law of the state.

Said charter, of which, by its terms, all courts must take judicial notice, undertakes to confer upon that city power "to regulate, control and suppress disorderly houses and houses of ill fame; to regulate, control and suppress houses of assignation; * * * to pass all laws to preserve the health of the city; to define, prevent and remove nuisances within the city" (section 70 "b"); "to restrain and punish vagrants * * * and prostitutes" (section 110); and "to prevent and punish the keeping of all houses wherein indecent, loud, or immodest dramatic or theatrical representations are given, or bawdyhouses or prostitution or assignation within the city, and to adopt summary measures for the removal or suppression of all such establishments" (section 116). Special Laws 1907, c. 5, p. 24.

Said ordinance contains the following provisions:

"That it shall be unlawful for any public prostitute, lewd woman, or woman of bad reputation for chastity to occupy, inhabit, live or sleep in any house, room, or closet situated without the following limits in said city of El Paso: [Here follow the boundaries of the designated district in said city.]" Section 1.

"That public prostitutes or notoriously lewd women are forbidden to stand upon the sidewalk in front of or near the premises they may occupy, or at the alleyway, door or gate of such premises or to occupy the steps thereof, or to accost, call or stop any person passing by or to walk up and down the sidewalk, or to stroll about the city streets indecently attired or in other respects so as to behave in public as to occasion scandal or disturb and offend the peace and good morals of the people." Section 2.

"That it shall not be lawful for any lewd woman to frequent any cabaret or coffee house or bar room and to drink therein." Section 3.

"Nothing in this ordinance shall be so construed as to authorize any lewd woman to occupy any house, room or closet in any portion of the said city of El Paso, and that nothing in this ordinance shall be so construed and it shall not in any manner interfere or prohibit the prosecution and punishment of any person or persons for any violation of the penal laws of the state of Texas in any portion of said city of El Paso." Section 7.

(b) That because of conflicting provisions therein the ordinance is not susceptible of construction, and is therefore void.

(c) That, if said ordinance is to be construed as suspending a penal law of the state, it is, for that reason, void.

In that connection defendants assert that, while said ordinance has the effect of bringing said "designated district" within the scope of said proviso, it does not prevent, nor seek to prevent, the operation of any penal law of the state within such district, in that said ordinance does not expressly provide for segregation or colonization of bawds and bawdyhouses, but merely requires that women of the named classes shall not "inhabit, live or sleep in any house, room or closet" outside of said district; but that view is manifestly inconsistent with the general contention of defendants relating to said proviso; that is, that its effect is to deny to plaintiffs the benefit of that injunction statute, and with their own plea under oath:

"That said city of El Paso, by ordinance of said city, controls and regulates bawds and bawdyhouses within said city and by ordinance of said city actually confine the same within the designated district in said city."

However, while the real purpose of that ordinance, upon its face, appears to be to con-

trol and regulate bawds and bawdyhouses in the city of El Paso, and practically to confine them within the "designated district" of said city, we do not consider it necessary that we express any definite opinion upon that point, or as to whether said ordinance is within the powers enumerated by the charter, or, if it is, as to whether said charter is valid; because, in our opinion, it is too clear for argument, and it is also well settled by the decisions of the courts of this state that no special charter and no ordinance thereunder, no matter what the phraseology of either or both might be, can possibly suspend anywhere the operation or legal effect of any general law of this state. Consequently, in view of the above-quoted provisions of our Penal Code relating to bawdyhouses and disorderly houses, and of our Constitution relating to suspension of such laws, and particularly in view of the status of the pleadings in this case, it well may be conceded, in accord with the general contention of defendants, and assumed, for the purposes of this appeal, that said charter does authorize said ordinance, that the latter was regularly adopted, and ostensibly was in force at date of the hearing before the chancellor, and that the effect of the ordinance upon its face, and that the actual effect thereof, in practice, was to control and regulate bawds and bawdyhouses and to actually confine them within said designated district in the city of El Paso, which is an incorporated city acting under a special charter. The effect, for the purposes of this appeal, and particularly in testing said proviso in article 4689, is to bring within the scope and meaning, and the legal effect, if any, of that proviso, said "designated district" in El Paso, and also so much of the case at bar as relates to equitable relief, under articles 4689, 4690, against bawdyhouses.

