money; but this does not prove that Chamberlain could himself repudiate that part of the contract by which he undertook to locate the certificate, and so, disregarding his obligation, have subjected the certificate to the payment of the money borrowed. It was an entire contract, and in all probability the money advanced was to pay the expenses of location and survey, since no interest was to be paid until the lapse of 12 months,—a time sufficient within which to have performed the work of locating and surveying the land. Whether we consider the mortgage as being upon the certificate or the land when located, it was nothing but a lien, and did not invest Chamberlain with title.

The sale by a mortgagee of his interest in the mortgaged property will not, in this state, operate as a transfer of the mortgage, unless there is something to indicate that it was intended to assign the mortgage. Jones, Mortg. § 808; Perkins v. Sterne, 23 Tex. 563; Miller v. Boone (Tex. Sup.) 23 S. W. 574; Swan v. Yaple, 35 Iowa, 248; Aymar v. Bill, 5 Johns. Ch. 570; Peters v. Bridge Co., 5 Cal. 334; Nagle v. Macy, 9 Cal. 426; Delano v. Bennett, 90 Ill. 533; Greve v. Coffin, 14 Minn. 345 (Gil. 263); Hill v. Edwards, 11 Minn. 22 (Gil. 5); Gale v. Battin, 12 Minn. 287 (Gil. 188); Weeks v. Eaton, 15 N. H. 145. A different rule obtains in some states, but it is based upon the doctrine that the mortgagee, after condition broken, has the legal title and right of possession. Welch v. Priest, 8 Allen, 165; Hunt v. Hunt, 14 Pick. 374; Dorkray v. Noble, 8 Me. 278. Such a doctrine is wholly inconsistent with the rules of law which govern the rights of mortgagor and mortgagee in this state. In its opinion the court of civil appeals said: "There is but little, if any, difference in principle between this case and that long line of decisions in this state which holds that a purchaser at a void judicial sale made to satisfy a valid lien, by reason of his subrogation to the lien, can hold the land until it is discharged." Our courts have gone far in applying this equitable doctrine, but in no case has it been held that where a man's property has been sold under a judgment to which he was not a party the purchaser acquires a right thereby against such owner of the property. The doctrine is founded upon the proposition that when the purchase money has been applied to the extinguishment of a lien upon the property sold, when the sale was made in a proceeding to enforce that lien, the purchaser will be subrogated to the rights of the lien holder. In this case the certificate was not sold as the property of Evans, but as belonging to the estate of Chamberlain. It was not sold to satisfy the mortgage debt, and there is no evidence that the purchase money was applied to the payment of that debt. The court that made the order could not have had jurisdiction to order the sale, as against Evans, who was not a party to the proceeding. To apply the equitable doctrine of subrogation to a purchaser, under such circumstances, and deny the owner of the property the right of possession, under such conditions, would extend the rule beyond the limits of precedent or principle. The purchaser at the administrator's sale acquired no title to the certificate. Neither did he acquire a right to the mortgage, nor was he subrogated to any right of Chamberlain as to the debt due from Evans, or lien upon the land or certificate. And the district court and court of civil appeals erred in so holding, for which errors the judgments of the said courts are reversed, and judgment is here rendered that plaintiff in error, M. D. Roberts, take nothing by his suit, and that defendants go hence without day, and recover of said plaintiff in error all costs in this behalf expended, in all courts. The intervener, C. P. Woodruff, showed by uncontroverted evidence that he had acquired the title of defendant Stewart to that part of the land in controversy deeded to said Stewart, which is not denied by Stewart, and no evidence to the contrary appears. It is therefore ordered that the said C. P. Woodruff recover of the defendant W. E. Stewart the land described in the plea of intervention, with all costs of the intervention.

(87 Tex. 32)

CONNOR v. CITY OF PARIS.

(Supreme Court of Texas. May 21, 1894.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—VALIDITY OF ORDINANCE—APPEAL—RENDITION OF JUDGMENT.

