of the estate, except one year's supply of provisions. Article 2000 provides that "no property upon which liens have been given by the husband and wife acknowledged in a manner binding upon the wife to secure creditors, or upon which a vendor's lien exists, shall be set aside to the widow and children as exempt property or appropriated to make up the allowances made in lieu of exempted property, until the debts secured by such liens are first discharged." After the adoption of the present constitution, the legislature passed an act "To regulate proceedings in the county court pertaining to the estates of deceased persons." Laws 1876, p. 93. That statute was modeled upon the law of 1848, and re-enacted the principal provisions of that act. The law of 1848 provided that, at the first term of the court after the return of the inventory, the chief justice should set apart, for the use and benefit of the widow and children of the deceased, all the exempt property; and it contained no prohibition against setting apart such property when subject to existing liens. Pasch. Dig. art. 1305. The act of 1876 provided that "no property on which liens have been given by the husband and wife, acknowledged privately and apart from her husband, to secure creditors shall be appropriated to make up the five thousand dollars or five hundred dollars aforesaid, until the debts secured by such liens shall be discharged." Laws 1876, p. 106, § 57. The sums mentioned were allowed in lieu of exempt property, when such property did not exist in kind. This act contained no express provision against setting apart exempt property when subject to liens. The case of Harrison v. Oberthier, 40 Tex. 385, arose under the law of 1848. In that case the homestead had been set aside to the widow by an order of the probate court. At a subsequent term a creditor applied to the court, and procured an order to sell the land to pay the balance due upon certain notes which had been given for the purchase money of the property. The order was granted, and the property sold, the defendant in error becoming the purchaser. The widow was not made a party to the proceeding. She brought suit, the character of which is not clearly disclosed in the opinion, and it was held she was entitled to recover the land. The opinion recognizes that, notwithstanding the order of the court setting apart the property, the lienholder had the right to subject the property to the payment of his debt, in a proper proceeding. Whether he should have applied to the county court to set aside the former order, and for an order for a sale of the land, making the widow a party, or should have proceeded in the district court, the opinion does not indicate. That case was decided in 1874, and it is probable that the confusion which resulted from the proceedings which gave rise to that suit led to the incorporation in the Revised Statutes of the article we have quoted. Under the former law the lien creditor could be seriously embarrassed by a judgment in a procedure of which he had no actual notice, and which was required to be taken within so short a time after the grant of letters that it would be unreasonable to affect him with constructive notice. Article 1993 empowers the court to set aside the homestead, but article 2000 limits the power to such property as is not subject to the liens therein specified. It follows, we think, that in this case the court acted without authority in setting apart to the appellant so much of the land as was subject to a vendor's lien. We are of opinion, therefore, that, although such an order should not be held absolutely void, it should be held void as to the lien holder, and that he may avoid it by establishing his claim, and procuring an order to sell the property for its satisfaction, in the same manner as if no such previous order existed. Hensel v. Association, 85 Tex. 215, 20 S. W. 116, is in accordance with those views. It does not appear, from the report of this case upon the former appeal, that the point was then made that the sale under which appellees claim was made for the purpose of satisfying a debt secured by a vendor's lien. Such being our view in regard to the first question, the second and third require no answer.

UNION CENT. LIFE INS. CO. v. CHOWNING.

(Supreme Court of Texas. May 10, 1894.)

INSURANCE COMPANIES — NONPAYMENT OF LOSS — PENALTY — LIABILITY FOR ATTORNEY'S FEE — CONSTITUTIONALITY OF LAW.

1. Rev. St. Tex. art. 2953, providing that health and life insurance companies failing to pay a loss when due are liable for 12 per cent. of such loss in addition thereto, does not violate Const. U. S. Amend. 14, § 1, providing that no state shall deny the equal protection of its laws to persons within its jurisdiction.

2. Rev. St. Tex. art. 2953, does not violate Const. Tex. art. 1, § 3, providing that no man or set of men are entitled to exclusive separate public emoluments, except in consideration of public services.

3. Rev. St. Tex. art. 2953, making health and life companies, failing to pay losses when due, liable for a reasonable attorney's fee in addition to such loss, does not violate Const. Tex. art. 1, § 13, providing that all courts shall be open, and every person shall have remedy by due course of law.