[19] And upon those assumptions it is clear that the legal and practical effect of said proviso, if it be valid, is to deny to plaintiffs the benefits of articles 4689, 4690, in so far as the alleged bawdyhouses are concerned, and thus effectually to deny their right to maintain thereunder their action herein to enjoin said bawdyhouses. But is said proviso constitutional and valid? The opinion of the Court of Civil Appeals herein holds that it is, but we consider that holding erroneous.

That said proviso is void because not specifically mentioned in, and not embraced by, the title to said original statute of 1907, from which articles 4689, 4690, including said proviso, were taken, is insisted by plaintiffs; but that contention has been sufficiently answered by the Court of Civil Appeals in this case by reference to the opinion of this court in Ex parte Allison, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653, under a somewhat similar statute, and to the later opinion of another Court of Civil Appeals in Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 918. See, also, Doeppenschmidt v. Railway, 100 Tex. 532, 101 S. W. 1080. But that point becomes practically inconsequential under our view herein that upon other grounds said proviso is wholly inoperative.

It has been suggested that, as affecting the right conferred by article 4689 upon a citizen to maintain a suit to enjoin a bawdyhouse, said proviso in that article is made inapplicable by the last proviso in article 4690; but, manifestly, that view is untenable, because the context shows that said last proviso refers to the preceding proviso in that article, and not to the proviso in article 4689. Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 919. In testing the validity of the proviso in article 4689 it must first be construed.

Upon careful consideration of the matter we regard it as reasonably certain that by "ordinance," as therein used, the Legislature meant one which, upon its face, and when tested, in relation to existing general laws of the state, by section 28 of article 1 of the Constitution of Texas, which sententiously declares that "no power of suspending laws in this state shall be exercised, except by the Legislature," would, if enforced, have the legal and practical effect of confining bawds and bawdyhouses to a "designated district" of a city of the defined class; and we so hold, although it is perfectly plain that article 500 of our Penal Code 1911, which expressly forbids bawds and bawdyhouses, was intended to extirpate them and absolutely prevent maintenance of them anywhere and everywhere within the borders of this state, and to our minds it seems equally plain that the above-quoted provision of our Constitution puts it beyond the power of the Legislature, by the enactment of a special charter or otherwise, to authorize any municipality to suspend any general law of this state, by ordinance or otherwise, within even a designated portion of such municipality, and although, ordinarily, the courts will presume that, when enacting a statute, the Legislature was familiar with the existence and legal effect of all general laws and all provisions of the state Constitution then in force.

Our conclusion as to what probably was in the mind of the Legislature controlling the construction to be placed upon said proviso is strengthened by the fact that this injunction statute (articles 4689, 4690), which deals specifically with bawds and bawdyhouses, and with disorderly houses, was originally adopted in 1907, and was carried into R. S. 1911 by an act approved April 1, 1911, both of which enactments, it thus appears, were prior to the decision of this court, on May 17, 1911, in Brown Cracker & Candy Co. v. City of Dallas, 104 Tex. 290, 137 S. W. 342, Ann. Cas. 1914B, 504. The opinion therein, which was prepared by former Chief Justice Brown, in discussing the effect of an ordinance of the city of Dallas which attempted to regulate, colonize, and segregate bawds

and bawdyhouses within that city pursuant to the provisions of its special charter, which expressly provided that it might do so by ordinance, pointed out the conflict between both the ordinance and said special charter provision and said article 500 (then article 361), and held, in substance, that said ordinance and said charter provision were alike violative of section 28 of article 1 of our Constitution, and therefore void. The language of the opinion was:

"The antagonism between the ordinance and the law is as emphatic as that between life and death. * * * If it be admitted that the Legislature intended to confer upon the city of Dallas authority to suspend article 361 within the district laid out, that provision of the charter would be void, because in conflict with section 28 of article 1 of our present Constitution. The Legislature had no authority to delegate that power to the city."

However, it must be conceded that this injunction statute, now articles 4689, 4690, was originally enacted after the decisions of Courts of Civil Appeals in San Antonio v. Schneider, 37 S. W. 767, in 1896, and Burton v. Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272, in 1898, and after the decision of the Court of Criminal Appeals in Ex parte Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845, in 1890, and Ex parte Coombes, 38 Tex. Cr. R. 648, 44 S. W. 854, in 1898, and that said revision of 1911 was adopted after the decision in 1910 of a Court of Civil Appeals in McDonald v. Denton, 132 S. W. 823, all of which decisions are in accord with said decision of this court in Brown Cracker & Candy Co. v. City of Dallas, supra, and all in direct opposition, in principle, to the holding of the Court of Civil Appeals in the case at bar that:

"The Legislature, in passing this statute [articles 4689, 4690], * * * had the right, under the Constitution, to so limit the extent of the statute, and that it was properly done."