1. Under a city charter authorizing street improvements to be made whenever, by a two-thirds vote of the aldermen, it is deemed for the public interest, an ordinance providing for such improvements is valid without an express declaration that it is deemed for the public interest.

2. A charter authorizing a city to assess the cost of street improvements against adjacent property is valid, in the absence of constitutional limitations.

3. The legislature may authorize the collection of interest on the unpaid installments of street assessments.

4. A city ordinance providing for street improvements is not a special law, within the meaning of Const. art. 3, § 57, prohibiting the passage of special laws without notice to the persons affected thereby; and such ordinance is valid without notice, when none is required by charter.

5. Where it is the duty of the supreme court to render such judgment as the trial court should have rendered, an erroneous judgment will not be rendered simply because errors have not been assigned.

6. In an action to foreclose the lien of a street assessment payable in annual installments, brought when the first installment fell due, the district court entered judgment foreclosing the lien for all the installments, which the court of civil appeals reformed, foreclosing the lien for the first installment, with an order to sell the land subject to the other installments. *Held* not a judgment for the same amount or of the same nature as that of the district court, within section 37 of the act organizing the court of civil appeals, authorizing that court, in such case, to render judgment against appellant and his sureties.

7. Under a city charter authorizing the city to collect interest on unpaid installments of street assessments, interest on each installment can only be collected when such installment falls due.

Error from court of civil appeals, fifth supreme judicial district.

Action by the city of Paris against E. S. Connor to foreclose the lien of a street assessment. The court of civil appeals modified and affirmed a judgment for plaintiff, and defendant brings error. Reversed.

The opinion of the court of civil appeals (RAINEY, J.), delivered February 14, 1894, was as follows:

"Conclusions of Fact.

"The city charter of the city of Paris provides as follows: 'The city council shall be vested with full power and authority to grade, pave, repair, or otherwise improve any avenue, street, alley, or other highway, or any portion thereof within the limits of said city, whenever by a vote of two-thirds of the aldermen elected they may deem such improvement for the public interest; two-thirds of the cost of which grading, paving or repairing shall be borne by the owners of the property fronting on such alley, avenue, street or other highway so improved; and to make provisions for the payment of the two-thirds of the cost of such improvements and the cost of collecting the same, the city council shall have full power to assess, levy and collect a tax upon the lot or lots fronting or adjoining on such alley, avenue, street or other highway, which tax when so levied and assessed, shall be a valid charge against the owner or owners of such lot or lots, as well as a lien and incumbrance upon the property itself, which amount may be collected and said lien enforced in any court of competent jurisdiction: provided, that the city alone shall pay for the other one-third of such improvements, and for the improving of the intersections of the streets from block to block across the streets either way; and provided further, that no one shall be made to pay for any improvement done on any street that may be paved or otherwise improved as hereinafter provided, save for the proportional part of the street that may be in front of or adjoining his property and to the center of such street, and in no event shall such owner be compelled to pay for the improvement of such street, not including sidewalks, more than 25 per cent. of the assessed value of his property fronting thereon, except with his written consent and except property not assessed, which shall be liable for its proportion according to frontage, and that any railroad or street railway company shall be liable for any grading, paving or other improvement made upon any portion of said street used or occupied by said company, to be paid for in same manner as by abutting owners: and provided further, that such improvements shall be paid in not less than five annual installments, with interest thereon not exceeding eight per cent. per annum; but any person interested in such improvement may pay his part in cash before the issuance of bonds to cover the same.' The city council of the city of Paris on July 8, 1889, by a vote of two-thirds of all the aldermen elected, duly passed an ordinance entitled 'An ordinance to improve Bonham street,' which is substantially as follows:

" 'Be it ordained by the city council of the city of Paris:

" 'Section 1. That curbing, guttering and paving are hereby ordered to be built and put in on Bonham street, between the Union Depot and the intersection of Mill street; that is, a point two blocks west from the public square, the same is hereby ordered to be paved,' etc., 'full width of the street between said points, beginning at the main track of the St. Louis and San Francisco Railroad, and thence east to the eastern edge of Mill street, with the exception of nine feet of sidewalk on each side of the street. That the curbing shall be made of stone, and the guttering and paving to be made of bois d'arc blocks six inches in length to be placed on an inch board; the plans and specifications to be more particularly furnished by the city engineer, and approved by the city council, and the work all to be done under the supervision of the city engineer.