4. Rev. St. Tex. art. 2953, does not conflict with Const. Tex. art. 1, § 19, providing that no citizen shall be deprived of property except by due course of the law of the land.

5. Rev. St. Tex. art. 2953, is not a special law regulating the practice of courts within the prohibition of Const. Tex. art. 3, § 56, subd. 16.

6. The legislature may impose a penalty on insurance companies for failure to pay their losses when due.

7. Act approved May 2, 1893 (section 35), which provides that questions may be certified to the supreme court by the court of civil appeals, requires the latter court to certify the "very question" to be decided. *Held*, that an

assignment of error in a question so certified, embracing three distinct propositions, and not separately specifying the particular error complained of, should not be considered.

S. A question certified to the supreme court by the court of civil appeals under Act May 2, 1893, not presenting the question to be decided except by defendant's exceptions to plaintiff's supplemental petition, which cover several pages, will not be considered.

Certified questions from court of civil appeals of fifth supreme judicial district.

Action by Sallie L. Chowning against the Union Central Life Insurance Company. From a judgment for plaintiff, defendant appealed to the court of civil appeals. On questions certified to the supreme court by the court of civil appeals.

Bassett, Seay & Muse and Ramsey, Maxwell & Ramsey, for appellant. Leake, Shepard & Miller, for appellee.

BROWN, J. The court of civil appeals for the fifth supreme judicial district has certified to this court the following questions and statement: "In the above-entitled cause the following issues of law arise, which this court deems advisable to present to the supreme court of the state of Texas for adjudication, to wit: Question 1. Article 2953, Rev. St. provides as follows: 'Penalty for Failure to Pay Loss. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss.' Is this statute, in providing for recovery of damages or attorney's fees, violative of the constitution of this state or the constitution of the United States, or is it valid and legitimate legislation? Question 2. The first, second, and third assignments of error in this case are as follows: 'First assignment of error: The court erred in its several rulings upon the issue of alleged waiver by the defendant of the forfeiture of the policy sued on: (1) In overruling the defendant's exceptions to the plaintiff's first supplemental petition, alleging such waiver, and setting up defendant's alleged custom of dealing with its policy holders; (2) in refusing the several special charges requested by the defendant numbered 1, 2, 4, 5, 7, 8, and 10, relating to that issue, and in submitting the same to the jury, as was done in the general charge, and in the second special charge given at the plaintiff's request; (3) in overruling the defendant's motion for a new trial, based on the insufficiency of the evidence to support the verdict in that respect. Second assignment of error: The court erred in its several rulings touching the alleged agreement between the defendant and Reeves & Chowning and A. C. Reeves, by which they were to act as agents of the defendant in making loans and soliciting insurance, and the alleged services rendered by them under said agreement, (1) in overruling the defendant's exceptions to the plaintiff's supplemental petition alleging said agreement and services; and (2) in admitting evidence, over defendant's objections, relating thereto, as shown by defendant's bill of exceptions in that behalf. Third assignment of error: The court erred in refusing to instruct the jury, as requested by the defendant in its fourteenth special charge, relating to the effect of Chowning's alleged agreement to surrender the policy, and his alleged determination not to pay the premium notes, and its fifteenth and sixteenth special charges, relating to the alleged tender of the premium by the witness Williams, and instructing the jury as was done in the court's charge in chief and in the special charges given at plaintiff's request in relation to said several matters.'"

For appellant it is claimed that article 2953, Rev. St., denies to the class of corporations embraced in its provisions the equal protection of the law, contrary to the prohibition contained in section 1 of the fourteenth amendment to the constitution of the United States, and is therefore void. The reason assigned in support of this contention is that all corporations engaged in the business of insurance are not embraced in the terms of the law; but is not claimed that all corporations embraced in the classes named are not affected alike by its provisions. In 1891 the legislature of this state enacted a law defining who are and who are not fellow servants, which related only to employes of railroad companies. In Campbell v. Cook (decided by this court at its present term) 26 S. W. 486, that law was under consideration with the same objection made to it, and based upon the same reasons, as are here urged against the article of the statutes now in question; and this court held that the act was not liable to the objection, quoting from Railway Co. v. Mackey, 127 U. S. 209, 8 Sup. Ct. 1161, as follows: "When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 189, 8 Sup. Ct. 737; Express Co. v. Seibert, 142 U. S. 353, 12 Sup. Ct. 250; Railroad Co. v. Gibbes, 142 U. S. 391, 12 Sup. Ct. 255; People v. Squire, 145 U. S. 175, 12 Sup. Ct. 880. This rule is equally applicable to the defendant in this case and to the law under consideration. All persons of its class are treated alike under like conditions. The article of the statutes is not liable to the objection that it denies to appellant the equal protection of the law.