Possibly the Legislature overlooked said previous decisions when it came to incorporate said proviso into that statute and into said revision of 1911.

In any event we must assume that said proviso was inserted in said injunction statute originally upon the mistaken assumption by the Legislature that it might be within the power of towns or cities, operating under special charters, to adopt an ordinance of the character stated which would be valid and effectual in law, not merely in the sense that it had been adopted and approved in the manner and form required by law, but also in the sense that it was valid and effective when tested by the simple, yet rigid, requirements of said section 28 of article 1, although the provisions of such ordinance might be antagonistic to those of article 500, P. C.; and we must and do presume that, had said decision in said Brown Cracker & Candy Co. Case been rendered prior to the adoption of R. S. 1911, said proviso would not have been carried forward into that revision.

Applying, then, said proviso, as so construed, to the case at bar, and assuming, as above, that the El Paso ordinance is within its meaning and scope, we conclude and hold that, because an ordinance of that nature and character is expressly and unequivocally inhibited by said section 28 of article 1 of the Constitution, such ordinance, at least to that extent, is inoperative, and cannot and does not have the legal force or effect of suspending anywhere the operation or the legal effect of said injunction statute (articles 4689, 4690), said proviso alone excepted.

Furthermore, while the proviso does not confer upon any municipality authority to adopt an ordinance of the character outlined in said proviso, nor seek to do so, it does attempt to circumscribe and limit the operation of said injunction statute itself, in some instances under a certain defined condition, to wit, the adoption, by an incorporated town or city acting under a special charter, of an ordinance of a certain kind and legal effect, which condition, as we have found, is utterly impossible of existence or fulfillment so long as article 500, P. C., and section 28 of article 1 of our Constitution both stand; and therefore said proviso itself necessarily is inoperative and of no legal force or effect whatsoever.

It may be conceded, though we do not herein hold, that there is in our Constitution no limitation upon the power and authority of the Legislature to restrict the operation of a statute conditionally by an arbitrary standard which is not obnoxious to the Constitution itself, as, for instance, by embodying therein a proviso that such statute shall not apply to any town or city operating under a special charter; still we deny that even the Legislature has power and authority to limit or restrict the operation of any general statute which it may see fit to enact by thus relating its operation to any status or condition which that Constitution forbids, such as the existence of a municipal ordinance which attempts to suspend, within even a designated portion of any town or city of that class, a general law of the state. It follows that, while the proviso here under consideration is not unconstitutional in the sense of attempting, directly and affirmatively, to authorize or validate an ordinance which is repugnant to article 500 of the Penal Code—for it does not attempt to do either—it is unconstitutional in the sense that, with both section 28 of article 1 of our state Constitution, and article 500, P. C., in force, it does undertake to constitute the existence of an ordinance of that character, under a special charter, a conditional territorial limitation or restriction upon the operation of this injunction statute itself. Consequently, the proviso being thus eliminated from consideration, the remaining portions of articles 4689, 4690, are to be treated as continuously applicable to every portion of the state; wherefore they should be applied and enforced in this case, unless they be found to be so tainted by said proviso as to render them unconstitutional. We do not think they are so tainted.

In said statute (articles 4689, 4690) as a whole we find nothing to indicate that the Legislature would not have enacted the other portions thereof into law had it known that said proviso would be held to be inoperative in view of article 500, P. C., and section 28 of article 1 of our Constitution. That seems very clear as to at least so much of it as relates to disorderly houses, which are not mentioned in said proviso. Evidently the general purpose of the Legislature was to provide specifically, by statute, for the exercise of equity jurisdiction in aid of criminal jurisdiction in the total suppression of bawdyhouses and of disorderly houses whenever and wherever within this state it might at the time of the action be illegal to maintain them. The proviso is distinctly severable from all other portions of the statute, and is in the nature of an exception to the rule there being prescribed with reference to bawdyhouses generally, and is predicated upon assumed specific municipal action, and therefore could hardly have been the controlling factor in the consideration of the lawmakers. The principal objective was, not to relieve by the proviso from the operation of the statute in certain instances, under a certain condition which we hold to be impossible of fulfillment, but by statute to release and direct against bawdyhouses and disorderly houses and those responsible for maintenance thereof, the lightning which rests in the bosom of equity, in order that its swift and effective processes may aid, unquestioned, in the suppression of an evil which our criminal law had long denounced, but had not eradicated.