" 'Sec. 2. The expense of such improvement shall be borne in the following proportions: The railway companies now occupying and using any part of said street shall pay for the improvement of such part of the same as is used and occupied by them, and the property owners fronting or abutting on said street, between said points, shall pay two-thirds of the remaining cost, less the cost of intersections of cross streets, in proportion to the number of fronting or abutting feet of land they may so own on said street, between said points, and the city of Paris shall pay the remaining cost of said improvement.

" 'Sec. 3. The cost to be paid by each property owner and by the railway companies shall be estimated and collected as is now or as may be hereafter provided by ordinance, and in conformity with the city charter, and the cost assessed against each property owner and railway company shall be a lien and incumbrance upon the property against which it is assessed.

" 'Sec. 4. That bids be advertised for ten days in Paris Daily News for said improvements, and the contract to be let in accordance with the provisions of the city charter in such cases made and provided.

" 'Sec. 5. That this ordinance take effect and be in force from and after its passage.

" 'This ordinance adopted July 8th, 1889, and approved by the mayor July 9th, 1889. Attest: John Harvey, City Secretary. M. J. Hathaway, Mayor.'

"In pursuance of said ordinance, said Bon-

ham street was improved, and the costs thereof assessed proportionately against the owners of the property fronting on said street. The sum of $246.73 was assessed against appellant, which was a lien upon his lot fronting upon said street, the same as described in plaintiff's petition, and which said sum was payable in ten annual installments, with interest; the first due February 24, 1891, and the others on the 24th day of February annually thereafter. It was further provided by ordinance that 'all deferred payments shall bear interest at the rate of 8 per cent. per annum and shall be paid annually; that is to say, one-tenth of the principal and all the interest shall be paid annually to the city tax collector.' The assessment was made February 24, 1890, and drew interest from that date, which interest was required to be paid annually.

"Conclusions of Law.

"1. It was not necessary for the city council, by a formal expression, to declare that they deemed the improvement of Bonham street for the public interest, in order to make the ordinance providing for such improvement valid. The act of passing an ordinance providing for such improvements by a two-thirds vote of all the aldermen elected was a sufficient declaration that they deemed such improvement to be for the public interest, and was a substantial compliance with the provision of the charter of the city of Paris which authorizes such improvements to be made 'whenever by a vote of two-thirds of the aldermen elected they may deem such improvement for the public interest.' Wood v. City of Galveston, 76 Tex. 132, 13 S. W. 227; 10 Am. & Eng. Enc. Law, p. 282, note 2; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521; Elliott, Roads & S. 385.

"2. The constitution places no limit upon the power of the legislature as to the amount it may authorize a municipal corporation to impose by way of assessment on property for local improvements within the city. Therefore, a charter which authorizes the city council to make the cost of the improvement of its streets a charge upon property fronting upon such streets is valid. Roundtree v. City of Galveston, 42 Tex. 613; Taylor v. Boyd, 63 Tex. 533; Adams v. Fisher, Id. 657.

"3. The charter of the city of Paris authorizes a personal judgment against an owner of property fronting on a street, against whom an assessment has been made for improvements made upon such street. Appellant contends that the legislature was without power to grant to the city such authority, and for that reason renders the section of said charter void which seeks to empower said city to levy a local assessment for street improvements upon the individual. There was no personal judgment rendered against appellant in this case, and we deem it unnecessary to pass upon the question here raised, further than to say, if the legislature did not possess the power to confer on the city government the authority to levy such an assessment upon the individual, it would not render void that part of the charter authorizing an assessment against the property.