Appellant's counsel assert that the article in question is in conflict with article 1, § 3, of the constitution of the state of Texas, which is in these words: "All free men when they form a social compact are entitled to equal rights, and no man, nor set of men, is entitled to exclusive, separate public emoluments or privileges but in consideration of public services." It is not shown just how the law violates this section, and, indeed, it would be difficult to imagine how a corporation which has no natural rights could be said to be entitled to such rights and privileges as grow out of the formation of a social compact. It is the creature of law, and entitled to just such rights as the law grants to it. When granted, such rights are protected from invasion the same as the rights of any natural person. Section 13 reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." The contention is that the exacting of an attorney's fee in case judgment shall be recovered against the insurance company prevents the free resort to the courts. We are referred to Dillingham v. Putnam (Tex. Sup.) 14 S. W. 303, as authority for this position, but that case was decided upon a different principle. That statute required receivers in all cases upon appeal to give bond for double the amount of the debt or judgment recovered. It was held that, as the receiver was but a fiduciary, this provision would in many cases prevent appeals altogether, and for that reason was void. In this case the party is not required to pay the fee or the damages as a condition precedent to making a defense, but only in case the defense is not maintained. The 12 per cent. is given as damages for a failure to comply with the contract by payment, and the attorney's fees are allowed as compensation for the costs of collecting the debt. Section 19 is as follows: "No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised except by the due course of the law of the land." Mr. Cooley, in his work on Constitutional Limitations, adopts, as the best definition, that given by Mr. Webster in the Dartmouth College Case, of the term "due course of the law of the land," which is: "By the 'law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." A law which is enacted by the legislature in the exercise of its constitutional powers, and which affords a hearing before it condemns, and renders judgment after trial, is not in violation of this provision of the constitution. The law in question gives to the persons coming within its provisions all of these safeguards, and is valid in that respect. Finally it is said that this act is in volation of article 3, § 56, subd. 16, as being a special law regulating practice in the courts. In the first place, it does not regulate the practice except in so far as the awarding of costs may be so considered. It is not a special law, because it applies to all cases that come under the provisions of the statute, and to all persons embraced in its terms. Dillingham v. Putnam, supra.

Appellant claims that the 12 per cent. which the statute gives as damages for a failure to pay when due, and the attorney's fees, are penalties for the breach of the contract, and that the legislature has no authority to inflict penalties for the breach of private contracts. The attorney's fees are not given for the breach of the contract. They cannot be recovered except upon a failure to maintain the defense. No right to an attorney's fee attaches upon the failure to pay; it is cost given to reimburse the plaintiff for expenses incurred in enforcing the contract. If it be conceded that the 12 per cent. is a penalty for a failure to pay when due, then the question arises, by what provision of our constitution is such legislation forbidden, and who will determine as to when the public is so interested in the enforcement of contracts as to justify the legislature in enforcing their performance by penalties? There is no clause of our state constitution which expressly or by implication prohibits the act. But it is said that "the genius, the nature, and the spirit of our state government amount to a prohibition of such acts, and the general principles of law and reason forbid them." Durkee v. Janesville, 28 Wis. 464; Wilder v. Railway Co., 70 Mich. 385, 38 N. W. 289; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285. We are also referred to Railway Co. v. Wilson (Tex. Civ. App.) 19 S. W. 910, as sustaining this proposition. That case rests upon a construction of article 10, § 2, of our constitution, the correctness of which we are not called upon to determine, which was held to prohibit that character of legislation as to contracts between a railroad company and their employes. We do not understand the learned judge who delivered the opinion of the court in that case to assert the doctrine contended for. It is sufficient to say that the case is not in point as authority upon this question. The powers of our state government are divided into three distinct departments, each of which is confined to a separate body of magistracy; the legislative functions to one, the executive to another, and the judicial to a third. Each of these departments is expressly prohibited from exercising a power conferred upon either of the others. Article 2, State Const. Mr. Cooley, in his work on Constitutional Limitations (pages 154, 155), after treating of various limitations on the legislative power,