[20, 21] That the status of said proviso is a subordinate one is evident from the fact that:

"A proviso contained in the same clause or in a subsequent clause of the statute is a matter of defense, and need not be negatived by the plaintiff seeking relief given by the statute." Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 919, citing Am. Dig. Cent. Ed. vol. 39, p. 1093, and cases therein mentioned.

In discussing the effect of an unconstitutional provision upon the remaining portions of a statute, an able writer said:

"A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the Legislature, and being in the form of law, may contain other useful and salutary provisions not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley's Const. Lim. 215; 1 Lewis' Suth. Stat. Const. p. 583.

That view has been uniformly upheld by our decisions.

In Railway v. Gross, 47 Tex. 429, this court, through Associate Justice Gould, said:

"But beyond question the leading object of the law was constitutional. * * * If the clause that follows as to lands 'hereafter granted' be unconstitutional and be rejected, there is still left the body of the law, comprehensive enough in its terms to require all land certificates thereafter issued to such companies to be alternate certificates. There would seem to be no difficulty in striking out the clause objected to; for that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent. Cooley's Con. Lim. 178. * * * Rejecting the clause in regard to future grants, sufficient remains to accomplish the object."

Kleiber v. McManus, 66 Tex. 48, 17 S. W. 249, involved a question as to the constitutionality of article 1016, R. S. 1879, which provided that:

"The said court [meaning Supreme Court], or any judge thereof, in vacation, may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law, returnable to the Supreme Court on or before the first day of the term, or during the session of the same, or before any judge of the said court, as the nature of the case may require."

Therein the court held, in substance, that the last two clauses, "or before any judge of said court, as the nature of the case may require," were violative of a certain provision of the Constitution of this state as it then stood, but that the remaining portions of said statute were nevertheless valid; the language of the court, through Mr. Justice Robertson, being as follows:

"The appellate power is vested by the Constitution in the Supreme Court, and not in the several judges. The attempt in the last two clauses of the article to confer this power upon 'any judge of the said court' will not defeat the purpose of the Legislature to confer warranted jurisdiction upon the court, if that purpose is declared in other parts of the statute. We may therefore discard the two last clauses in determining the effect of the statute; what is left is complete without them. On this principle, the act of May 10, 1840, P. D. art. 469 et seq., was given effect by ignoring the void features. Thomas v. State, 9 Tex. 333; Miller v. Holtz, 23 Tex. 141."

The rule as stated by Judge Cooley was quoted approvingly and applied in an opinion by Judge Stayton, afterward Chief Justice, in Telegraph Co. v. State, 62 Tex. 630. To the same effect is the following language of the same learned judge, in Lytle v. Halff & Bro., 75 Tex. 128, 12 S. W. 610:

"The leading purpose of the act was to establish two judicial districts, and thus secure the holding of two district courts in the county, and

the parts of the act claimed to be in conflict with the Constitution are not so inseparably connected with that part of the act we hold valid as to require a holding that the entire act must fall did we hold some of its provisions in conflict with the Constitution. Nor are the provisions as to legality of which there may be question such as to induce the belief that the Legislature would not have passed the act with these omitted."

The principle which we apply herein was well stated in Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. 485, wherein this court, through Associate Justice Gaines, afterwards Chief Justice, said:

"The rule for the construction of statutes in partial conflict with the Constitution is that, if the portion repugnant to the fundamental law can be stricken out, and that which remains is complete in itself and 'capable of being executed in accordance with the legislative intent, it must be sustained.' Ex parte Towles, 48 Texas, 421, quoting Cool. on Const. Lim., 178. If the unconstitutional provision be but incidental to the main purpose, and be not essential to give effect to the statute, such part may be rejected, leaving the remainder to stand."