"4. The legislature has power to confer upon the city government authority to levy an assessment for improvements of a street, upon the property fronting thereon, and to authorize it to regulate the manner and time of payment, with interest. City of Galveston v. Heard, 54 Tex. 447.

"5. Where it is not made a prerequisite by the charter, to the passage of an ordinance for the improvement of a street, that notice should be given to the property owners in order to create a charge upon the property, the failure to give notice will not render such assessment illegal. As no such requirement is contained in the charter of the city of Paris, nor in the ordinance for the improvement of Bonham street, the failure to give notice does not affect the validity of the assessment made in this case, and the same is legal and binding. City of Galveston v. Heard, 54 Tex. 429; Adams v. Fisher, 63 Tex. 651; Dill. Mun. Corp. 803.

"6. The assessment made by the city council for the improvement of Bonham street, against appellant's property, was valid, and constituted a valid lien upon said property to secure the payment thereof.

"7. The court erred in rendering judgment against appellant for the installments not due at the time of trial, and in ordering a sale of defendant's property for the aggregate amount of such installments. The judgment should have been declaring the validity of such assessment, rendering judgment for the installment due, with interest due on the whole amount from the date of the assessment to the time of trial, and foreclosing the lien on said property for the amount of same, and ordering the property sold subject to the payment of the other installments, and interest thereon, when due.

"8 There being no other error in the judgment, the same will be reformed as indicated, and affirmed."

A. P. Park and Burdett & Connor, for plaintiff in error. H. D. McDonald, for defendant in error.

BROWN, J. The city of Paris is a municipal corporation created by special act of the legislature, approved March 27, 1889, of which we quote below that part material to the determination of the questions presented in this case, as follows: "The city council shall be invested with full power and authority to grade, pave, repair, or otherwise improve any avenue, street, alley, or other highway, or any portion thereof within the limits of said city, whenever by a vote of two-thirds of the aldermen elected they may

deem such improvement for the public interest; two-thirds of the cost of which grading, paving or repairing shall be borne by the owners of the property fronting on such alley, avenue, street, or other highway so improved; and to make provisions for the payment of two-thirds of the cost of such improvements and the cost of collecting the same, the city council shall have full power to assess, levy and collect a tax upon the lot or lots fronting or adjoining on such alley, avenue, street, or other highway, which tax when so levied and assessed, shall be a valid charge against the owner or owners of such lot or lots, as well as a lien and incumbrance upon the property itself, which amount may be collected and the said lien enforced in any court of competent jurisdiction; provided that the city alone shall pay for the other one-third of such improvements, and for the improving of the intersections of the streets from block to block across the streets either way; and provided, further, that no one shall be made to pay for any improvement done on any street that may be paved or otherwise improved as hereinafter provided, save for the proportional part of the street that may be in front of or adjoining his property and to center of such street, and in no event shall such owner be compelled to pay for the improvement of such street, not including sidewalks, more than 25 per cent. of the assessed value of his property fronting thereon, except with his written consent and except property not assessed, which shall be liable for its proportion according to frontage, and that any railroad or street railway company shall be liable for any grading, paving or other improvement made upon any portion of said street used or occupied by said company to be paid for in * * *. And provided further, that such improvements shall be paid in not less than five annual installments, with interest thereon not exceeding eight per cent per annum; but any person interested in such improvement may pay his part in cash before the issuance of bonds to cover the same." The city council did not, before adopting the ordinance, declare that the improvement on Bonham street in said city was for the public interest; but, by a vote of two-thirds of all the aldermen elected in said city, the council passed an ordinance, that part of which involved in this case is as follows:

"Be it ordained by the city council of the city of Paris:

"Section 1. That curbing, guttering, and paving are hereby ordered to be built and put in on Bonham street, between the Union Depot and the intersection of Mill street; that is, a point two blocks west from the public square, the same is hereby ordered to be paved," etc., "full width of the street between said points, beginning at the main track of the St. Louis and San Francisco Railroad, and thence east to the eastern edge of Mill street, with the exception of nine feet of sidewalk on each side of the street. That the curbing shall be made of stone, and the guttering and paving to be made of bois d'arc blocks six inches in length to be placed on an inch board; the plans and specifications to be more particularly furnished by the city engineer, and approved by the city council, and the work all to be done under the supervision of the city engineer."