says: "Besides the limitations on legislative authority to which we have referred, others exist which do not call for special remark. Some of these are prescribed by the constitution, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience. The legislature is to make laws for the public good, and not for the benefit of individuals. * * * But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with large discretion, which cannot be controlled by courts, except perhaps where its action is clearly evasive, and when, under the pretense of lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." State v. McCann, 21 Ohio St. 198; Queen Ins. Co. v. State (Tex. Sup.) 24 S. W. 406. The justice or injustice, good or bad policy, of the law was for the legislature. The article is not in conflict with the constitution of the United States or of the state of Texas, and is valid.

The first assignment is subdivided into three propositions, each pointing out a particular ground of error, and, if separated, would each be sufficient as a distinct assignment of error. The second subdivision specifies seven distinct charges that were refused, of which five appear in the brief of appellant. These are but statements in different forms of one proposition of law, and may be considered together; but as to the other two we cannot tell, as they are not submitted to this court. The second assignment is likewise subdivided as the first, and presents in different forms alleged error of the court upon one proposition,—the alleged agreement between the parties. These assignments are irregular in the manner of presenting the points, but should not be considered as void, the different errors being pointed out by the assignments. The third assignment embraces at least three distinct propositions, and does not separately specify to the court the particular error complained of. It should not be considered. The third and fourth questions do not submit to this court questions of law to be answered, but present to this court the supplemental petition of plaintiff, covering a number of pages, and the defendant's exceptions thereto, and call upon the court to deduce therefrom the questions of law arising thereon, and to answer the questions thus deduced therefrom. Section 35 of the act organizing the court of civil appeals, as amended by an act approved May 2, 1893, requires the court of civil appeals to certify the very question of law to be decided. For reasons more fully expressed in the case of Waco Water & Light Co. v. City of Waco (Tex. Sup.) 26 S. W. 943, this court declines to answer questions 3 and 4. Ordered that this opinion be certified to the court of civil appeals.

GULF, C. & S. F. RY. CO. v. ELLIS.

(Supreme Court of Texas. May 10, 1894.)

CONSTITUTIONAL LAW—CLAIMS AGAINST RAILROAD COMPANIES—RECOVERY OF ATTORNEY'S FEES.

Act April 5, 1889, providing that railroad companies failing to pay claims for stock killed and certain other claims within 30 days after presentation thereof are liable in each case for an attorney's fee not exceeding $10, is an exercise of the political power declared by Const. art. 1, § 2, to be "inherent in the people, and does not infringe the pledge therein to preserve a republican form of government."

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

Action by W. H. Ellis, by next friend, against the Gulf, Colorado & Santa Fe Railway Company. A judgment for plaintiff was affirmed on appeal to the court of civil appeals (21 S. W. 933), and defendant brings error. Affirmed.

J. W. Terry, for plaintiff in error.

BROWN, J. This is a suit instituted by the appellee, W. H. Ellis, by next friend, H. W. Ellis, against the appellant, in the justice court of precinct No. 1, Lampasas county, Tex., wherein, by an amended account, filed October 9, 1890, the plaintiff charges, in substance, that on or about the 12th day of August, 1890, the appellant, by its engines and cars, killed a certain colt, the property of the appellee, of the value of $50. He further charges that he presented his claim, verified by affidavit, to the defendant's station master nearest the place where the colt was killed, according to the provisions of the act of 1889, and that the amount was not paid at the expiration of 30 days after the presentation of the claim; wherefore plaintiff claims $10 additional as attorney's fees, as provided by said act of the legislature. The appellant filed an answer, by which it, in substance, admitted the allegations in plaintiff's account, but denied that it was liable for attorney's fees, and moved the court to strike out plaintiff's claim for the same. There was a judgment in the justice court for the sum of $50, with interest and attorney's fees, from which appellant prosecuted an appeal to the district court of Lampasas county. At the November term of the district court the same judgment was rendered in favor of the appellee, from which judgment the appellant prosecuted the appeal to this court. The defendant, in open court, excepted to so much of the judgment