In Railway v. Mahaffey, 98 Tex. 392, 84 S. W. 646, this court, through then Chief Justice Gaines, said:

"It is settled law, and now a familiar rule, that where a statute contains an unconstitutional provision and another which, if standing by itself, would be valid, the latter will be given effect, provided they are so clearly independent of each other that the court can say that the Legislature would have passed it, if the former had been omitted. On the other hand, if they be so connected one with the other, or so dependent one upon the other, that it is apparent that the Legislature would not have passed the act except as a whole, then the entire statute must fall."

The old Court of Appeals of this state, in an opinion by White, then Presiding Judge, said:

"It is true our Code denounces the penalty against any person selling intoxicating liquors after the votes have determined that 'the sale or exchange' shall be prohibited (Pen. Code, art. 378), and it is also true that an election can only be held to prohibit the 'sale' (Rev. St. art. 3227), and that, if the election were ordered to prohibit 'the sale and exchange' or the 'exchange,' it would be void. Steele's Case, 19 Tex. App. 428. Yet, when a penal law prohibits two or more acts (e. g., a sale and an exchange), the one valid and constitutional, and the other not, it may and will be held valid and constitutional, and can and will be enforced, as to that portion which is valid and constitutional. Holley v. State, 14 Tex. App. 506." Ex parte Kennedy, 23 Tex. App. 77, 3 S. W. 114.

In other jurisdictions the rule above stated is generally recognized and applied as sound. 36 Cyc. p. 976, etc. In City of Westport v. McGee, 128 Mo. 152, 30 S. W. 523, the Supreme Court of Missouri, in dealing with a statute authorizing extension of city limits, providing that "all agricultural or pastoral lands included within the corporate limits of such city shall be exempt from taxation for city purposes until they have by recorded plats or sale been reduced to tracts or lots of five acres or less," held that said proviso "violates the plain mandate of the Constitution," but that "the power of extension in this charter was not so dependent upon it that the ordinance incorporating defendant's lands within the city should be held void."

People v. Richmond, 59 Mich. 570, 26 N. W. 770, arose under a statute which contained the proviso:

"That in all cities and incorporated villages the common council may, by ordinance, allow the saloons, and other places where said liquors shall be sold, to remain open not later than 10 o'clock on any week-day night."

The defendant claimed:

"That the proviso was bad as giving cities and villages the power to dispense with general laws, and that its invalidity affected the whole law."

Therein the Supreme Court of Michigan said:

"It is hardly necessary to say that invalidity of a proviso does not destroy a law, unless going to show that the law would not have been passed without it. No such idea is suggested by this proviso."

Upon the whole, we are of the opinion that, excepting said proviso, articles 4689, 4690, are clearly good against all attacks made against them, on constitutional grounds, in the case at bar, and that thereunder, in the light of the record before us in this case, plaintiffs are entitled to a temporary writ of injunction enjoining said alleged "bawdyhouse," including said house at No. 214 Broadway.

[22] Moreover, even were it conceded and held that, as contended by defendants, said proviso of article 4689 is constitutional and valid, and that its legal effect is to deny to plaintiffs the right to maintain their action herein under articles 4689, 4690, against the alleged "bawdyhouses" within said designated district in the city of El Paso, that would not be to deny to plaintiffs their right to maintain, under those very articles, that branch of this suit wherein they seek to enjoin said alleged "disorderly houses." In this connection it will be noted that our statutes denounce "disorderly houses" as well as "bawdyhouses," defining them separately and differently, and that said proviso in article 4689 makes no reference whatever to "disorderly houses," and therefore, even if it be valid and fully operative, that proviso cannot be held to stop or stay, in any manner or to any extent whatsoever, the operation of that injunction statute in its application to "disorderly houses." From what has been said above it follows that, beyond all cavil, plaintiffs are entitled, under articles 4689, 4690, to a temporary injunction against said "disorderly houses," including said house at No. 214 Broadway. This feature of the case seems to have been overlooked.

Third. That plaintiffs are not entitled to an injunction under the general principles of equity, aside from articles 4689, 4690, against said bawdyhouses and disorderly houses, because said answer under oath traverses the allegations of the petition concerning damage to the property of the plain-

tiffs and of others similarly situated, and there is in the record no evidence of any damage to any of said properties.