The city made the improvement on Bonham street, and assessed upon the lot in plaintiff's petition described, as one-third of the improvement in front of the lot on said street, the sum of $246.73. The lot fronted on Bonham street, and was the property of plaintiff in error. The sum assessed, according to another ordinance of the city, was to be paid in 10 equal installments, and to bear 8 per cent. interest per annum, payable annually. The first installment fell due on the 24th day of February, 1891; and, Connor having refused to pay either installment or annual interest, the city sued in the district court of Lamar county to foreclose the lien of the city upon the lot for the first installment, and first year's interest on the whole amount. In the petition it was alleged that the other 10 installments would fall due, respectively, on the 24th day of each succeeding year, until and including the year 1900, and prayed for general relief. Connor filed a general demurrer and special exceptions, and a general denial, which exceptions and demurrer were overruled, and judgment rendered, foreclosing the lien of the city upon the lot for the first payment due, and first year's interest upon the entire assessment, amounting to the sum of $46.86, and also ascertaining that the remaining nine payments would fall due at the times alleged, including annual interest for each year upon the unpaid installments; ordered that, when the property should be sold, the purchaser should execute to the city of Paris his notes for each installment due, at the time that the installment would become due, including annual interest, to bear interest, with a lien upon the lot,—the balance, if any, to be paid to the defendant, he paying all costs. The court of civil appeals reformed this judgment so as to order the sale of the property for the first payment and first year's interest on the whole amount for installments not due, subject to the city's lien, and judgment against Connor and his sureties on his appeal bond for the said sum of $46.86, and all costs.

The questions presented by the plaintiff in error for our determination are: First. That a declaration, by two-thirds of the aldermen elected in the city of Paris, that "they deemed the improvement for the public interest," was a condition precedent to passing the ordinance ordering the improvement to be made, and, this not having been done, the ordinance is void. Second. That section 22 of the charter is unconstitutional and void (1) because it authorizes a special

tax on property in a particular locality for the public interest; (2) because it authorizes a perpetual tax upon the property fronting on the street to be improved, and because it authorizes such tax to bear interest; (3) because the charter does not require notice to be given of the intention of the council to levy the tax, and to cause the improvement to be made, as being in violation of section 57, art. 3, of the constitution of the state. Third. That the court of civil appeals erred in entering judgment against the plaintiff in error and his sureties upon the appeal bond for the amount of the first installment and interest, and because the court erred in entering judgment against the plaintiff in error and his sureties, or against the plaintiff for the costs of appeal.

A city or town has no inherent right to assess upon the abutting property on a street the cost of improvement of the street. Such power must be given by its charter, or some law of the state; and in the exercise of the power, when conferred, the requirements of the law must be strictly followed, or the assessment will be void. If the performance of an act is made a condition precedent to the exercise of the power, the act so required must be performed substantially as directed, or the assessment will be invalid. Elliott, Roads & S.; Frosh v. City of Galveston, 73 Tex. 401, 11 S. W. 402; Merritt v. Village of Port Chester, 71 N. Y. 309; Hoyt v. East Saginaw, 19 Mich. 39. Neither by its language, nor by fair implication, does the charter of the city of Paris make it a condition precedent to the exercise of the power to order the work to be done, or to levy the assessment, that the council shall, by a two-thirds vote, declare that it is "deemed for the public interest." The object of the law was to secure the citizen against hasty and improper impositions of such burdens, by requiring that a vote of two-thirds should be requisite to order the work. The council could not order it for any purpose other than to meet the demands of "public interest," and the law will presume that in adopting the ordinance the council acted from lawful motives. It is not necessary to declare beforehand, nor in the ordinance itself, that the council deemed it to be in the interest of the public. The adoption of the ordinance declared that as effectually as if it had been so expressed. Elliott, Roads & S. p. 386; Stuyvesant v. Mayor, 7 Cow. 588; Young v. City of St. Louis, 47 Mo. 492; Kiley v. Forsee, 57 Mo. 390; Platter v. Elkhart Co., 103 Ind. 360, 2 N. E. 544. The cases of Merritt v. Village of Port Chester and Hoyt v. East Saginaw, supra, cited by plaintiff in error, do not hold a contrary doctrine. In the case of Merritt v. Village of Port Chester, the law required the commissioners to be sworn before entering upon the discharge of the duty imposed, and it was held that this was a condition precedent to the performance of the duty. So, in Hoyt v. East Saginaw, the law expressly required that a resolution should, by the council, be passed, before the work could be undertaken; and the court there said, in effect, that if it had not been so required the passage of the ordinance would have been a sufficient declaration. In Frosh v. City of Galveston, cited above, it was held that the report of the engineer was made a condition to be performed before the council could determine whether or not the work should be done. Nothing of the kind is embodied in this law. The thing to be declared is, of itself, necessarily considered and determined in the passage of the ordinance ordering the improvement to be made. That the legislature may empower a city to levy upon abutting property an assessment to pay a part of the cost for improving a street upon which such property fronts is too well settled by the decisions of this court to admit of argument. Roundtree v. City of Galveston, 42 Tex. 625; Taylor v. Boyd, 63 Tex. 533; Adams v. Fisher, Id. 651. It has likewise been settled that the legislature may authorize the collection of interest upon taxes. City of Galveston v. Heard, 54 Tex. 447; Cooley, Tax'n, 436.

It is claimed that the charter, so far as it authorizes the assessment, is void, because no notice was required to be given by the council before the ordinance was adopted; being in violation of article 3, § 57, of the constitution. This was not a special law, within the meaning of that section, which has reference alone to the acts of the legislature. No notice was required, other than that prescribed by the charter. Taylor v. Boyd, 63 Tex. 533; Adams v. Fisher, Id. 651.

The district court entered judgment foreclosing the lien for all the assessments, which the court of civil appeals reformed, and entered judgment foreclosing the lien for the first assessment, and one year's interest on the whole amount, with an order to sell the lot subject to the installments not embraced in the judgment. This was not a judgment for the same amount nor of the same nature as specified in section 37 of the act to organize the court of civil appeals (Laws Called Sess. 22d Leg. 31), and the court of civil appeals erred in entering judgment against the plaintiff in error (appellant in that court) and his sureties for the installment and interest for which it gave judgment, and for costs of appeal. Connor should have recovered the costs of that court. The error shown above will require that this court reverse the judgment of the court of civil appeals and the district court, and enter such judgment as the district court and the court of civil appeals should have rendered. This presents a question not mentioned in the petition for writ of error. The twenty-second section of the charter of the city of Paris authorizes it to collect interest, not to exceed 8 per cent. per annum. Interest, unless otherwise expressed, is payable when the debt becomes due, and cannot be collected

before maturity of the debt. The statute did not authorize the city to make interest on the whole amount payable annually, when the installments were not due. The interest upon each installment can be collected only when the installment falls due. It was error in the district court and in the court of civil appeals to give judgment for the interest on the entire assessment. Although we would not ordinarily take notice of an error not assigned, yet, when the duty devolves upon this court to enter such judgment as the district court should have entered, an erroneous judgment will not be entered because the point of objection has not been assigned. It is ordered that judgment be entered in favor of the city of Paris, against E. S. Connor, that the first installment of the assessment made against the property described was done on the 24th day of February, 1891, to wit, the sum of $24.67; and that the lien of said city of Paris upon the said lot be, and the same is, foreclosed; said sum of $24.67 to bear interest at the rate of 8 per cent. per annum from the 24th day of February, 1891. It is further ordered that E. S. Connor have judgment against the city of Paris for the costs of the court of civil appeals and of this court, and that the city of Paris recover of E. S. Connor the costs of the district court.