Upon that point we think it is sufficient to say that, inasmuch as we hold herein that articles 4689, 4690, extend to every citizen of Texas a clear, broad, and effectual remedy by injunction against all "bawdyhouses" and against all "disorderly houses," it becomes unnecessary for us, in this appeal, to go further and determine whether plaintiffs in error have or have not shown themselves entitled otherwise, and under the general principles of equity jurisdiction, to all or any of that relief.

[23] Fourth. That, even though plaintiffs were at one time entitled to an injunction to abate said disorderly houses, nevertheless, by long acquiescence, they abandoned that right. In support of that proposition they cite several text-writers and the decision of this court in Railway v. De Groff, 102 Tex. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749, none of which authorities is applicable to an action under a statute which expressly authorizes an injunction at the suit of any citizen to restrain an act which is prohibited by a penal statute. The contention is overruled.

There remains to be considered the other branch of this case, which relates to intoxicating liquors. Defendants contend:

Fifth. That plaintiffs are not entitled to an injunction, under subdivision 1 of article 4674, to restrain defendants from further selling and keeping for sale spirituous, vinous, and malt liquors at 214 Broadway, because there is neither allegation nor proof that defendants, or either of them, is engaged in or pursuing there the business of selling intoxicating liquor; an integral part of that contention, and the holding of the Court of Civil Appeals, upon that point being to the effect that article 4674 does not authorize an injunction to restrain the mere "keeping for sale" of intoxicating liquors "without having first procured the necessary license and paid the taxes required by law."

Plaintiffs' petition does, indeed, include the prayer that defendants "be restrained from further selling and keeping for sale spirituous, vinous, and malt liquors on their said premises"; but the only specific allegation which fairly may be considered as a predicate therefor is the one which charges merely:

"That spirituous, vinous, and malt liquors are kept for sale on the said property at 214 Broadway street without the said defendants, or any one holding under them, having obtained a license."

The petition as a whole contains no distinct averment that defendants, or either of them, did "engage in" or did "pursue" "the business of selling intoxicating liquor without first having procured the necessary license." Moreover, the above-quoted specific allegations relating to intoxicating liquors are not materially strengthened, in so far as any action under article 4674 is concerned, by the preceding allegations that defendants' premises are "disorderly houses," inasmuch as the statutory definition of a "disorderly house," set out in article 496 of our Penal Code 1911, includes any house in which liquors are "kept for sale," as well as "any house in which spirituous, vinous or malt liquors are sold," without first having obtained a license under the laws of this state to retail such liquors. However, said specific allegations relating to liquors, as well as the preceding general allegations of the petition, do clearly and distinctly charge that said house at No. 214 Broadway is a "disorderly house," and consequently, in the present status of this case, plaintiffs clearly are entitled, under articles 4689, 4690, to have it temporarily enjoined as a "disorderly house."

It is therefore practically immaterial, and we need not now determine whether, plaintiffs are entitled to have the keeping for sale of intoxicating liquors at No. 214 Broadway temporarily enjoined under the provisions of article 4674 also.

The judgment of the Court of Civil Appeals and the order of the district judge denying the temporary writ of injunction herein are reversed, and this cause is remanded to the district court, with instructions to proceed therein in accordance with this opinion.

Addendum by Associate Justice HAWKINS Only.

Besides what appears in the opinion of the court in this cause, from which reference to the hereinafter mentioned point was eliminated to avoid introducing therein any feature upon which exists a difference of opinion among its members, this writer considers it his duty to say here, individually, and for himself alone:

(1) Although personally still of the views expressed by him upon the subject of jurisdiction in his dissenting opinion in McFarland v. Hammond, 173 S. W. 645–660, he nevertheless fully recognizes the controlling effect of the opinion of the majority therein, and, as in duty bound, and as a matter of course, officially yields obedience to it as an authoritative declaration of the law of the land upon that subject, and believes that, wherever applicable, it should be duly applied and enforced accordingly.

(2) He believes that the logic or reasoning of the majority opinion in that county court case, which controlled the decision therein dismissing it for want of jurisdiction, is as applicable in this district court case, both being interlocutory appeals authorized by the same interlocutory injunction statute (articles 4644–4646, R. S. 1911), which is as much later than the subdivision of article 1591, R. S. 1911, relating to county court cases (subdivision 1), as it is later than the subdi-

vision of that article relating to interlocutory appeals (subdivision 6), said injunction statute (articles 4644–4646), in this writer's personal view of the matter, itself directly conferring upon this court appellate jurisdiction over all cases within its purview.

(3) He also believes that, if applied to the case at bar, said logic or reasoning of the majority in McFarland v. Hammond would support defendants' contention that article 1591, R. S. 1911, controls articles 4644–4646, and that the inevitable result would be that this appeal also would be dismissed for want of jurisdiction.

(4) This addendum is not intended to reopen or reargue the point, but merely to state and explain, as briefly as possible, this writer's individual view as to the applicability in this case of the law affecting this court's jurisdiction as established by said earlier decision.

MORGAN v. STATE. (No. 3846.)

(Court of Criminal Appeals of Texas. Dec. 1, 1915.)

CRIMINAL LAW ⟸1092—APPEAL—BILL OF EXCEPTIONS—APPROVAL.

Under Rev. St. art. 2076, that the bill of exceptions may be considered, it must be signed and approved by the trial judge, he being accessible when, and for a considerable before, the time therefor expired, though he had been away on a vacation, and another, elected therefor, was presiding in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834–2861, 2919; Dec. Dig. ⟸1092.]

Appeal from Harris County Court; Clarke C. Wren, Judge.

J. T. Morgan was convicted, and appeals. Affirmed.

John H. Crooker, Crim. Dist. Atty., and E. T. Branch, both of Houston, and C. C. McDonald, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of wife desertion.

There is no statement of facts in the record. The record and affidavits before us show that the term of court at which appellant was convicted convened on July 5 and adjourned September 4, 1915; that Hon. C. C. Wren was the duly elected, qualified, and acting judge of said court at the time of this trial; that the trial occurred on July 9, 1915, before Judge Wren; that his motion for new trial was heard and overruled by Judge Wren on July 14, 1915, at which time appellant gave notice of appeal to this court, and Judge Wren allowed 20 days after adjournment to file bills of exceptions and a statement of facts; that Judge Wren thereafter, on July 16th, went off on a vacation and remained away until the latter part of August, 1915; that he then returned and remained in and about his office in the courthouse from that time continuously until he opened the September term of said court on the first Monday in September; that on July 16th, after Judge Wren left, Judge Snowball was properly elected to preside, and did do so, until the close of the July term. Judge Snowball did not preside nor have anything whatever to do with the trial of this cause. During Judge Wren's absence, appellant's attorneys presented to Judge Snowball several bills of exception in this case, which he approved, and which were filed. The record shows them. Under these circumstances, appellant's bills of exceptions cannot be considered at all. Revised Civil Statutes, art. 2076. Richardson v. State, 71 Tex. Cr. R. 111, 158 S. W. 517; Porter v. State, 72 Tex. Cr. R. 71, 160 S. W. 1195; Allen v. State, 72 Tex. Cr. R. 277, 162 S. W. 868; Kaufman v. State, 72 Tex. Cr. R. 455, 163 S. W. 74.

The judgment is therefore affirmed.

Ex parte WAY. (No. 3863.)

(Court of Criminal Appeals of Texas. Dec. 1, 1915.)

BAIL ⟸49—RIGHT TO BAIL—HOMICIDE.

The circumstances and positive testimony *held* to present the issues of manslaughter and self-defense with such cogency as to entitle accused to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195–208, 241, 244; Dec. Dig. ⟸49.]

Harper, J., dissenting.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Application of Fletcher Way for bail was denied, and he appeals. Reversed.

J. Ed Wilkins and T. M. West, both of San Antonio, for appellant. Joe H. H. Graham, Asst. Dist. Atty., of San Antonio, and C. C. McDonald, Asst. Atty. Gen., for the State.

HARPER, J. This is an appeal from an order refusing to grant relator bail.

Relator killed Louis Moglia, Sr., on or about the 15th day of last July. The facts would show that deceased owned a saloon in San Antonio, and his son, Joe, was his bartender. Relator went into the saloon to get a drink, and did get a drink. He says the drink made him sick, and he called for a "lemon and soda," after drinking which he vomited. He then sat down at a table and went to sleep. He had on a diamond ring, and the bartender's attention was attracted to it, and the bartender sought to buy it, but he refused to sell it because it had been given him by his mother. When relator awoke, after sleeping some two hours, he missed this ring, and, without detailing the conversation, it may be said that he created the impression that he believed Joe Moglia, the bartender, had taken the ring while he slept.