(57 Tex. 104)

DILLINGHAM v. CRANK et al.

(Supreme Court of Texas. June 4, 1894.)

ACTION FOR PERSONAL INJURIES—INSTRUCTIONS—TELEPHONE WIRE OVER RAILROAD TRACK—LIABILITIES OF RECEIVER.

1. In an action by a brakeman against the receiver of the H. railroad company, against the C. and F. railroad companies, and against a telephone company, for personal injuries caused by being thrown from a box car by a wire of the latter company over the F. company's track, the receiver claimed and gave evidence that plaintiff was in the employ of and was paid by the C. company, while plaintiff gave evidence that he was in the receiver's employ; and the court charged that if plaintiff was in the receiver's employ, and was also in the employ of the C. railroad,—"in other words," if he was in the joint employ "of the above-named parties,"—and was injured while working along the F. railroad, and such last-named road was leased to such receiver, then, if plaintiff was in the employ of the C. railroad and received injury, it would be immaterial in this case. *Held*, that such charge did not withdraw from the jury the question whether, at the time of the accident, plaintiff was in the employ of the latter company.

2. The court properly refused to charge that, if, at the time plaintiff was injured, he was working for and being paid by the C. railroad company, and not for defendant receiver, the jury should find for the receiver, and that "the question is, for whom was he at work, and in whose pay was he when he received his injuries?"—since such charge put undue stress on the question whether, at the time of his injury, plaintiff received payment for his services from the receiver or such railroad company.

3. Since the accident occurred on the track of a road leased to the receiver, and it was his duty to furnish a safe track, he was liable to any one injured by his failure to do so, whether the person injured was in his employ or not.

4. It appearing that the telephone wire was located and used before the railroad was constructed under it, the receiver was not entitled to judgment over against the telephone company for the amount of plaintiff's damage, in the absence of some contract or appropriate proceedings condemning the right of way under the wire, and conferring the right to entail on the telephone company the burden of elevating its lines at the point of intersection.

Error from court of civil appeals, fifth supreme judicial district.

Action by John T. Crank against the Southwestern Telegraph & Telephone Company, Charles Dillingham, receiver of the Houston & Texas Central Railway Company, the Ft. Worth & New Orleans Railway Company, and the Texas Central & Northwestern Railway Company, to recover damages for personal injuries caused by the negligence of defendants. There was a judgment of the court of civil appeals (27 S. W. 38) affirming a judgment against defendants Dillingham, receiver, and the Southwestern Telegraph & Telephone Company, and defendant Dillingham brings error. Affirmed.

Head & Dillard, for plaintiff in error Dillingham. John W. Wray, for defendant in error Southwestern Telegraph & Telephone Company. Randell & Wolfe, for defendant in error Crank.

GAINES, J. This is a writ of error to the court of civil appeals from a judgment affirming a judgment of the district court in favor of defendant in error Crank, against the plaintiff in error and the Southwestern Telegraph & Telephone Company, also made a defendant in error in this court. Crank, the plaintiff below, made both Dillingham, as receiver, and the telephone company, parties defendant, and recovered jointly against both. The suit was for damages for personal injuries. At the time when the alleged injury occurred, Dillingham was receiver of the property of the Houston & Texas Central Railway Company, and was operating, in connection with the main line of that company's road, a branch extending from Garrett, through Waxahachie, to Ft. Worth. This branch consisted of two sections of railroad, one of which belonged to the Central Texas & Northwestern Railroad Company, of which Dillingham was president, and the other to the Ft. Worth & New Orleans Railroad Company. The latter was leased to Dillingham, as receiver of the Houston & Texas Central. Before the accident occurred, the plaintiff was employed upon the Houston & Texas Central's main line as a brakeman, but at the time of the accident had been put to work in the same capacity on the Garrett & Ft. Worth branch. In the city of Waxahachie the Ft. Worth & New Orleans Company had a spur track, which, at the time mentioned, was used only for the purpose of